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Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 60.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

APRIL—MAY, 1894.

ST. PAUL:
WEST PUBLISHING CO.

1894.

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BY

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FEDERAL REPORTER, VOLUME 60.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

HOLT et al. v. BERGEVIN et al.

(Circuit Court, N. D. Idaho. February 13, 1894.)

No. 48.

FEDERAL COURTS—JURISDICTIONAL AMOUNT—JOINDER OF CAUSES.

Two parties, having claims for labor performed for the same employer, which arose under separate contracts, were supported by separate evidence, and which would result in several judgments, joined their claims in a single suit, seeking to enforce a lien for their claims by virtue of a law of Idaho which allows any number of parties to join in the same action, where they claim liens on the same property. The suit was removed to the circuit court, where it appeared that neither claim amounted to \$2,000, though their aggregate exceeded that sum. *Held*, construing Rev. St. § 914, that the claims were in their nature separate, and that their joinder could not give the federal courts jurisdiction, whatever might be their aggregate amount.

At Law. On motion to remand. Action by Samuel H. Holt and others against Louis Bergevin and others. Motion granted.

James W. Reid and P. Tillinghast, for complainants.

James H. Hawley, for defendants.

BEATTY, District Judge. The complainants have moved to remand the cause. Their claims—each of which is less than \$2,000, but aggregate over that sum—are for labor performed by them for defendants, against whom they ask judgment, and for a lien upon property to secure the judgment. The claim of each complainant rests upon his separate contract. It must be supported by separate testimony, and any judgment recovered must be, in effect, several, for each complainant, for the amount found due him. The complainants have joined their several separate causes of action in one suit, through the authority given them by a statute of the state of Idaho providing that “any number of persons claiming liens against the same property may join in the same action.” The only question for consideration, under this motion to remand, is whether, in the na-

tional courts, such causes of action can be joined. If they cannot be, the motion must prevail as to the entire cause, as each claim is less than \$2,000.

There are different classes of cases in which several plaintiffs, defendants, or claims may be joined; as, when the action is in ejectment for several distinct tracts of land, and it appears that there had been a joint entry and ouster by different parties, and a joint judgment can be had against the defendants. *Friend v. Wise*, 111 U. S. 797, 4 Sup. Ct. 695. So, when the question was concerning an injunction against the enforcement of several judgments, each involving the same facts, and all between the same parties, it was held that they might be united in the same action. *Marshall v. Holmes*, 141 U. S. 595, 12 Sup. Ct. 62. It is also held, in a class of actions which, in character, more resemble the one under consideration, that several parties may join in one action when they have a common interest in some fund, and the object is, not to procure several judgments against it in favor of each party, but one judgment, to have it paid into court or into some depository, thereafter to be distributed by some appropriate proceeding among all parties entitled to it, according to their respective rights. In *Davies v. Corbin*, 112 U. S. 36, 5 Sup. Ct. 4, several persons were permitted to join in an action against a tax collector to compel him to collect a tax, and pay it as a gross sum or fund into the treasury, whence it would be paid to the parties according to the prior judgments they had recovered against the taxpayers. There was no controversy between the tax collector and the parties as to the amount to be paid to each,—that was to be settled between the parties through some other proceedings,—but the only question was the collection and payment into the depository ordered by the court of a certain sum, the amount of which had been determined by prior agreements and proceedings. In *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, several creditors of an insolvent corporation brought a joint action, in behalf of themselves and all others in similar situation who desired to join, against the stockholders, for the payment into court of the amount due from them to the corporation, the same to be used by the court as a trust fund for the payment of the creditors. The only question for determination was whether the stockholders should pay the amount they owed the corporation. Its distribution to the creditors was not an issue in that action. The rule is stated in *Gibson v. Shufeldt*, 122 U. S. 30, 7 Sup. Ct. 1066, as follows:

"Generally speaking, however, it may be said that the joinder in one suit of several plaintiffs or defendants who might have sued or been sued in separate actions does not enlarge the appellate jurisdiction: that, when property or money is claimed by several persons, suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party."

And in *Clay v. Field*, 138 U. S. 479, 11 Sup. Ct. 419:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claims

or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transactions, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

In this cause, each complainant has his separate claim, to be supported by testimony applicable to it alone; and for each there must be the equivalent of a separate judgment, notwithstanding all may be framed into a single document. The proceeding would involve in one action, in effect, as many different trials as there are complainants. While all the complainants ask a lien for the security of their several claims against the same property of the defendants, they have no joint interest therein. They are not asking this court to lay its hand upon a fund or property to be used in the liquidation of certain adjudicated and determined claims, as in the cases cited; but, on the contrary, each has a separate contest with the defendants, to determine whether he has a claim against them. There can be no question that, without some enabling statute, each complainant, even under the state practice, would be compelled to maintain his separate action; and it is equally clear that this court has not jurisdiction of the cause, unless it is conferred by the state statute allowing such joinder of cause in the state court, but it must be conceded that the United States courts are invested with jurisdiction alone through national authority, and that state statutes can neither confer nor annul it. While section 914, Rev. St., provides for a like practice and procedure in the state and national courts "in civil causes other than equity and admiralty," it has been frequently held that rights granted by state laws will be enforced, either at law or in equity, in the United States courts; and in *Davis v. Gray*, 16 Wall. 221, it is said that:

"A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality."

The United States courts, so far as they can, in harmony with United States laws and the rules of practice applicable to such courts, do enforce all rights granted by state laws, and in certain classes of cases follow state procedure; but the question raised here is one of jurisdiction, and not that of procedure, or the enforcement of a right granted by state laws. If, under the pretext of enforcing a right granted by the state, this court should assume a jurisdiction which otherwise it could not have, it would permit a state statute to determine its jurisdiction, which, of course, cannot be conceded. If there were a United States statute which, in express terms, declared, in cases like this, that the parties could not join in a single action, no one would contend that such a law could be controlled by a state statute. It is true there is no statute expressly so framed, but the law, in effect, is such. All laws must be held to convey that meaning which is given them by the construction of courts. The supreme court has placed such construction upon the laws now

in force as operates to exclude cases of this class from the jurisdiction of national courts. This construction is equivalent to a declaration of the existence of such a law, and is as potent as would be a law framed in express terms.

The conclusion then must be that under the laws of the United States, and the practice of its courts, such causes of action as are involved in this suit cannot be joined to constitute the jurisdictional amount. The motion to remand is granted.

FOX v. MACKAY et al.

(Circuit Court, N. D. California. February 12, 1894.)

1. REMOVAL—SEPARABLE CONTROVERSY—JOINT AND SEVERAL ACTIONS.

The complaint alleged that defendant M. and his associates owned a controlling interest in the stock of a certain corporation, and by means thereof chose certain persons as directors, and through them defrauded the corporation and its other stockholders, of whom plaintiff was one, of large sums of money; and this money the complainant sought to recover. Only part of the alleged directors were made defendants, and one of M.'s associates was also omitted. *Held* that, the right of action being joint and several, bringing the action against part of the tort-feasors only is not an election to treat it as several only, and hence there is not a separable controversy between plaintiff and M., within the meaning of the removal acts.

2. SAME—SEVERAL ACCOUNTING.

The complaint concluded with a prayer that "defendants may account for all the wrongs alleged, and on such accounting repay all sums realized by said defendants, or any of them." *Held*, that this is not a prayer for a several account, and the controversy is not separable on that ground.

3. SAME—NOMINAL PARTIES.

Under the allegations of the complaint, the directors appear to have been actual participants in the frauds charged, and hence they are not merely nominal parties, who can be disregarded in arranging the parties to the controversy for purposes of removal.

H. S. Siebert, for plaintiff.

Garber, Boalt & Bishop and W. E. F. Deal, for defendants.

McKENNA, Circuit Judge, (orally.) This action was originally brought in the superior court of San Francisco, and transferred here on the petition of defendant Mackay, on the ground that the real plaintiffs are Fox and the Consolidated California & Virginia Mining Company, and, as between him and them, there is a controversy separable from that between them and the other defendants, and that he is a citizen of the state of Nevada. The complaint is very long, and, for the purpose of considering the point in contention, it is only necessary to say that it contains a cause or causes of action in tort. It alleges that the defendants Mackay, Jones, and Flood were the owners of the majority of the stock of the Consolidated California & Virginia Mining Company, and by reason thereof the defendants caused Fish, Pollis, and O'Connor, and certain others, from time to time to be elected directors of said corporation, and through them cheated and defrauded it and its stockholders by con-

tracts made with the Comstock Mill & Mining Company, also controlled by said Mackay, Jones, and Flood, by which the latter company was paid an exorbitant price for crushing the ores of the Consolidated California & Virginia Mining Company, and that, besides, the ores were crushed in an imperfect manner, not more than 70 per cent. of the metal thereof being extracted, and that the "slimes, tailings, and residues" obtained by said milling company and Mackay, Jones, and Flood were worth the sum of \$2,500,000, or thereabouts; that Mackay, Jones, and Flood, through said other defendants as directors of the Consolidated California & Virginia Mining Company, caused to be issued certain shares of stock to certain persons for their benefit, which were worth in the open market, within a year afterwards, over \$2,000,000, and that dividends were paid thereon in the full sum of \$567,918. The plaintiff further alleges that the stockholders of said corporation, other than the said individual defendants, are scattered throughout the world, and that it is impracticable to make them all parties, and he therefore sues for all; that the directors of said corporation were requested to bring the suit, but that they refused, having colluded and confederated with said Mackay and Jones, and now are colluding and confederating with them.

The frauds alleged in the complaint cover a considerable period of time, and during such time several sets of directors were successively elected. Those elected were Fish, Hull, Follis, O'Connor, Frier, Havens, and Wells; Fish and O'Connor and Hull for the whole time. Hull is dead; Havens has been a director only since February 26, 1886. Fish, O'Connor, and Wells only are made defendants; the other directors are omitted. Flood died on the 1st of December, 1889, and his legal representatives are not made parties to the suit. It is contended by defendant Mackay that the liability of defendants is joint and several, and that plaintiff has elected to treat it as several by omitting some of the tort-feasors, and therefore the controversy as to him was made separable. This view is supported by counsel with very great strength of reasoning, but I am unable, nevertheless, to concur in it.

The language of the act of congress, as amended in 1887, is:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then one or more of the defendants actually interested in said controversy may remove said suit into the circuit court of the United States for the proper district."

"A separable controversy does not mean a separable cause of action," Judge Wallace said in *Boyd v. Gill*, 19 Fed. 148, following the decisions of the circuit court of the second and eighth circuits. On the other hand, it was held in the seventh circuit, whenever the suit was founded on a cause of action which could be made joint or several at the election of the plaintiff, a nonresident defendant could remove the suit, though sued jointly with residents of the same state as plaintiff. The test adopted was that, because the defendants were severally liable, the controversy was several. A different test, however, was applied by the supreme

court in *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, and *Pirle v. Tredt*, 115 U. S. 42, 43, 5 Sup. Ct. 1034, 1161. The test in these cases for both actions on contract and actions on torts was made to be that which the plaintiff made it in his pleadings. In the first case the court said:

"The cause of action is the subject-matter of the controversy; and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. * * * The controversy is the case, and the case is not divisible."

In the latter case, which was an action in tort, the court said:

"We are unable to distinguish this case in principle from that."

But in the case in 115 U. S., 5 Sup. Ct.:

"There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants, acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants, only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract."

The defendant, however, contends that the plaintiff, by suing less than all of the tort-feasors, has elected to make the action several as to all, though a number be joined in the suit, and the controversy is separable as to each; and it is further contended that this view is supported by the decisions of the supreme court *supra*. In both cases all the defendants were sued, but that was not the determining test. It is true, the court said, "The plaintiff might have sued each defendant separately, or all jointly," but it does not mean to say, as a literal construction of its language would make it say, that plaintiff could not have sued some of the defendants, but must have sued one or all. It was the plaintiff's right to sue some; not all, or one. Electing to so sue some, the controversy would then be declared by the pleadings to be whether, under the facts alleged, the defendants sued would all be liable to him. This would be the case, and it is as indivisible as to the defendants sued as if others were joined. To join others would extend the remedy to them as well; not change or divide the grounds of it. The controversy is single when it seeks the same remedy against all the defendants sued on the same facts; that is, on the same case. Hence the expression of the supreme court in *Railroad Co. v. Ide*, *supra*, "The controversy is the case, and the case is not divisible."

The defendant further argues, but not with much insistence, that the prayer of the complaint is for several, as well as joint, accounting, and the action is therefore brought within the doctrine laid down in *Boyd v. Gill*, 19 Fed. 149,—which is, when a several account is prayed for, the controversy is separate,—and 21 Blatchf. 543. I do not so read the complaint. Its prayer is that the defendants—all of them—"account * * * for all the wrongs, frauds, and breaches of trust * * * alleged, * * * and, on

such accounting, repay and restore * * * all sums gained, realized, or obtained by said defendants, or any of them, * * * and such other further relief as may be proper in the premises." The right of the plaintiff is to have restored to the company he represents all sums it was defrauded of, if it was defrauded; and the measure of relief would be such sums, whether they were lodged in the hands of one defendant or distributed evenly or unevenly among them all. The accounting is prayed against all.

The defendant further urges that the directors are not connected with the frauds, and are but nominal parties, and must be disregarded in arranging the parties to the controversy. But the complaint charges them with being participants in the acts of fraud; maybe not as directly and precisely as it might, but sufficiently for the purposes of this motion. They could not have been ignorant and inactive. As to the other defendants, they may be said to have been instruments as to the company, whose officers they were in every proper sense,—they were principals in the frauds. It would be extending too much indulgence to assume that the officers of a valuable mine, which "had acquired," to quote the complaint, "a high reputation for the known richness of its ore deposits," should, besides paying an exorbitant price for milling them, accept, during a series of years, only 70 per cent. of their real product, giving to others two and a half millions of dollars, the property of the company which they represented. Again, it would be extending too much indulgence to assume that they were ignorant of the value of the stock of the company which they issued. It was their duty to know. I think, therefore, that the complaint, as far as this motion is concerned, is sufficient to connect O'Connor, Fish, and Wells with the frauds alleged. The motion to remand is therefore granted.

THOMAS v. EAST TENNESSEE, V. & G. RY. CO., (COOK, Intervener.)

(Circuit Court, N. D. Georgia. February 17, 1894.)

RECEIVERS—INJURIES TO EMPLOYEES—COMPENSATION.

Where a person in the employ of a receiver has been injured in the discharge of his duty without negligence on the part of either, the court may order that his wages be paid him for the time during which he was disabled, in the view that the officers of the court should be required to act towards their employes as persons of ordinary humanity and right feeling would act under similar circumstances; but such compensation should be confined to faithful and deserving employes, and to those who merit such consideration. *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 33 Fed. 701; *Id.*, 41 Fed. 319,—limited.

In Equity. On exceptions to master's report. Intervening petition of Frank G. Cook in the suit of Samuel Thomas against the East Tennessee, Virginia & Georgia Railway Company. Exceptions sustained.

Smith, Glenn & Smith, for plaintiff.

Dorsey, Brewster & Howell, for defendant.

NEWMAN, District Judge. This was an action against Henry Fink and Charles M. McGhee, receivers of the East Tennessee, Virginia & Georgia Railway Company, to recover damages for injuries alleged to have been sustained by the intervener by reason of the negligence of the servants and agents of the receivers. The special master found that both the intervener and the receivers were free from negligence; that there was no liability on the part of the receivers to the intervener for his injuries. He suggests to the court, however, on the authority of *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 33 Fed. 701; *Id.*, 41 Fed. 319,—decided by Circuit Judge Pardee,—the propriety of requiring the receivers to pay to the intervener his wages for the time he was actually laid up on account of his injuries. To pay the intervener for his lost time is a mere gratuity, of course, there being no legal liability on the part of the receivers. The view of the circuit judge doubtless was that the receivers, as officers of the court, should be required to act towards their employes as persons of ordinary humanity and right feeling would do under similar circumstances towards their employes. If an individual acting for himself, or even as head of the corporation, who has a faithful employe who is injured, although without any fault on the part of the employer or the other employes, the injured employe being himself free from fault, the employer, if actuated by proper feeling, would feel disposed to at least allow the injured person compensation for his lost time. As stated, it was probably this view of the matter which actuated the circuit judge in making the orders he did in the cases named. No views are expressed and no reasons are given by the circuit judge such as to show to what extent or to what character of cases he believes the rule should be applied.

Instruction by the court to receivers to compensate injured employes under the circumstances and for the reasons above stated, it seems to me, should be confined to faithful and deserving employes, and to those who merit such consideration at the hands of the employer. It could hardly be claimed that if a receiver had in his service an employe who had been negligent and unfaithful in the discharge of his duties, and who had been kept in his service simply because he had no one for the time being to supply his place, and such employe was injured without fault on the part of the receivers, the court would require them to pay such person anything in a case where they are not legally liable. It seems to me that, while the court might very well direct its officers to do that which a just employer would ordinarily do, it would not require him to go beyond that, and give the money which he holds for the benefit of the creditors of the corporation to one wholly undeserving. To hold that it is the duty of receivers of a railroad in every case where an employe is injured, and both the receiver and employe are free from fault, to pay the employe his wages for his lost time, would establish a rule which would necessarily drift into a matter of legal right, and ingraft an entirely new principle on our jurisprudence. This I do not believe the circuit judge intended. His orders were doubtless confined to the par-

ticular cases before him, which were probably such as commended themselves to him, and there was no intention to establish a precedent or a new rule of law such as I have indicated. With this expression of views on the subject, it is ordered that this case be referred back to the special master for the purpose of determining whether or not, considered as above indicated, the intervener is entitled to have from the receivers his wages for his lost time.

CENTRAL TRUST CO. OF NEW YORK v. SHEFFIELD & BIRMINGHAM COAL, IRON & RY. CO.

ALABAMA IRON & RY. CO. et al. v. ANNISTON LOAN & TRUST CO. et al.

(Circuit Court, N. D. Alabama, N. D. February 21, 1894.)

1. COURTS—TERM TIME AND VACATION—SALES—CONFIRMATION.

Equity Rule No. 1, U. S. Cir. Ct., provides that "the circuit courts, as courts of equity, shall be deemed always open for the purpose of * * * issuing and returning mesne and final process," etc. *Held*, that the question of the confirmation of a sale made under a decree in chancery is one as to the exercise and sufficiency of final process, and may be determined in vacation, especially when each of the parties has brought the other before the chancellor on the subject by a rule nisi,—the one to show cause why the sale should not be confirmed; the other, why it should not be set aside.

2. JUDICIAL SALES—TERMS AND ADVERTISEMENT—PROSPECTIVE ACT.

Act Cong. March 3, 1893, regulating the manner in which property shall be sold under orders and decrees of any United States courts, is prospective, only, in its operation, and does not apply to cases where decrees have been rendered prior to that act, specifically providing for the place of sale, and the time and place for advertisement.

3. SAME—CONFIRMATION—MANNER OF SALE—PRICE.

An objection that property was sold at judicial sale as a whole, and not in the parcels in which it actually existed, and that either of such parcels was of sufficient value to discharge the lien for which the whole was sold, is not available against confirmation of the sale, where neither party objected to the decree which directed its sale as a whole, and where there is no offer to pay higher price in case the bidding shall be reopened.

In Equity. On rule to show cause against confirmation of sale. The original proceeding was a bill filed by the Central Trust Company of New York against the Sheffield & Birmingham Coal, Iron & Railway Company. The Anniston Loan & Trust Company filed an intervening petition in this suit, and had a decree therein. The Alabama Iron & Railway Company and others thereupon filed a supplemental and dependent bill of complaint against the trust company and others. Rule absolute.

Henry B. Tompkins, for complainants.

Knox & Bowie, for defendants.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. In the case of The Central Trust Company v. The Sheffield & Birmingham Coal, Iron & Railway Company,

the Anniston Loan & Trust Company, intervener, holder of certain receiver's certificates issued in the main case, obtained a decree November 22, 1892, condemning Napoleon Hill, trustee, or his assignee, the Alabama Iron & Railway Company, and James C. Neely, trustee, or his assignee, the Townley Coal & Coke Company, to pay or cause to be paid to the intervener, the Anniston Loan & Trust Company, a corporation created under the laws of the state of Alabama, or to Knox & Bowie, its solicitors of record, or to Milton Humes, special master, the sum of \$29,675, and all the costs of the case, within 20 days from the signing of the decree, and otherwise that the said Milton Humes, special master, shall forthwith proceed to sell at public outcry, for cash, to the highest bidder, all of the property described in the certain two mortgages, and purchased by Napoleon Hill and J. C. Neely, trustees, under a decree of foreclosure in above-entitled suit of Central Trust Co. v. Sheffield & Birmingham Coal, Iron & Ry. Co., of date December 3, 1889, in the city of Huntsville, Madison county, Ala., in front of the United States government building in the said city, giving 30 days' notice in some newspaper published in said county of the time, terms, and place of sale, and that the said special master shall execute proper deeds of conveyance to the purchaser upon receipt of the purchase money, and place him in possession of the property purchased. The said decree also specifically described the property thus ordered to be sold, and the decree further provides that the special master, Milton Humes, shall make report of his action in the premises to the court. This decree, on appeal to the circuit court of appeals for the fifth circuit, was affirmed. 6 C. C. A. 242, 57 Fed. 25. Thereafter, and after the expiration of 20 days, the special master advertised the said property, as required in said decree, by publication of the time and place of sale for 30 days in the Huntsville Daily & Weekly Argus, a newspaper published in the city of Huntsville, Ala., to be sold on Monday, the 22d day of January, 1894. Pending that advertisement, the Alabama Iron & Railway Company, a corporation created by and existing under the laws of the state of Alabama, the Townley Coal & Coke Company, a corporation created by and existing under the laws of the state of Alabama, Napoleon Hill, trustee, and J. C. Neely, trustee, brought their supplemental and dependent bill of complaint against the Anniston Loan & Trust Company, and therein recited the litigation in this court previously had in relation to the decree and order of sale obtained by the Anniston Loan & Trust Company, as hereinbefore recited. The complainants averred that the special master had caused to be advertised the property for sale under the said decree, and assigned the following objections and complaints against the same: (1) That no advertisement had been made in any other paper or in any other place, except Huntsville, Ala., although the property advertised to be sold was none of it situated in Madison county, Ala., in which county Huntsville is situated, but is situated in the counties of Colbert, Franklin, Marion, Winston, Walker, and Fayette, although said advertisement recites that the said property is situated only in the counties of Colbert, Walker, and Fayette. (2)

That the said advertisement is illegal, in that it undertakes to sell property lying in six different counties, in each of which counties there is a newspaper published, without having said property advertised in either of said counties wherein it lies, and that the said advertisement is illegal and void because the sale is not advertised to be made upon the premises, nor in a county where any portion of said real estate is situated, as provided by the act of congress approved March 3, 1893, entitled, "An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts." (3) That said advertisement, so made, contains a description of what was formerly the Sheffield & Birmingham Railroad, now known as the Birmingham & Tennessee River Railroad, which property at one time was a part of the Sheffield & Birmingham Coal, Iron & Railway Company's property, but upon which it is averred that the claim of the said Anniston Loan & Trust Company never bore any lien. (4) That the levy upon and advertisement of a large quantity of property situated in so many different counties is unnecessary and onerous, and can result in no possible good to any one connected with the litigation; that the three furnaces situated in the six acres of ground in Sheffield, Colbert county, are worth several hundred thousand dollars, and could easily be made to yield at forced sale a sum of money largely in excess of the claim of the Anniston Loan & Trust Company; further, that other properties levied upon were of sufficient value to pay the claim of the Anniston Loan & Trust Company. The prayer of the bill was for an injunction restraining the sale of properties of the complainant, or any part of them, from being made by the special master, as set forth in his advertisement, on the 22d day of January, 1894, and for general relief.

Upon this bill, on a rule nisi, the injunction on the hearing was denied. Thereafter, on the 22d day of January, 1894, the special master proceeded to make the sale of all the property described in the decree and mentioned in his advertisement, except that of the said line of railroad formerly known as the Sheffield & Birmingham Railroad, and at said sale said property was bid for and purchased by John H. Noble, trustee, he being the best and last bidder therefor, for the sum of \$35,000. The said purchaser complied with the terms of sale, and thereupon the special master put the said purchaser in possession of the property sold. On the 1st day of February, 1894, the Alabama Iron & Railway Company filed an amended and supplemental bill to the bill of complaint filed in the cause on the 13th of January, 1894, therein reciting that the special master, Milton Humes, in accordance with his advertisement referred to in the original bill, exposed for sale, and sold, all of the property described in the decree, except the property of the Sheffield & Birmingham Railroad Company, now known as the Birmingham & Tennessee River Railroad Company; that, at said sale, John B. Knox, Esq., counsel for the Anniston Loan & Trust Company, bid in the whole of said property, which was sold in lump, and not in parcels,—including the property belonging to the

Alabama Iron & Railway Company, and also the property belonging to the Townley Coal & Coke Company,—for the sum of \$35,000, and had the same knocked down to J. H. Noble, trustee for the Anniston Loan & Trust Company; that immediately after the sale, and without any report being filed by said special master, said special master executed and delivered to said Noble, as trustee, a deed for the whole of said property, and thereupon a writ of assistance was obtained, without any order of court therefor, and the marshal for the northern district of Alabama thereunder placed the said Noble, his attorneys or agents, in possession of a part, if not the whole, of said property of the Alabama Iron & Railway Company, and in possession of a part, if not the whole, of the property of the Townley Coal & Coke Company. The complainants aver that said sale was illegal and void because of the facts set forth and shown in the original bill; that the deed given by said special master is illegal and void because no report of said sale was made by him to the court, and no confirmation thereof had and obtained, and that the action of the purchaser in procuring the writ of assistance was also illegal and void. Complainants further aver that the properties belonging to the Alabama Iron & Railway Company cost, in cash, about \$1,100,000, or more; that the properties belonging to the Townley Coal & Coke Company cost, in cash, \$200,000, or more. The prayer of this amended and supplemental bill was for a decree declaring the sale illegal and void, declaring the deed of the special master to the purchaser invalid and of no effect, and that the properties so sold should be delivered up to the complainants, to be held and possessed by them until there shall be a legal sale of the same, and a legal deed by the special master, and legal possession obtained by whomsoever shall be the legal purchaser. They further pray for writ of injunction against John H. Noble, trustee, his agents, attorneys, and abettors, restraining and enjoining them from retaining possession, custody, or control of said properties, or any part of them, or in any wise selling or disposing of said property so illegally purchased by them, and from using, operating, or in any manner interfering with or incumbering, the same, until the final decree of the court. Upon this bill the complainants obtained a rule nisi directing John H. Noble, trustee, and the Anniston Loan & Trust Company, to show cause on the 12th day of February, 1894, before Don A. Pardee, circuit judge, at his chambers in New Orleans, why the injunction prayed for should not issue pendente lite, and further obtained a restraining order, as follows:

“United States Circuit Court for the Northern District of Alabama,
Northern Division.

“In Equity.

“Alabama Iron and Railway Company et al. v. Anniston Loan and Trust Company et al.

“Upon reading and considering the foregoing bill, being an amended and supplemental bill to the bill of complaint filed in this cause on the 13th of January, 1894, it is ordered that the same be filed, and that the defendants, the Anniston Loan & Trust Company and J. H. Noble, trustee, do show cause before me, at my chambers, in New Orleans, La., on Mon-

day, the 12th day of February, 1894, or as soon thereafter as counsel can be heard, why the injunction and relief prayed for in said cause should not be granted.

"It is further ordered that in the meantime, and until the hearing above provided for, the said Anniston Loan & Trust Company and John H. Noble, trustee, their attorneys, agents, and abettors, be temporarily restrained and enjoined from making any sale, transfer, or disposition of any part of the property of the Alabama Iron & Railway Company or of the Townley Coal & Coke Company, as the same were set forth and described in an advertisement lately appearing in the newspaper called the Argus, published at Huntsville, Ala., in a notice wherein Milton Humes, Esq., as special master, advertised said property to be sold at Huntsville on the 22d day of January, 1894.

"It is also ordered that until further orders of the court the defendants, the Anniston Loan & Trust Company and J. H. Noble, trustee, their attorneys, agents, employes, and abettors, and all parties claiming under or through them, or either of them, are also restrained and enjoined from possessing, controlling, or exercising any rights of ownership, possession, or dominion over, the aforesaid properties, or any part thereof, as against the said Alabama Iron & Railway Company, the Townley Coal & Coke Company, or their attorneys, officers, or agents.

"It is further ordered that this order be served by having certified copies of the same served upon the Anniston Loan & Trust Company and J. H. Noble, trustee, by the marshal, or his authorized deputy, for the northern district of Alabama. This order not to be construed as preventing a report of the sale and proceedings to confirm the same regularly and according to equity practice."

On February 6th, John H. Noble, trustee, filed his petition in court, showing that he was the purchaser of the property sold by the special master under the decree rendered in the case called The Central Trust Company of New York v. The Sheffield and Birmingham Coal, Iron & Railway Company, in favor of the Anniston Loan & Trust Company; that he has in all respects complied with the terms of his purchase, by paying the purchase money, and had received a deed of conveyance to said property, as directed by the decree of the court, and, exhibiting a copy of the special master's report, prayed for a rule nisi to issue to respondents, the Sheffield & Birmingham Coal, Iron & Railway Company, the Alabama Iron & Railway Company, the Townley Coal & Coke Company, Napoleon Hill, trustee, James C. Neely, trustee, and Jacob G. Chamberlain, receiver, to show cause why the said sale should not be confirmed. Said rule nisi was granted, returnable on the 12th day of February, 1894, before Don A. Pardee, circuit judge, at his chambers, in New Orleans. On the 6th day of February, 1894, the Alabama Iron & Railway Company, the Townley Coal & Coke Company, Napoleon Hill, trustee, and James C. Neely, trustee, filed their second amended and supplemental bill of complaint, wherein the history of the sale is again recited, and the same alleged to be illegal for the following reasons, to wit: (a) Because the advertisement under which said special master made said sale was illegal, null, and void. (b) Because said sale was of the whole of said properties in a lump, without putting them up in separate lots or parcels. (c) Because the price of \$35,000 is so small and inadequate that no court can legally confirm said sale. (d) Because said special master, as orators are informed and believe, had not filed any report of said

sale at the time of executing the deed. (e) Because the report filed by said special master on the 24th day of January, 1894, has never been ratified, adopted, or confirmed by this honorable court, and cannot be except in term time, after due opportunity has been given orators to file exceptions, if they see proper, to said report of said sale. (f) Because said deed, being made before confirmation of said sale, conveyed no title or claim, or right whatever, to said John H. Noble, as trustee, or otherwise. The prayer of this amended bill was for a decree declaring the said deed so executed by the special master to John H. Noble, trustee, illegal and void, and that the same be canceled and set aside as a cloud upon the title of orators, (complainants,) and reiterating the prayer for an injunction.

On the 12th day of February, both the two rules nisi heretofore mentioned came on for hearing, all parties being represented by counsel. Thereupon, the Anniston Loan & Trust Company and John H. Noble, trustee, filed demurrers to the second amended and supplemental bill, and also an answer to the second amended and supplemental bill. The grounds of these demurrers and answers need not be recited. The Alabama Iron & Railway Company, the Townley Coal & Coke Company, Napoleon Hill, trustee, and James C. Neely, trustee, filed grounds of exception to the report of the special master, in which the objections, uncertainties, and illegalities, as set forth in the several amended and supplemental bills filed by the Alabama Iron & Railway Company et al. are reiterated, although more fully detailed and specified, and, further reciting the issues presented by the said amended and supplemental bills, contended that the confirmation of the sale and the disposition of the exceptions to the report of the special master should not be disposed of prior to a hearing and decree under said amended and supplemental bills, and further setting out that the property sold is subject to a lien equal, if not superior, in rank, to the lien of the Anniston Loan & Trust Company, amounting to \$125,000 and interest, which lien and the holders thereof should be represented; and exceptors further objected to the hearing of the rule nisi for the confirmation of the sale made by the special master in vacation, and not in and at the regular term of the circuit court for the northern division and northern district of Alabama.

The vital question presented for consideration is whether the sale made by the special master under the decree of court of November 22, 1892, should be confirmed. If so, the proper disposition of all other questions presented is easily determined.

A preliminary question is whether we have, sitting in chambers, and not at a stated term of the circuit court for the northern division of the northern district of Alabama, jurisdiction to pass upon the question of confirmation. The first equity rule is as follows:

"Court, When Open. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits."

It is to be noticed that the question of confirmation of a sale made under a decree of a court of chancery vel non is one as to the execution and sufficiency of final process; and, in this particular case, it is to be further noticed that all the questions presented are questions of law arising upon the face of the record, there being no facts in contestation which require the taking of evidence.

In the case of *Mining Co. v. Mason*, 145 U. S. 349-364, 12 Sup. Ct. 887, it is held that equity rule 83, which provides for exceptions to masters' reports, hearing the same, etc., has no reference to a report by a master of a mere ministerial matter like a sale, but only to his report upon matters heard and determined by him; and in the same case (page 364, 145 U. S., and page 891, 12 Sup. Ct.) the rule as stated in 8 Am. & Eng. Enc. Law, p. 254, to wit:

"The master or commissioner making the sale should report his action to the court, to the end that the sale may be confirmed, and motion to confirm the sale, with notice to the parties adversely interested to the confirmation, should be made. Confirmation nisi will be ordered to become absolute within a designated time, unless cause is shown against it. If cause is not shown, it stands confirmed."

—is approved as the correct rule of practice.

In *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, where the question was whether a confirmation of a sale under a decree in chancery is necessary in order to compel the purchaser to comply with his bid, it is said:

"It is undoubtedly true that Camden's bid of \$173,050 was, in legal effect, only an offer to take the property at that price, and that the acceptance or rejection of that offer was within the sound equitable discretion of the court, to be exercised with due regard to the special circumstances of the case, and to the stability of judicial sales."

Section 574, Rev. St., provides—

"That district courts, as courts of admiralty and as courts of equity so far as equity jurisdiction has been conferred upon them, shall be deemed always open for the purpose of filing any pleading, or issuing or returning mesne and final process and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing upon their merits of all causes pending therein,"

—which is substantially the same as is provided for the circuit courts under the first equity rule.

In *Gould & Tucker's Notes of the Revised Statutes*, commenting on this statute, it is said:

"With respect to that provision, it is to be observed that while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open; the chancellor's authority being personal, as representing the crown or supreme head of the state, and capable of exercise equally in term time and in vacation;" citing *Langd. Eq. Pl. § 38*; *Crowley's Case*, 2 Swanst. 1; *Brown v. Lull*, 2 Sumn. 443, Fed. Cas. No. 2,018.

As a matter of practice, within this circuit,—and in the other circuits, so far as we are advised,—it has been universal to treat all questions of confirmation of sale as relating to final process, and under the head of "Motions and Orders not Grantable of Course," and as within the jurisdiction of the chancellor to determine at

any time, irrespective of whether a stated term of the circuit court be in session; and this under and in accord with the sixth equity rule, which is as follows:

"Motions and Orders not Grantable of Course. All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion."

The objection to considering and determining the matter of confirmation at this time, particularly when each side has brought the other before the chancellor on the subject on a rule nisi, must be disregarded. The report of the master shows that, in advertising and selling the property, he has strictly followed and complied with the terms of the decree under which he derived his authority, and his report thereof, and the sale made by him thereunder, should be confirmed, unless the exceptions filed thereto are well taken.

The first exception is that the special master had no right to make the sale, because he had not made any legal or proper advertisement of said properties, as provided by the act of congress of March, 1893, in respect of legal sales made under any process in the circuit courts of the United States, and presents the only serious question in relation to the matter of confirmation. The act of congress, having been passed after the decree in question was rendered, must be given a retroactive or retrospective application, if it applies in this case. The act not only contains no expression of an intention that it shall be retrospective, but, on the contrary, seems to show on its face that it was expected to operate only prospectively. In each section of the act the expression occurs, in regard to details of either the sale or advertisement, "as the court rendering said order or decree of sale may direct." It is a general rule that statutes are not given a retroactive effect unless the contrary intention is clearly expressed. *Murray v. Gibson*, 15 How. 421; *U. S. v. Heth*, 3 Cranch, 399; *McEwen v. Bulkley*, 24 How. 242; *Twenty Per Cent. Cases*, 20 Wall. 179; *Auffm'ordt v. Rasin*, 102 U. S. 620; *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255. In *U. S. v. Heth*, supra, the court said:

"Words in the statute ought not to have a retrospective action unless they are so clear, strong, and imperative that no other meaning can be annexed to them,—unless the intention of the legislature cannot otherwise be satisfied,—and such is the settled doctrine of this court."

If the statute in question is given a retrospective effect, it would impose a necessity of again applying to the court in the case of every unexecuted decree rendered prior to the passage of the act, a mischief which we do not think was intended. The authorities cited by the contestants bear upon the question of vested rights and remedial statutes, but, in the view we take of the statute, such authorities need not be considered. We construe the statute as

clearly intended for application prospectively, and as not intended to apply to cases in which decrees had been rendered prior to the act specifically providing for the place of sale, and the time and place for advertisement.

It is further objected to the confirmation that the sale was made of all the property subject to intervenor's lien as an entirety and not in parcels, in relation to which it is averred that either parcel was of sufficient value to pay intervenor's lien. The answer to this objection is twofold: First, the decree so directed, and neither party complained until afterwards; second, there is no offer now by any one to pay a higher price for any parcel, or for the whole, than the sale realized, in case the bidding shall be reopened. It is true there are averments as to the cost of parcels and of the whole, which tend to show that the property realized an inferior price, compared with its cost, but these averments fall short of showing that on another sale a better price would be realized. The present hard times, and the depreciation attending all property of the kind in question, may possibly account for the situation; and the case seems to be somewhat like *Mining Co. v. Mason*, *supra*. The decree is a sufficient answer, however, to the objection that the sale was not made in parcels. *Hammock v. Trust Co.*, 105 U. S. 77-86; *Central Trust Co. v. Wabash, etc., Ry. Co.*, 30 Fed. 332.

Another objection to the confirmation is that other liens bear upon the same property, of equal rank, and that the property ought to be resold, and for the benefit of all lienholders. The record of the cases discloses that there are other and large liens on the property, of equal and perhaps prior rank to the intervenor's lien. This in part accounts for the price brought at the sale, as the purchaser as well as other bidders knew that the property offered was incumbered. But such fact is no reason why the sale, as made, should not be confirmed; the other lienholders not complaining, and otherwise being able to take care of themselves.

On the whole, we see no reason why the sale should not be confirmed, and an order to that effect will be entered. As the sale should be confirmed, the complainants in the dependent and supplemental bill and in amended supplemental bill ought not to have the injunction pendente asked for.

McCORMICK, Circuit Judge, concurs.

MERRILL v. FLORIDA LAND & IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1893.)

No. 189.

1. SALE—FRAUDULENT REPRESENTATIONS—BANK STOCK.

An intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.

2. SAME—RESCISSON AS AGAINST A BANK—RIGHTS OF CREDITORS.

The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its
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creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. 52 Fed. 77, 2 C. C. A. 629, 2 U. S. App. 434, reaffirmed.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. This is a suit by the Florida Land & Improvement Company against T. B. Merrill, as receiver of the First National Bank of Palatka, Fla., the Florida Land & Lumber Company, the Manhattan Trust Company, and William J. Winegar for the rescission of an alleged fraudulent sale of bank stock. The bill was originally dismissed on demurrer by the court below, but, on an appeal to this court, the decree was reversed. 2 C. C. A. 629, 52 Fed. 77. The case was then heard on the merits, and a decree entered granting the relief prayed, from which the defendant Merrill appeals. The decree is now affirmed.

J. W. Stripling, for appellant.

H. Bisbee, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This cause was before this court at the former term on appeal from a decree sustaining a demurrer to the bill of complaint and dismissing the bill, and it was then held that the matters averred in the bill, taken as truly stated, entitled the complainant to relief. 2 U. S. App. 434, 2 C. C. A. 629, 52 Fed. 77. The cause, when returned to the circuit court, was put at issue on what purports to be the joint and several answer of T. B. Merrill, receiver, W. J. Winegar, and the Florida Land & Lumber Company. It will be noticed, with regard to this answer, that the Florida Land & Lumber Company did not sign the answer, nor was its seal attached thereto, or oath made to it by any of its officers, and that, while this answer purports to be the joint and several answer of all the defendants, it is doubtful whether it should be considered other than the answer of T. B. Merrill, receiver. The Manhattan Trust Company filed its former answer, but, under the developments of the case, this trust company became, practically, an unnecessary party.

On filing the mandate of this court remanding the case to the court below for further proceedings, an injunction against T. B. Merrill, as receiver, enjoining him from disposing in any manner of the bonds of the Florida Land & Lumber Company in his possession, was reinstated, and he was thereby prevented from making any sale of the bonds; but, in the order of injunction referred to, it was provided that if, at any time, he should deposit a sufficient sum of money in the registry of the court to cover any decree which might be rendered in favor of the complainant, then such injunction should be dissolved. In accordance with this provision, by agreement of the parties, the receiver, desiring to make sale of the bonds, deposited in the registry of the court the sum of \$15,260, and thereupon the order was entered, by agreement of the

parties, dismissing the Florida Land & Lumber Company from the case, and providing that any decree for the complainant should be satisfied out of the moneys so deposited. The cause being fully at issue by replication to the alleged answer, testimony was taken, and the cause submitted to the court for final hearing. From a decree giving the complainant all the relief prayed in his bill, Merrill, receiver, has taken this appeal. The errors assigned are as follows:

"First. That the court erred in rendering a decree in favor of the complainant, and against said defendant.

"Second. That the court erred in refusing to render a decree in favor of the defendant, and dismissing the complainant's bill.

"Third. That the court erred in decreeing that the complainant has a vendor's lien on all of the lands described in the bill of complaint for the balance of purchase money, viz. \$11,500, together with interest at 8 per cent. per annum from the 29th day of December, 1890.

"Fourth. That the court erred in decreeing that the complainant be paid the sum of \$13,743.78 out of the moneys deposited in the registry of the court by the defendant Merrill.

"Fifth. That the court erred in decreeing that the complainant be relieved from any and all liability for assessment made, or to be made, on one hundred shares of stock, and that the said Merrill, as receiver as aforesaid, and his successors, be enjoined from collecting or enforcing from the complainant any assessment made or to be made on said one hundred shares of stock."

The learned counsel for appellant, in presenting his case, resolves these errors into two general questions stated by him, as follows:

"First. That the court erred in decreeing a rescission of the contract relating to the bank stock and lien upon the lands, and in requiring the payment of the \$11,500 and interest out of the funds deposited by the appellant in the registry of the court.

"Second. That the court erred in enjoining the collection of the assessment against the appellee on the shares of stock held by it, and in not denying the relief prayed, and dismissing the bill."

The evidence adduced on the trial in the court below, and brought up in the record, fully sustains the allegations of the bill. In regard to the matter of the ownership of the shares of bank stock which were transferred to the complainant, and made a part of the consideration given for the large property rights acquired from the complainant, the showing is not as clear as in other matters, but that we consider as the fault of the appellant, and resolve the matter accordingly. From the answer it appears that 60 shares of the said stock belonged to the bank, leaving it in doubt as to who was the owner of the remaining 40 shares. The testimony of Winegar, president of the bank, shows that the remaining 40 shares belonged, prior to the transaction, 30 to him and 10 to a Mr. Mersereau, but were acquired by the bank to complete the transaction with the complainant, credit being given on the books of the bank to pay for the same. As to the fraudulent representations alleged, the evidence is clear and conclusive. While it was true that the bank, on January 6, 1891, had a paid-up capital of \$150,000, and had deposits to the amount of \$250,000, and, further, had paid the

previous dividends as alleged, it was not true that the bank had a surplus of \$23,600, or any actual surplus. The fact was that, on paper, the bank had an excess of assets over liabilities of between thirteen and fourteen thousand dollars, but really, while the bank was not insolvent, by reason of bad investments its capital stock was largely impaired. The evidence further shows that the representations complained of were made by the president of the bank, who was, or ought to have been, in full possession of all the facts in the case. The learned counsel for the appellant contends that the appellee had no right to rely upon the representations of the president of the bank, but should have instituted an inquiry in other directions, and that the representations with regard to the assets of the bank should have been inquired into through other sources, and that the appellee should have informed himself as to who were the debtors of the bank, how the moneys of the bank were invested, etc.

In this view we cannot concur. The information with regard to the business of the bank was peculiarly within the control and knowledge of the president, and for information as to its condition the appellee was not required to look further. In giving our former decision we said:

"On the facts as stated, all admitted by the demurrer, the appellant has been defrauded of a property right, and is entitled to relief, unless, in the mean time, the rights of innocent third parties have intervened. The learned judge presiding in the circuit court gave no reasons in writing for his decision, and we are left to infer what they may have been. It is suggested in the briefs that the court held that, by the declaration of insolvency of the bank and the appointment of a receiver, the rights of innocent third parties, to wit, creditors of the bank, have intervened, and that, as the receiver represents the creditors of the bank as well as the bank, although it did not appear that there were any creditors of the bank who had given credit to it on the faith of the bonds issued on the lands in controversy, yet the court would infer, from the fact that the receiver had been appointed, that there were creditors of the bank who were prior in equity to the appellant. As it is admitted that the bank stock, when fraudulently sold and delivered to the appellant, was the property of the bank, and that the proceeds of the fraudulent sale were at once turned over to the bank, and are now held by the receiver as the property of the bank, we do not understand how it can be that any creditor of the bank can have such an interest as would prevent restitution. The receiver, representing creditors, has only the rights of property possessed by the bank. It does not appear, nor is it to be inferred, that the receiver or the creditors of the bank have parted with anything of value upon the faith of the bonds fraudulently held by the bank; and to allow the receiver, on the theory that there may be some bona fide creditor of the bank, to retain the proceeds of the fraudulent sale would be to give the creditors of the bank the fruits of a gross fraud, which, by taking and holding, would make them particeps criminis. 1 Story, Eq. Jur. 193a; Kerr, Fraud & M. 233. Counsel for appellees contends in this court 'that the capital stock of an incorporated company is a fund set apart for the payment of its debts,' citing *Sanger v. Upton*, 91 U. S. 56. And he says, further: 'Under this principle the interests of the insolvent bank and its stockholders are secondary and contingent. They have no interest until the last obligation of the bank to its creditors shall have been fully discharged. After the payment of all debts they are entitled to the residuum. The creditors are interested parties, and, under the circumstances, the bill should allege that they had notice of the alleged fraud, and that the credit was not extended upon the faith of the bonds in question, nor upon the faith of appellant being a stock-

holder. Fraudulent misrepresentations of the officers of a bank, made to stockholders at the time of purchase, constitute no defense after its insolvency, and the appointment of a receiver.' Citing *Benj. Sales*, par 709; *Kerr, Fraud & M.* pp. 48, 49; *Ogilvie v. Insurance Co.*, 22 How. 380; *Upton v. Tribilcock*, 91 U. S. 45; *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679, and note; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Duffield v. Iron Works, (Mich.)* 31 N. W. 310; *Moore v. Jones*, 3 Woods, 53, Fed. Cas. No. 9,769. In our opinion, these arguments and authorities do not apply in this case. This is not a case of subscription to the capital stock of an incorporated company; nor a case of transfer of stock by an ordinary stockholder, but it is a case where the bank, as an actor, made a fraudulent sale of its own stock, and now, by its receiver, holds the proceeds thus acquired. In other words, the receiver of the bank holds property that does not belong to the bank, to which neither he as receiver nor the creditors of the bank are entitled in equity and good conscience. * * * Considering, however, as we do, that the bill charges, and the demurrer admits, that the bank was the real vendor of the stock, we think that, in equity, the appellant is entitled to have a complete rescission of the fraudulent transaction complained of."

As counsel for appellant gives us no new authority nor well-grounded argument to the contrary, we still adhere to these views, and, as they control the case, it follows that the decree appealed from must be affirmed with costs, and it is so ordered.

READ v. DINGESS et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 53.

1. EQUITY JURISDICTION—REMEDY AT LAW—FORFEITURE OF LANDS.

Lands were forfeited through failure to enter same for taxation. Const. W. Va. art. 13, § 6. *Held*, that a deed from the state would not be set aside upon the ground that the complainant had been deprived of his property without "due process of law," because the forfeiture is in that event a nullity, and complainant has an adequate remedy at law.

2. TAXATION—FORFEITURE—REDEMPTION.

The privileges given to former owners of forfeited lands by the West Virginia statute of February 21, 1887, and prior acts of like character, cannot, by any rule of construction, be enlarged into an absolute right of redemption, but, on the contrary, are mere matters of grace on the part of the state, and are confined by the terms of the act to (1) a right to obtain from the state the excess of purchase money, in case the lands have been sold by it; and (2) the right to intervene by petition at any time pending proceedings for sale, and redeem by paying all taxes and costs. Hence, after the sale is complete, the former owner has no interest whatever therein. *McClure v. Maitland*, 24 W. Va. 576, followed.

3. SAME—EQUITY JURISDICTION.

Even if the school commissioner of the state sells forfeited lands as "waste lands," when he has no right to do so, the former owner has no rights therein which he can enforce in a court of equity; for the sale is either void, in which case there is an adequate legal remedy, or it is merely irregular, in which case relief must be had in the state court in which the proceedings for sale were had.

4. EQUITY—LACHES.

A court of equity will not be disposed to exercise any merely discretionary powers in order to relieve from statutory forfeiture lands which for 30 years have paid no taxes, and have not been reported for taxation

as required by the laws, especially when the owner does not now offer to pay the same, or aver an intention to do so, but merely seeks to set aside certain conveyances, which he alleges will embarrass him in the exercise of his right to redeem, in case he should elect to do so.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Bill by John R. Read, trustee, against Zatto C. Dingess. Case heard below on bill and demurrer, and bill dismissed. Dingess having died pending the appeal, his heirs were substituted.

Z. T. Vinson and J. S. Clarke, for appellant.

N. Dubois Miller, James H. Ferguson, and J. F. Brown, for appellee.

Before FULLER, Circuit Justice, and SEYMOUR and SIMONTON, District Judges.

SEYMOUR, District Judge. Complainant alleges, among other things, (which it is unnecessary to the opinion to state,) a grant, of date January 21, 1796, of 100,000 acres of land in Virginia, within the boundaries of what is now West Virginia, lying mainly in Logan county, in said state; a forfeiture of the tract under the taxing laws of Virginia, whereby it became vested in the president and directors of the literary fund; an act of the Virginia legislature of March 15, 1838, by which the title of the president and directors of the literary fund was transferred to and vested in one Dumas, in trust for the estate of the former owners of the tract and certain creditors, discharged from all taxes due before 1838; the due appointment of successive trustees of the trust, the last of whom is the complainant, and payment of taxes by trustees for the years 1840-54, inclusive. He states that the land was not charged to the trust with taxes from 1857 to 1860, and that it has never been entered for taxation on the land books of the counties in which it is situated since the organization of the state of West Virginia, (June 20, 1863.) He further alleges that, by reason of such fact, it became liable to be sold by the commissioner of school lands for the benefit of the school fund; that, during the years 1882-88, such commissioner sold various parts of it to defendant, as waste and unappropriated land; and that the school commissioner has since made deeds to him of the same. He further alleges that he has ever since had a right, under the laws of West Virginia, to redeem said land, upon payment of the taxes in arrears, which right, he avers, can only be divested by a sale for the benefit of the school fund, in conformity with the law providing for such sales, and that no such proceedings have been had. He avers, however, that, until the deeds from commissioner to complainant are set aside, he is embarrassed in the exercise of that right. He alleges that the commissioner sold the land as waste and unappropriated, without notice to him, for the express purpose of defeating his redemption. His prayer is that the deeds to defendant be set aside and annulled, and that he be put in possession of the land.

The demurrer, among other grounds of demurrer, assigns the following:

"Third. Because it appears from the said bills of the said plaintiff, and each of them, that under the constitution of the state of West Virginia, and the laws in force in said state, the plaintiff, John R. Read, has no right to redeem the said 100,000 acres of land, or any part or parcel of the said land, and especially the parts or parcels of the 100,000 acres in question in this suit, the same having been absolutely forfeited, first to the state of Virginia and to the president and directors of the literary fund, and then to the state of West Virginia, and became the absolute property of said state, for the failure of said Robert E. Randall, trustee, and of the plaintiff, to cause the said tract of 100,000 acres, or any part of it, to be entered and charged with taxes on the land books of said Logan county, or of any other county in West Virginia, in the manner prescribed by law, for more than five successive years prior to the year in which this suit was brought, and in fact for any year or years from the creation of West Virginia to the present time, to wit, A. D. 1892; and because it appears by said bills, and each of them, that no taxes have, in any view of the case, been paid on said 100,000 acres of land, by either of the trustees named in said bills, and each of them, since the year 1855.

"Fourth. Because it appearing by the said bills, and each of them, that, the lands therein referred to having been absolutely forfeited to the state of West Virginia, the plaintiff has no right or claim of property therein, and consequently has no title upon which to maintain the present bill."

The constitution of West Virginia (article 13, § 6) provides as follows:

"It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing 1,000 acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the state. But, if, for any one or more of such five years, the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause."

The legislature of West Virginia has passed several acts providing for the forfeiture of land not entered on the proper books for taxation. The earliest of them is the act of March 4, 1869, the seventh section of which is given:

"(7) It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor and charged with the state taxes thereon not charged to the owner, for the year eighteen hundred and thirty-two, or any year thereafter, heretofore or hereafter, not released, paid or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable thereto, shall without any proceeding be absolutely forfeited to and vested in this state. Provided, however, that such owner may, within one year after the passage of this act, cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years."

The constitutional provision is of later date than this statute. The new constitution of West Virginia, which contains it, was adopted in 1872. At the session of the legislature following the adoption of the new constitution, it passed an act to carry into

effect article 13, § 6, of the constitution, (Acts 1872-73, c. 134.) The law upon the subject has been certified, and appears in chapter 105 of the Code of West Virginia, (Warths' Code, p. 639, Ed. 1884.)

The right of redemption, as it existed at the commencement of this action, appears in the act of February 21, 1887, as follows:

"(14) Any owner may, within the time aforesaid, file his petition in the said circuit court, stating his title to such lands, accompanied with the evidences thereof, and upon full and satisfactory proof that at the time the title to said lands vested in the state he had a good and valid title thereto, legal or equitable, superior to any other claimant thereof, such court shall order the excess mentioned in the next preceding section to be paid to such owner; and upon a properly certified copy of such order being presented to the auditor, he shall draw his warrant on the treasury in favor of such owner, or his personal representative, for such excess. At any time during the pendency of the proceedings for the sale of any such land as hereinbefore mentioned, such former owner, or any creditor of such former owner of such land having a lien thereon, may file his petition in said circuit court as hereinbefore provided, and asking to be allowed to redeem such part or parts of any tract of land so forfeited, or the whole thereof, as he may desire, and upon such proof being made as would entitle the petitioner to the excess of purchase-money hereinbefore mentioned, such court may allow him to redeem the whole of such tract if he desire to redeem the whole, or such part or parts thereof, as he may desire, less than the whole, upon the payment into court, or to the commissioner of school lands, all costs, taxes and interest due thereon, as provided in this chapter, if he desire to redeem the whole of such tract; or if he desire to redeem less than the whole of such tract, upon the payment, as aforesaid, of so much of the costs, taxes, and interest due on such tract as will be a due proportion thereof for the quantity so redeemed. But if the petition be for the redemption of a less quantity than the whole of such tract, it shall be accompanied with a plat and certificate of survey of the part or parts thereof sought to be redeemed. Whenever it shall satisfactorily appear that the petitioner is entitled to redeem such tract, or any part or parts thereof, the court shall make an order showing the sum paid in order to redeem the whole tract, or the part or parts thereof which the petitioner desired to redeem and declaring the tract or part or parts thereof, redeemed from such forfeiture, so far as the title thereto was in the state immediately before the date of such order; which order, when so made, shall operate as a release of such forfeiture so far as the state is concerned, and of all former taxes on said tract or part or parts thereof so redeemed, and no sale thereof shall be made. If the redemption be of a part or parts of a tract, the plat or plats and certificate of the survey thereof, hereinbefore mentioned, together with a copy of the order allowing the redemption shall be recorded in a deed book in the office of the clerk of the county court. Provided, that such payment and redemption shall in no way affect or impair the title to any portion of such land transferred to and vested in any person as provided in section 3 of article 13 of the constitution of this state."

This is substantially a re-enactment of the law in force when the proceedings in the circuit court to sell were instituted. The later legislation of the state, (chapter 94, Acts 1891, and chapter 24, Acts 1893,) gives no additional rights or privileges to plaintiff. On the contrary, it materially limits his right to redeem. The act of 1893 provides that, if lands have been sold as "waste and unappropriated," when in fact they were "forfeited and escheated," the purchaser, upon obtaining his deed "shall be vested with all the title of the state to such land immediately before the date of such deed, either as forfeited, escheated or waste."

This legislation is a continuation of the long-settled policy of the

parent state. "In the early settlement of this country," (Virginia,) says Mr. Justice Johnson, "the man who received a grant of land, and failed—at first in three, and afterwards in five, years—to seat and improve it, was held to have abandoned it. It received the denomination of 'lapsed land,' was declared to be forfeited, and any one might take out a grant of it." *Hawkins v. Barney*, 5 Pet. 457, 468. Laws forfeiting land for failure to enter it for taxation existed in Virginia until 1814, were repealed during that year, and re-established by the act of February 27, 1835. The same legislation was enacted in West Virginia almost upon the organization of the state, and has existed to the present day. These laws have, since 1835, been sustained, in frequent decisions of the courts of the two Virginias,—some of them, like that of *Staats v. Board*, 10 Grat. 400, elaborately considered; and they have become, if legislation and long enforcement can make them such, the law of the land.

The method of enforcing collection of taxes by forfeiture for failure to enter for taxation is somewhat unusual, and it may aid us in interpreting this legislation to glance at the reasons for it:

The original grant of 100,000 acres set up in the bill bears the date of 1796. That date directs us to a period of extensive land speculation, originating in the settlement of what was then "the west," that ensued upon the adoption of the federal Union. The legislation of the day favored such speculation. "The public land policy of the United States, at this period, was founded upon an untenable idea, which congress afterwards abandoned, namely, that of deriving an immediate revenue from the sale of large tracts, and trusting the whole plan of colonization to mercenary purchasers or proprietaries." Shouler, *Hist. U. S.* 1, 198. "Five millions of acres extending along the Ohio from the Muskingum to the Scioto were sold to the so-called 'Ohio Company.' One Symmes, of New Jersey, bought two millions of acres between the Great and Little Miami, which included the present site of Cincinnati." *Id.* In 1795 the Georgia legislature sold its right in over 20,000,000 of acres of Indian land to four companies for half a million dollars. This was the "Yazoo Act," so famous in the early history of the United States. The recent case of *Halsted v. Buster*, 140 U. S. 273, 11 Sup. Ct. 782, cited in defendant's brief, originated out of two Virginia patents of 1795 and 1796. The latter one issued to one Martin, and called for 85,600 acres, including within its outside boundaries a smaller tract granted the previous year to Albert Gallatin, a citizen of Pennsylvania, afterwards secretary of the treasury. The case of *Hawkins v. Barney*, *supra*, also cited on the argument of this suit, was ejectment for a 50,000-acre tract, of about the same date, lying in what was once the territory of Virginia, now a part of Kentucky. All North Carolina lawyers are familiar with the John Gray Blount patents, issued at about the same period, and covering immense tracts of land from the Sounds to the French Broad river. The North Carolina Reports are full of cases of litigation growing out of these grants. The case now being considered is a good epitome of the ordinary history of such grants. One hundred thousand acres of land were patented by one McCleary in 1796; the real party,

however, being James Swan, to whom McCleary conveyed the day after his purchase. The land, with other tracts in Virginia and Kentucky, nearly 2,000,000 of acres in all, was made the basis of a colonization society; and after various negotiations, loans, and expenditures, these tracts were sold for nearly a million dollars, the greater part of which, however, was never paid. It is needless to go into the litigation which has since ensued, which has occupied a large part of one century, and bids fair to be continued in another. In the mean while the land was not colonized, or settled in any way other than by colonization, and no taxes were paid on it. In 1838, more than 40 years after the original patent, the tract, being forfeited to Virginia under tax laws, was, by an act of its legislature, tantamount to a grant, conveyed to trustees, discharged from all taxes prior to January 1st of that year, for the purpose of enabling the trustees to pay the indebtedness of James Swan,—chiefly, it is said in the act, due to French officers, who were in the American service during the Revolution, or their descendants. Since 1838, during a period of 56 years, no taxes have been paid, excepting, perhaps, between 1840 and 1856; and the land is again forfeited, and has been sold for nonentry for taxation. And now the present claimant, who asks to have the deeds given to the purchaser set aside, that he may be in condition to redeem, states, in his counsel's brief, the present condition of his title. As a ground for equitable relief, he says that his remedy at law would be defective, because he would have to redeem the whole tract, "and it is plastered over with adverse claims, many good and many bad;" and, as he alleges, after having redeemed, he might fail to recover, his land.

These patents of large tracts of land, imperfectly surveyed, usually including within their boundaries, but excluding in their words of conveyance, undescribed tracts of land previously granted, covering tens and hundreds of thousands of acres of land, existed in Virginia, as in many other states. They were fruitful sources of litigation. They prevented settlements by bona fide purchasers of land, encouraged the existence of squatters, and withheld land from cultivation. It is not good policy for any government to encourage the withdrawal of land from cultivation for speculative purposes. The only remedy, when it is so withdrawn, is to subject it to the ordinary taxation that rests upon other real property. That will, in ordinary cases, render the holding of it unprofitable; and it will either be divided up and sold, or surrendered to the state, through the operation of the machinery of taxing laws. It will, in the latter case, remain in the hands of the state—the only holder properly exempt from taxation—until it is required for private use. But it is difficult to reach tracts of land, held as these large patents are, by the ordinary processes of tax laws. Resident owners of land, as a rule, pay their taxes, if not when due, then within the time allowed for redemption. When such taxes are not paid, it is usually not difficult to sell the defaulting owner's land to persons who are willing to pay the amount of the tax. These facts do not obtain in the case of nonresident owners of large tracts of unimproved land.

When the state bids in the land, it obtains a tax title, and it is matter of common knowledge that, owing to irregularities of one kind and another, tax titles are seldom perfect. But the main difficulty in these cases appears to be that these tracts do not appear upon the tax lists at all. Laws like those of the Virginias strike at the root of both of these difficulties. They forfeit the land upon the failure of its owner to have himself charged on the proper books for taxation, and they vest title immediately in the state; thereby avoiding all questions of validity of title, which might otherwise arise upon possible irregularities in assessment, or on proceedings previous to or at the sale.

If such legislation can be sustained, it is more effectual than are the more common modes of collecting real estate taxes. But it is contended that such laws are unconstitutional, in this: that they conflict with the fifth and fourteenth amendments of the constitution of the United States, by depriving persons of their property without "due process of law." Plaintiff's contention is that he is entitled to require some legal proceeding, upon due notice, and something analogous to a judgment, before his title to land can be divested, and that, this manner of proceeding not having been adopted, he has the right to have the deeds given to defendant set aside, as embarrassing his right to redeem, which he claims is still in existence. We know of no reason why a forfeiture of title to land for sufficient cause, by statute or constitutional legislation, is not by "due process of law." It certainly is not that arbitrary exercise of the powers of government which Magna Charta intended to prevent, when it declared that no person should be deprived of life, liberty, or property except by the judgment of his peers or the law of the land. The contention that the constitutional provisions re-enacting those of the great charter require something in the nature of process and judicial proceeding before divesting title seems inconsistent with accustomed methods of enforcing revenue laws, which are themselves as old as Magna Charta. The objection appears to be, not to the right of a state to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty. All penal legislation does that. It is to declaring the forfeiture complete by the act, without any subsequent legal procedure. But if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the state to enforce the forfeiture. The question is not a new one, and there have been conflicting opinions upon it. Against the constitutionality are cited: *Kinney v. Beverley*, 2 Hen. & M. 318; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Robinson v. Huff*, 3 Litt. (Ky.) 38; *Water Power Co. v. Greely*, 11 Minn. 321, (Gill. 225); *Hill v. Lund*, 13 Minn. 451, (Gil. 419); *Griffin v. Mixon*, 38 Miss. 424. In favor of it: *Levasser v. Washburn*, 11 Grat. 572, which cites the earlier Virginia decisions; *Usher v. Pride*, 15 Grat. 190; *Smith v. Tharp*, 17 W. Va. 221. See, in Maine, *Hodgdon v. Wight*, 36 Me. 326; *Adams v. Larrabee*, 46 Me. 516; *Cooley, Tax'n*, (1st Ed.) 316.

We do not, however, find it necessary to pass upon the question of constitutionality. The present case can be decided upon other grounds. If the forfeiture provided by the constitution of West Virginia is unconstitutional, then it is a nullity, plaintiff's title has not been divested, defendant's deeds are void, and plaintiff has a complete and adequate remedy at law. Nor can he sustain this action, in such case, as one to remove a cloud on his title. He does not aver that he is in possession of the locus. On the contrary, he asks the court to put him in possession of the land. 2 Story, Eq. Jur. § 700, note a; 3 Pom. Eq. Jur. § 1396; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129.

It remains to consider what, if any, are complainant's rights in the grant, under the constitutional provision and statutes already cited. It is claimed by complainant that they give him an absolute right to redeem. The contention of defendant is that the grant is forfeited by complainant's failure to enter it for taxation; that the state had, before selling a part of it, an indefeasible title in the whole, which it might sell in any manner it pleased; and that he became possessed, by the sale, of full title to the tracts conveyed to him by the commissioner of school lands. He contends that the redemption provided for in the act of 1884 and in earlier acts was a gratuity,—a mere matter of favor, allowed as matter of grace, but not enforceable by any legal proceedings; and this is the view of the question held by the supreme court of West Virginia.

Complainant admits in his bill that he has been guilty of the negligence which brings him within the words of the constitution. He has, "for five successive years after the year 1869," failed to have his land in Logan county "entered upon the land books of that county, and charged against him with the taxes thereon." And the constitution says that in case of such failure the land is forfeited, by operation of law, and the title thereto vests in the state. By subsequent legislation, provision is made for a redemption of the land, if application is properly made by the owner before sale, and for a payment to him of any surplus, if application is made in due season, after the sale. Without this legislation, the state's title—the legislation being constitutional—would have been absolute. Let us see what is given by the subsequent enactment: (1) If the land has been sold, the former owner may, within a given time, file a petition to recover the excess of purchase money realized by the sale. Act Feb. 21, 1887, *supra*. (2) At any time during the pendency of proceedings for a sale, he may intervene by petition, and pay all costs, taxes, and interest due, and thereby redeem his title. *Id.*, *supra*.

It must be held in mind that without this legislation, and under the constitution, complainant has no rights whatever in the forfeited land. The act of 1887, and the previous ones of like effect, allow a redemption only by a certain mode of proceeding, viz. by filing a "petition in the circuit court," and only within a certain limit of time, viz. "during the pendency of proceedings" for the sale of the land. But there can be no question, on this bill, in

regard to the duties of the circuit court, and there never have existed any proceedings for the sale of the land. It is clear that complainant does not bring himself within the statute, if we confine ourselves to what it says. But it is contended that it means more than it says, and that, by the equity of the act, an absolute right of redemption is given, which this court can assist in enforcing. Statutes are sometimes interpreted in this way. But the liberty once practiced by English courts, of modifying statutes by what is called their equitable construction, has been much modified by the modern cases. "Equity," says Lord Coke in an often-quoted sentence, "is a construction made by the judges, that cases out of the letter of the statute, yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth." "The modern doctrine is that to construe a statute liberally, or according to its equity, is nothing more than to give effect to it according to the intention of the lawmaker, as indicated by its terms and purposes." *Suth. St. Const.* § 415, p. 531. We are asked to construe an act giving the privilege of redeeming land during the pendency of a certain proceeding as an act giving an absolute right of redemption until such proceedings shall have been had.

It is said by Bailey, J., to be "a dangerous rule of construction to introduce words not expressed, because they may be supposed to be within the mischief contemplated." *Guthrie v. Fisk*, 3 *Barn. & C.* 183; *Suth. St. Const.* § 414. Such a construction of the act would nullify what is, in my judgment, the purpose of the Virginia system of forfeiture under the revenue laws. It would in effect change it to the ordinary one of sale for taxes, and open the door to the ordinary defenses of actions on land titles. The statute gives the right, by its terms, of redemption only after the state has commenced proceedings for sale of the forfeited land. But there is nothing in it setting a time within which the state must sell, or requiring it to sell at all. If the state desires to hold the land permanently as a state reservation, or park, or for public institutions, nothing in her legislation prevents it. It is only if sale is attempted that a right to redeem is given; and the state cannot be forced to sell.

But it is said that the school commissioner has no right to sell forfeited as wasteland; that the form of the two proceedings is materially different; and that complainant, being injured, has a right to be relieved from the consequences of such a sale. But, if the land belonged to the state, it is the state, not the complainant, who has a right which has been violated. It may be that the commissioner acted illegally in selling forfeited land as waste land, and that his action may be open to correction, yet it may not follow that it can be corrected in this action. While the commissioner has not the right to substitute one set of proceedings for another, only one of two alternatives results from his action: The sale is void on the ground that his petition has not given jurisdiction to the state court, in which case complainant has a complete legal remedy, or it is only irregular, in which case he has, if it is not lost by laches,

a remedy in the state circuit court where the proceedings were had. In either event, he is not entitled to relief in equity in the federal courts. The legislation which we have discussed has been passed upon by the supreme court of West Virginia. In *McClure v. Maitland*, 24 W. Va. 576-578, Snyder, J., holds that after the statutory forfeiture the former owner has no interest whatever in the land, but that the land is absolutely forfeited and vested in the state, and that the interest given by the statute to the former owner is a mere matter of grace on the part of the state. This is the determination of the highest court of West Virginia upon a question which is both a construction of state statutes, and of its law of real estate, and is controlling in the courts of the United States.

The conclusion we have reached is not a hardship, in this case. The learned circuit judge dismissed the bill because of laches. Although we do not rest our determination solely on that ground, yet, leaving out of view all that has been said with regard to any other negligence on complainant's part and on that of the predecessors in whose shoes he stands, there has been such default in the matter of taxes as would indispose a court of equity to exercise any merely discretionary power for his benefit. At the date of the organization of West Virginia [June 20, 1863], the estate which complainant is administering claimed the ownership of more than 150 square miles in said state. For upwards of 30 years since then, as is admitted by the bill, it has borne no share of the public burdens, paid no taxes, and not even reported its land for taxation. Complainant does not now, in his bill for relief, aver any tender of the taxes due to the state, or that he is ready and willing to pay them, or even that he has any intention of paying them. The land—a part of it—has been sold by an officer of the state without authority of law, as complainant claims; irregularly, as defendant admits. The court is asked to set aside the deeds given in pursuance of the sale, so as to allow an opportunity to him to exercise his right to redeem, if he shall, after they have been set aside, think fit to do so. What he claims is an absolute right to redeem, and he asks that this court shall set aside these deeds because they embarrass him in the exercise of that right. Courts of equity will, as far as is within their jurisdiction, interfere to prevent an unnecessarily harsh enforcement of forfeitures. No man ought to lose his estate because of failure to meet his engagements or perform his duties by some exact day which has been prescribed by statute; and to that extent the law favors provisions for redemptions from forfeitures of mortgages or from judicial sales, and this principle applies to laws providing for redemption from tax sales. *Cooley, Tax'n*, 363. But this case is not one of failure to pay by an exact day, or even of ordinary negligence. It is rather that of an attempt to evade all obligations for taxes to the state. The forfeiture results from neglect and refusal to comply with a law essential to the existence of a state, continued through a long series of years.

We have not considered it necessary to discuss several questions

presented by counsel. What has already been said seems sufficient. The conclusion reached is that complainant was not entitled to the relief prayed for in his bill, and that the demurrer was properly sustained. The decree of the circuit court will be affirmed.

SAVINGS & LOAN SOC. v. MULTNOMAH COUNTY et al.

(Circuit Court, D. Oregon. February 19, 1894.)

No. 2,062.

1. TAXATION—PROPERTY—MORTGAGES—WHERE TAXABLE.

The rights conferred by a real-estate mortgage are, in their very nature, rights attached to land, and hence such mortgages may properly be made taxable in the state and county where the lands lie, without regard to the residence of the owners of the mortgages, or to the fact that the instruments themselves are in the possession of the owners.

2. SAME—IRREGULARITIES—CORRECTION—JURISDICTION OF FEDERAL COURT.

The statutes of Oregon provide that real estate—which includes real-estate mortgages—shall be assessed at its actual value. Complainant, the nonresident owner of mortgages on lands within the state, filed its bill in the United States circuit court, alleging that the state board of equalization had “arbitrarily” assessed all the mortgages at their full value, while lands were assessed at only 65 per cent. of their actual value. It also alleged that this was done in order to “discriminate against mortgages, and especially against those held by complainant,” but no facts were set up in support of this conclusion; and it prayed an injunction against the collection of the tax so assessed. *Held*, that the federal court has no authority, under the circumstances, to correct the inequality, and an attempt to that end would be an unwarrantable interference with state affairs.

In Equity On demurrer. Bill by the Savings & Loan Society against Multnomah county and Penumbra Kelly, sheriff, for an injunction. Demurrer sustained.

Milton W. Smith, for plaintiff.

John H. Hall, for defendants.

BELLINGER, District Judge. The complainant is a California corporation, and has a large amount of money loaned in this state upon the security of real-estate mortgages. These mortgages are recorded in Multnomah county, but are alleged to be without the state, in the possession of the complainant, in the city of San Francisco. It is alleged that, in obedience to a custom long established, all the real estate in the county, and all mortgages upon such real estate, were each assessed for the year 1892 at 50 per cent. of their cash value; that thereafter the state board of equalization arbitrarily, and for the purpose of discriminating against mortgages, and especially against the mortgages of the complainant, increased the assessment upon lands to 65 per cent. of their cash value, and increased the assessment of mortgages to 100 per cent. of such value; that such assessment subjects mortgages to a greater tax, proportionately, than lands are subjected to, and is grossly out of proportion to the values involved; that the sheriff threatens to sell

the lands mortgaged and the mortgages of the complainant, and will do so unless restrained by order of the court. To this complaint a demurrer is filed, upon the ground that it does not state facts which entitle the complainant to the relief prayed for. By the laws of this state, mortgages upon real property within the state are declared to be, for the purposes of assessment and taxation, real estate, and are taxable within the county where the mortgaged lands are. This statute has been upheld by the supreme court of the state in *Mumford v. Sewall*, 11 Or. 70, 4 Pac. 585, where it is held that the state may tax real-estate mortgages where the mortgaged land lies, without regard to the domicile of the owner, or the situs of the debt or note secured thereby. This court held the same way in the case of *Dundee Co. v. School Dist.*, 19 Fed. 359. In that case, Judge Deady, referring to the question of the situs of the property taxed, said:

"The maxim so much relied on by the plaintiffs—that personal property follows the person of the owner—is but a legal fiction, invented for useful purposes, and must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the situs of such property. In cases of attachment and for purposes of taxation it is constantly disregarded, as the following cases will show: *Catlin v. Hull*, 21 Vt. 153; *People v. Commissioners of Taxes*, 23 N. Y. 225; *People v. Home Ins. Co.*, 29 Cal. 533; *Green v. Van Buskirk*, 7 Wall. 150. And the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, cited and also much relied on by plaintiffs, only decides that a state law which comes between the foreign lender and the local borrower, and compels the latter to pay a portion of the interest due the former on his debt, as taxes to the state, is void because it impairs the obligation of the contract between the parties; and this same ruling could as well have been made on this ground if the parties had both been citizens of the state seeking to impose the tax."

Without reference to the statute which provides that mortgages of land shall, for the purposes of assessment and taxation, be deemed to be real estate, the right secured by mortgage attaches to the land. It has no other locality,—no extraterritorial existence. If the right follows the person of the owner, then it must be enforceable where the person is, without regard to the location of the mortgaged premises, since a right which is not enforceable in a particular locality cannot be said to have a legal existence there. This principle is contained in the maxim, "Where there is a right there is a remedy." All recording acts relating to mortgages as well as deeds of realty recognize this fact, and, in conformity with it, the records of mortgages, which are intended to impart notice of the mortgagees' rights, are by an invariable rule required to be kept in the county where the mortgaged land is located; and in this state such record, in addition to being notice, is evidence of the mortgagee's right, and has the like force and effect as the original as evidence in any court of the state.

The second ground relied upon by the complainant is the alleged fact that the assessment of mortgages is higher than that of lands and lots, and has the effect to compel the mortgagees to pay more taxes, proportionately, than owners of other real estate are required to pay; and it is alleged that such assessment upon mortgages was made by the board of equalization arbitrarily, and with

the willful and deliberate purpose to discriminate against mortgages, and especially against the mortgages of complainant. Assuming that the assessment complained of is unequal, this court cannot assume the function of correcting such inequality. It will not undertake to supervise the operation of the taxing machinery of the state. Such interference in the affairs of a state would be intolerable. If the inequality complained of was the result of a statute of the state, designed to discriminate injuriously against any class of persons or species of property, or if it resulted from a combination of officers making assessments, who adopted a principle of valuation necessarily having such result, the court would give relief. *Bank v. Kimball*, 103 U. S. 735. True, it is alleged that the assessment complained of was made by the board of equalization arbitrarily, and with the willful and deliberate purpose to discriminate against mortgages, and especially against those of the complainant; but this is a mere conclusion, not warranted by any fact alleged in the complaint. The alleged purpose to discriminate against the mortgages of the complainant is contradicted by the fact that the increase in the assessment of mortgages applies indiscriminately to all mortgages. The assessment complained of, so far as it relates to the complainant's property, is in conformity with the statute, which requires property to be assessed at its value. The complaint is that other property is assessed too low, and that this is unjust to the complainant, since it results in making it pay more than its just proportion of taxes. But it is settled that mere irregularities or injustice in the tax will not authorize an injunction. *State Railroad Tax Cases*, 92 U. S. 613, and cases cited. In the case just cited the court says:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. * * * Let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation by municipalities; that the board of equalization increased the entire assessment on each company without sufficient evidence,—in short, let us suppose that in these and many other respects the proceedings were faulty and illegal; does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax, when it is obvious that, in justice, a large part of it should be paid, and, if not paid, that the complainant escapes taxation altogether?"

As to the alleged inequality of the tax complained of, it is a sufficient answer that the complainant has not offered to pay any tax,—to do the equity that is required of it; and for this reason, if for no other, the injunction should be denied. But I do not place the decision of the case upon this ground. The assessment complained of is in pursuance of a law of the state, the validity of which is not questioned. There is no claim of fraud in the assessment made, nor of inequality between the assessment of the complainant's property and that of the same class belonging to all other persons. The property in question is assessed at its cash value, as the law re-

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quires. The matter resolves itself into a complaint that this class of property is assessed, proportionately to its cash value, at a higher rate than one other class of property. It is not within the power of the court to correct such inequality, nor is it practicable or desirable that it should be so. The demurrer is sustained.

SCOTT v. LOCKEY INV. CO. et al.

(Circuit Court, D. Montana. November 6, 1893.)

No. 202.

1. PUBLIC LAWS—PATENTS—CONCLUSIVENESS IN COURT.

Where a patent for agricultural land has issued to one who entered it under "additional soldiers' homestead" scrip, the determination of the land department that the land was of the character described, and that the patentee was entitled to enter it under such scrip, is final, and will not be reviewed by the courts.

2. SAME—FRAUD—RIGHTS OF PRIVATE PERSONS.

Where such determination in favor of the patentee is procured by fraud, such fraud is committed against the United States, which alone can complain of it; and hence a bill to quiet title, filed by one who claims mineral rights to the land in question, against the patentee, on the ground of such fraud, is bad on demurrer.

In Equity. On demurrer to bill. Bill by William H. H. Scott against the Lockey Investment Company and Richard Lockey to quiet title. Demurrer sustained and bill dismissed.

Toole & Wallace, for complainant.

George F. Shelton, Henry N. Blake, W. E. Cullen, and M. Bullard, for defendants.

KNOWLES, District Judge. Complainant in this case has presented a bill to quiet title to certain premises described as mining claims. It is alleged that defendants claim title to the same by virtue of a patent to the premises from the United States. The patent, it appears, is to the premises as agricultural land. It is averred in the bill that the claim described in the first cause of action was located on the 18th day of March, 1887; that the claim described in the second cause of action was located on the 17th day of December, 1886. It appears that the patent bears date June 13, 1889; that the entry was made in September, 1888. When the application to enter the land was made, does not appear. The title of plaintiff, it will thus be seen, is derived from a location of the premises as mineral land; that of defendants, by virtue of a patent from the United States. The plaintiff has, therefore, only a possessory title, or easement, that is difficult to describe. The plaintiff asks to have the patent set aside, upon two grounds: The first is that the defendants claim under and by virtue of conveyances from one Samuel R. Patterson and wife, patentee of said premises, as a part of lot 2; that the entrance of said land was made with a piece of additional soldiers' homestead scrip, issued under certain acts of congress, respectively, as follows: 12 Stat. 392; 13 Stat. 35; 14 Stat. 66; 17 St. 49; and Id. 333,—relating to soldiers'

homestead rights, and the homestead rights of minor children, heirs of deceased soldiers and sailors. It is alleged, as one of the grounds which make the patent void, that Samuel R. Patterson was not a minor heir of Samuel Patterson, deceased, at the time of the entry of said land, but was at that date over 25 years old, all of which was known to said Lockey at the date of entry; that Lockey was the real party in interest; that the said Samuel R. Patterson never saw the land, and it was not entered for his benefit. It is not averred that the said Samuel R. Patterson was not an heir of Samuel Patterson, deceased, but that he was not his minor heir. The second ground upon which it is claimed that the patent should be canceled is that the premises were known mineral land at the date of the entry of the land, and that Lockey never filed an affidavit of its nonmineral character. To the bill the defendants filed their general demurrer upon the ground that the bill did not state facts sufficient to constitute a cause of action. There is no objection as to the form in which these issues are presented, or of the demurrer.

As to the first ground, it may be stated that the land department was called upon to determine as to whether the said Patterson was a proper man to enter said land, and whether he had performed the necessary acts to entitle him to make the same. In the case of *Johnson v. Towsley*, 13 Wall. 72, the supreme court said:

"That the action of the land office in issuing a patent for any of the public lands subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted, under the principle above stated; and in all courts, and in all forms of judicial proceedings, when this title must control, either by reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

In the case of *Smelting Co. v. Kemp*, 104 U. S. 640, the supreme court said:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title; and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

In the case of *Minter v. Crommelin*, 18 How. 87, the supreme court, in speaking of patents, said:

"The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent."

It may be said, also, that if there was any fraud committed in the representation as to the character of Patterson, or in any representations he may have made in procuring the patent,—as to whether it was for himself, or otherwise,—they were representations to the government through its officers, and any fraud perpetrated thereby was upon the government, and not upon plaintiff. The government is the only one who can take advantage of such fraud. *Vance v. Burbank*, 101 U. S. 514; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 281, 8 Sup. Ct. 850.

The second ground presents a question of more difficulty, perhaps. From the fact that the land was known to be mineral at the date of entry, according to the statement in the bill, it is urged that the land was reserved from sale as agricultural land and could be sold only as mineral land. But the question arises, how and by whom is land classed as mineral or agricultural? It is held by the supreme court that the land department of the government is intrusted with the power of determining to what class any piece of land for which an application to enter is made belongs. In the case of *Steel v. Refining Co.*, 106 U. S. 447, 450, 1 Sup. Ct. 389, the supreme court, in considering this question, said:

"And the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought,—whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld,—and also as to the citizenship of the applicant. * * * That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, and the acts he has performed to secure the title, the nature of the land, and whether it is of the class open to sale. Its judgment is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation."

In the case of *French v. Fyan*, 93 U. S. 169, the supreme court held that the land department had the right to determine whether or not land was swamp land. This case should be distinguished from a case where land is absolutely reserved from entry and sale, such as land included in a military reservation. Then there is no jurisdiction in the land department to make a sale or conveyance of the same. But when an application is made to enter a certain piece of land, which is not specially reserved from sale by a definite description, and the application is made to enter it as agricultural land, then the land department must, of a necessity, determine whether or not it is agricultural land. It would certainly be against public policy to allow the land department to make a conveyance of a piece of land as agricultural, and leave it an open question, to be determined by a court, or a jury, as to whether or not the land was agricultural land. Such a conveyance would be of little value to a patentee. For this reason, I think it must be held that the land department conveyed to the grantor of defendants the legal title to the land, as far as that title was in the government.

According to the bill, the plaintiff had a grant of a mining right, which entitled him to the possession of the premises. Under the decisions of the supreme court, it was held by this court in the case of *Black v. Mining Co.*, 49 Fed. 549, that it was difficult to class the title called a "mining claim;" that, under the statutes and decisions of the supreme court, it could be classed as a possessory title, carrying with it an interest in the estate. This case came up for review in the circuit court of appeals for the ninth circuit. 3 C. C. A. 312, 52 Fed. 859. In that case the court held that the locator of a mining claim does not possess such a title in his location as

that the rights of dower can be predicated thereon, by virtue of any state legislation, as against the United States. In the case of *Belk v. Meagher*, 104 U. S. 279, 283, the supreme court held that congress had seen fit, in its legislation in regard to lands valuable for minerals, to make a possession thereof by virtue of a location separable from the fee, while the paramount title remained in the United States. Could the plaintiff, with this possessory mining right, maintain an action against the United States to quiet its title to this possessory right, even if it could sue the United States in such an action? The answer must be, he could not. How, then, can such an action be maintained against its grantor, who has only the title the United States possessed in the land,—that is, the paramount title in fee?

A part of the prayer to this bill is "that the conveyance to defendant, and under which it held, may be annulled and canceled and set aside, and the cloud upon plaintiff's title thereby removed." A private person cannot maintain an action to set aside and annul a patent from the United States for fraud committed on the United States. It was so held in the case of *Mowry v. Whitney*, 14 Wall. 434. This doctrine was approved in *U. S. v. San Jacinto Tin Co.*, 125 U. S. 274, 281, 8 Sup. Ct. 850, when the question of the title to land was involved. The matters of fraud here charged are committed, if at all, against the United States.

For these reasons, I think the demurrer should be sustained. In so deciding, I do not hold that plaintiff has no rights to his mining possessions. That may depend upon whether he has lost any rights by not contesting the application of Patterson to enter the ground and receive a patent therefor. Neither do I hold that upon a proper statement of facts, making it appear that he has a right to purchase the land in controversy, the defendants could not be compelled, in a proper suit, to convey to him the legal title to the same. But, under the allegations in this bill, he has no standing in this court, and I do not see how he can amend it so as to give him such a standing. It is therefore ordered that the demurrer be sustained and the bill dismissed.

BOARD OF ASSESSORS OF PARISH OF ORLEANS et al. v. PULLMAN'S PALACE-CAR CO.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1894.)

No. 160.

1. TAXATION—RAILROAD ROLLING STOCK—INTERSTATE COMMERCE.

It is within the power of a state to tax sleeping cars and other rolling stock of a foreign corporation, employed in interstate commerce, in the ratio which the number of miles of line within the state bears to the total number of miles of the whole line, as is done by the Louisiana statute, (Acts 1890, No. 106, § 29.) 55 Fed. 206, affirmed. *Pullman's Palace-Car Co. v. Pennsylvania*, 11 Sup. Ct. 876, 141 U. S. 18, followed.

2. SAME—REMEDIES—ILLEGAL TAXATION—INJUNCTION.

The provision of the Louisiana statute (Acts 1890, No. 106, § 26) requiring taxpayers who fail to make a return of their property to apply,

within a limited time, to the committee of assessments for correction of any errors in the assessment, on pain of losing all right of redress, relates only to errors of description and valuation, and does not apply in the case of a company whose sleeping cars, employed on interstate lines, are illegally assessed at their full valuation instead of at the ratio prescribed by the statute, and such illegal assessment may be enjoined. 55 Fed. 206, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a suit brought by the Pullman's Palace-Car Company against the board of assessors of the parish of Orleans, in Louisiana, the city of New Orleans, and C. H. Parker, state collector of taxes for the first district of New Orleans, to enjoin the collection of certain taxes assessed upon complainant's sleeping cars, and alleged to be in excess of the amount that could legally be imposed. A preliminary injunction was allowed, the court rendering an opinion in which the facts are fully stated. See 55 Fed. 206. Thereafter the cause was submitted for final hearing, and the injunction was made perpetual. From this decree, the respondents appeal.

Horace L. Dufour, for appellants.

Percy Roberts, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. We affirm the judgment of the circuit court in this case. The appellee is a corporation created under the laws of Illinois, having its domicile in that state, having no domicile in Louisiana, if capable of acquiring one there except by her grant. In 1892, and during the whole of that year, the appellee owned 16 cars, of the aggregate market value of \$100,000, which were engaged in interstate passenger traffic from distant states, through intermediate states, into Louisiana, or from New Orleans, in Louisiana, through intermediate states, to distant states, constantly engaged in making round trips on such lines, and not stopping longer or oftener at any point or points in Louisiana than in other states. It is not useful for us to inquire whether such property can be made subject to the same rate of tax on its full actual or market value that real estate or other personal property permanently located in Louisiana is charged with by the state law. Louisiana has not undertaken to impose such a tax on this character of personal property. She has provided that the rolling stock or movable property of any transportation company whose line lies partly within Louisiana and partly within another state or states, or whose sleeping cars run over any line lying partly within Louisiana and partly within another state or states, shall be assessed in Louisiana in the ratio which the number of miles of the line within Louisiana has to the total number of miles of the entire line. This tax provision is substantially similar in kind, though not in detail, to that imposed on the property of the appellee in the state of Pennsylvania, which stood the test of the scrutiny of the supreme court. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876.

The circuit court rightly judged that the cars in question were subject to the tax imposed by the statute of Louisiana, where that tax had been assessed on it, because such a tax the state could impose. The court also rightly judged that the cars in question were not subject to the tax attempted to be assessed on them, because the law of Louisiana did not charge such property so engaged with the tax attempted to be assessed on it. It was the duty of the appellee, or of the railroad companies having these cars under contract, to make the due return thereof under the state law to the assessors. There seems to have been, and to still be, some question between the appellee and the railroad companies to which its cars are let as to whether the appellee or the railroad companies should make the return of this property, and pay the taxes due thereon, in the state of Louisiana. But that is a question in which the state of Louisiana, the parish of Orleans, and the city of New Orleans have no vital interest. The property is liable without regard to who makes, or fails to make, the return. It possibly explains why the return was not made. The assessors cannot impose, as a penalty for such failure, the assessment of such property as other personal property permanently located in the state, because no such penalty is denounced by the statute. The statute provides that such failure shall deprive the party whose duty it is to make the return of any standing in court to correct a wrong description, whether in name, measurement, or otherwise, unless written complaint is made within certain specified time. It puts a limitation of time on the right of parties to be heard concerning the description of the property listed, and the valuation of the same as assessed, and on the right of testing the correctness of their assessments before the proper courts of justice. The circuit court held correctly that these provisions for applying to the committee of assessments, and of testing assessments by suit, have relation to matters of description and valuation. Here these are not questioned. Both are correct. The liability to the tax sought to be imposed by the appellants without warrant of law is what the appellee seeks to avoid. It is entitled to the protection it asks.

The judgment of the circuit court is therefore affirmed.

SAVANNAH FIRE & MARINE INS. CO. v. PELZER MANUF'G CO. et al.

(Circuit Court, D. South Carolina. February 26, 1894.)

1. SUBROGATION—COVENANT IN LEASE.

A warehouse was built on leased ground belonging to a railroad company, and the warehouseman covenanted in the lease that, for any damage to house or contents by fire caused by the railroad company, the company should not be liable unless such fire was due to its negligence. *Held*, that, though Gen. St. S. C. § 1511, makes railroad companies liable for fires set by them, without regard to the question of negligence, this covenant is binding on the insurer, who is subrogated to the rights of the warehouseman.

2. RAILROAD COMPANIES—FIRES—NEGLIGENCE—EVIDENCE.

The fact that the fire occurred immediately after the passage of a locomotive to and fro alongside the warehouse is not sufficient to show

negligence on the part of the railway company, where there is evidence that the company used all reasonable precautions to prevent fires, and that its locomotive was equipped with all proper appliances generally found effective to prevent the escape of sparks.

In Equity. Bill by the Savannah Fire & Marine Insurance Company against the Pelzer Manufacturing Company, the Columbia & Greenville Railroad Company, and others. Bill dismissed.

Julius H. Heyward and Mitchell & Smith, for complainants.

Cothran, Wells, Ansel & Cothran, Smythe & Lee, Abney & Thomas, Haynsworth & Parker, and T. Q. & A. H. Donaldson, for defendants.

SIMONTON, Circuit Judge. The facts of this case, as developed in the record and testimony, are these: The Pelzer Manufacturing Company had on storage in the warehouse of Cely Bros., in Greenville, 1,000 bales of cotton, estimated to be of the value of \$45,000 and more. The rate of storage was 25 cents per bale, insured. Cely Bros. insured the cotton for nearly its full value in policies taken out in their own name in various companies of their own selection. The policies were concurrent, covering all the cotton in the warehouse, each policy being for a fixed amount. The warehouse was erected on lands of the Columbia & Greenville Railroad Company, upon or next adjacent to their right of way. The land was held by Cely Bros. under lease for the term of 20 years from the railroad company at a nominal rent. This covenant was inserted in the lease, and was a part of the consideration thereof:

"And it is further covenanted and agreed, by and between the parties hereto, that during the continuance of this lease the Columbia and Greenville Railroad Company, its successors and assigns, shall not in any wise be responsible, for any loss or damage to the said building, or the contents thereof, from fire communicated by the locomotive engines of the said company, its successors or assigns, or originating within the limits of the right of way of the said Columbia and Greenville Railroad Company, its successors or assigns; and all such loss or damage shall be borne by the said Cely Brothers, their executors, administrators, and assigns."

This lease was dated 15th December, 1882. Adjacent to the warehouse, which was filled with the cotton of the Pelzer Manufacturing Company, was a platform extending towards, and almost up to, the track of the Columbia & Greenville Railroad Company. On this platform, at the time of the fire hereinafter mentioned, were a number of bales of cotton, the property of other persons than the Pelzer Manufacturing Company. On 15th March, 1889, before noon, while a locomotive of this railroad company was passing to and fro on the track of the railroad, and alongside this platform, a fire broke out in the cotton on the platform. This fire was thereby communicated to the cotton in the warehouse, and consumed all the bales therein and on the platform. Very shortly after the fire, Cely Bros. assigned all the policies held by them, covering cotton in the warehouse, to the Pelzer Manufacturing Company, who at once notified each insurance company of this fact,

made proofs of loss, and demanded payment. Three of these insurance companies—the Springfield Fire & Marine Insurance Company, the Rochester German Insurance Company, and the Continental Insurance Company—paid the losses on demand, and each of them obtained an assignment to the amount of the payment made by each of them, respectively, of that much of the claim which the Pelzer Manufacturing Company might have against the railroad company because of the loss by fire. The other companies, among them the complainant in this suit, resisted payment, chiefly upon the ground that Cely Bros., in whose name the policies were issued, had released the railroad company from a claim for damages, and had concealed this fact when the insurance was effected. After protracted litigation the decisions were adverse to the insurance companies, and each of them has paid its share of the loss. The Savannah Fire & Marine Insurance Company, one of the litigating companies, now files this bill of complaint, in behalf of itself and all other insurance companies in like plight, averring that the Pelzer Manufacturing Company, as owner of the cotton, has a claim for damages against the railroad company by reason of its destruction under the circumstances stated, and that each of them is entitled to subrogation, pro tanto, on payment of loss, to these rights; and that, inasmuch as the tort is indivisible, this claim of damages must be made in the name of the Pelzer Manufacturing Company for the use of the insurance companies. The bill prays that an account be taken of the number of bales of cotton covered by the policies of insurance and the value thereof, and that the Columbia & Greenville Railroad Company be required to pay the same; that the same, when paid, be distributed among the parties entitled thereto, according to their respective rights and interests; and for general relief. To this bill the Columbia & Greenville Railroad Company, and its lessee, the Richmond & Danville Railroad Company, the Pelzer Manufacturing Company, two of the insurance companies who have paid, and Cely Bros. are defendants and have answered.

The position of the complainant is this: Cely Bros. were either the insurers of the cotton to the Pelzer Manufacturing Company, and so protected themselves by reinsuring in these several insurance companies, or they effected the several policies of insurance as agents of the Pelzer Manufacturing Company in that behalf, and for its use and benefit. If they were insurers, then, upon payment of the loss, they became subrogated to any rights the Pelzer Manufacturing Company may have against the railroad company; and, inasmuch as the actual payment was made by these companies, they, in turn, became subrogated to all the rights of Cely Bros., and, through them, to the rights of the Pelzer Manufacturing Company. If Cely Bros., in effecting the policies, acted as agents for and in behalf of the Pelzer Manufacturing Company, then the insurance companies paying the loss become subrogated directly to the rights of the Pelzer Manufacturing Company. The answer of the railroad companies to this contention is that if Cely Bros. were the insurers, and the complainant and the other insur-

ance companies their reinsurers, and so work out their subrogation through Cely Bros., they are bound by the release and covenant executed by Cely Bros. to the railroad company, above set out; or, if Cely Bros., by authority of the Pelzer Company, in their own name effected these policies for the Pelzer Company, they, and their principals through them, had full notice and knowledge of this release, and are bound by it. This is met by the complainant with this contention: The release in question was directed to and released the liability imposed on railroad companies by section 1511, Gen. St. S. C., holding them responsible for the destruction of property by fire communicated from the locomotive on, or originating on, the right of way, without regard to the question of negligence; and that it does not cover the destruction of property by fire on or adjacent to the right of way, occasioned by the negligence of the company, its officers and agents; that the language of the release, being in the words of the statute, shows this, and that, were it otherwise, a release of the railroad company from the consequences of its own negligence is against public policy, and void. Subrogation puts the person subrogated in the shoes of him to whom he is subrogated, and gives him the same rights,—neither more nor less. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 750, 1176. The insurance companies paid these losses to the assignees of Cely Bros., the persons they insured. They have all the rights Cely Bros. had, or would have had,—no more and no less. It must be borne in mind that we are not discussing the liability of the railroad company as a common carrier. It never, in any sense, had the cotton which was stored in the warehouse in its care, custody, possession, or control. Indeed, the testimony shows that there never was any design to ship it on this railroad. When the president of the company at one time entertained the design of moving it, he provided drays or wagons for this purpose. So, the bare fact of the destruction by fire of this cotton does not involve a responsibility upon the railroad company from which it cannot be freed unless it be shown that the fire was occasioned by the act of God or the public enemy. In the circumstances of this case, negligence on the part of the railroad company must appear, and it cannot be held responsible if no negligence is made to appear. *McCready v. Railroad Co.*, 2 Strob. 359. Indeed, this is the reason and the excuse for the drastic provisions of section 1511, Gen. St. Assuming, therefore, for the purposes of this case, the position taken by complainant,—that while the release binds Cely Bros. from such damages as are included in section 1511, Id., and that public policy would avoid it if it guarded against the results of negligence on the part of the company,—does such negligence appear in this case? A careful examination of the testimony shows that no direct and positive evidence has been adduced explaining, beyond question, the origin of this fire. The coincidence of the passage of the locomotive to and fro alongside of the platform filled with cotton and the outbreak of the fire leads to the conclusion, as an inference, that the fire may—perhaps must—have been started by a spark from the locomotive;

and we may assume that this is the case. But, on the other hand, the testimony shows that every care and precaution was taken by the railroad company to prevent such an occurrence; care and precaution taken but a short time—not many minutes—preceding the disaster. All the proper appliances generally found effective in preventing sparks from flying were actually in use and in good order. If the fire did so originate, it was not from the want of care; that is to say, was not the result of negligence. As we have seen, the railroad company, not occupying the relation of common carrier to this cotton, was not its insurer against all accidents. What was the degree of care it should have exercised is not clearly established in the books. Judge Wallace, on circuit, in an obiter dictum, seems to think that the rule in *Danner's Case*, 4 Rich. Law, 329, will be applied to all cases of injuries from railroad companies, (*Gregory v. Layton*, 36 S. C. 94, 15 S. E. 352;) but even then he holds that only the burden of proof is shifted, and that negligence could be disproved. Be this as it may, if, considering the circumstances of this case, and the great danger, from the hot furnace and fire of the locomotive, to cotton on the platform, we hold the company to extreme care,—*summa diligentia*,—the testimony for the defendant establishes that this was exercised. Nothing from the evidence on the part of the complainant disproves it. Under the rigid rule of *Danner's Case*, this would exonerate the railroad company. Let an order be taken dismissing the bill, each party paying his own costs; the complainant to pay the costs of the officers of the court; the stenographer's fees to be equally divided among all the parties.

NOTE. Although it has been assumed, for the purposes of this case, that one cannot contract for a release of his own negligence or that of his agents or servants, it must be noted that this rule is not universal. Even a common carrier can insure itself against the negligence of itself, its servants and agents. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 320, 6 Sup. Ct. 750, 1178.

ROME R. CO. v. RICHMOND & D. R. CO.

(Circuit Court, N. D. Georgia. February 14, 1894.)

1. GARNISHMENT—DISSOLUTION—GARNISHEE'S ANSWER—COSTS.

Code Ga. § 3549, provides that the expense incurred by a garnishee shall be taxed in the costs in the principal suit, when the garnishee shall answer truly "as now required by law, and shall pay the sum due to the defendant into court, or shall turn over any personal property of the defendant that he may have, or shall answer truly that he owes the defendant nothing." Act. Ga. Oct. 15, 1885, (Laws 1884-85, p. 96,) provides that the garnishment may be dissolved by giving a bond conditioned to pay the judgment rendered on the garnishment, but it required the garnishee to answer notwithstanding the dissolution of the garnishment. *Held*, that a garnishee answering truly is entitled to the costs of his answer, where the garnishment is dissolved, so that no money is paid into court, or property turned over.

2. GARNISHMENT IN SUIT COMMENCED BY ATTACHMENT.

Act Ga. Oct. 15, 1885, entitled "An act to amend the garnishment laws of this state," and providing a method for the distribution of garnishments, has reference only to garnishment at common law, which is pro-

vided for by Code Ga. §§ 3532 et seq., and does not apply to garnishment by attachment, which is provided for elsewhere in the attachment laws of the state.

8. SAME—ANSWER AT DEFENDANT'S REQUEST—COSTS.

But when the garnishee in a suit commenced by attachment answers in accordance with the requirements of the act of October 15, 1885, at the request and by the direction of defendant's attorney, defendant is estopped to deny his right to have the expense of his answer taxed in the costs.

At Law. On motion to tax costs. Action by the Rome Railroad Company against the Richmond & Danville Railroad Company, (the Georgia Railroad & Banking Company and the Georgia Railroad, garnishees.) Motion granted.

Brooks & Turnbull, for plaintiff.

Jackson & Leftwish, for defendant.

NEWMAN, District Judge. Attachments were sued out against the Richmond & Danville Railroad Company, a foreign corporation, in suits brought against it, and summons of garnishment were served on the Georgia Railroad & Banking Company and the Georgia Railroad, lessee. Defendant filed answers acknowledging indebtedness; the answer being in accordance with the terms of the act of the legislature of Georgia of October, 1885, which will be hereafter discussed. The questions raised in this matter involve the construction of the statutes of the state of Georgia in reference to the right of garnishees to have their expenses for making answers taxed as costs in the case in which garnishment is issued. There were, up to October, 1885, provisions in the statute by which garnishment might be dissolved by defendant, by giving bond in the terms of the statute; and thereby the garnishee was relieved from all further liability with reference to the garnishment, and no answer of any kind was required to be filed. By the terms of the act alluded to, approved October 15, 1885, provision is made for the dissolution of garnishments by the giving of bond conditioned for the payment of the judgments that should be rendered on the garnishment, instead of bonds conditioned for the payment of the amount which might be recovered in the principal suit, or the amount due on the judgment, accordingly as the garnishment was sued out pending suit or after judgment was obtained, as had been theretofore the law in Georgia. This statute of 1885 further provides (see Laws Ga. 1884-85, p. 96) that:

"The garnishee shall file his answer stating what amount he was indebted to defendant or what effects he had in his hands belonging to the defendant at the time of the service of such summons, and what he had become indebted to the defendant, or what effects had come into his hands belonging to the defendant, between the time of the service of such summons and the making of his answer, and in the event the court shall decide that the fund or property in the hands of the garnishee were subject to garnishment, had the garnishment not been dissolved, then the court shall render judgment against the defendant and his securities."

The difference between the old and new law being that under the old law the bond to dissolve was conditioned to pay the debt

which might be found to be due to the plaintiff by the defendant, and by the act of 1885 the bond is conditioned to pay the amount that might ultimately be determined to be in the hands of the garnishee, or be due by him to the defendant; the act providing, further, that the garnishee should be required to answer the garnishment, this latter provision being rendered necessary in order to ascertain the extent of liability on the bond. In this case, notwithstanding the fact that the garnishment was dissolved, the garnishee filed answer, being advised by counsel that it was necessary to do so under the provisions of the act of the legislature just alluded to. The provision of the Code of Georgia (section 3549) with reference to the right of garnishees to have costs is as follows:

"In all cases where process of garnishment shall be served upon any person, and such person shall make a true answer to the garnishment, as now required by law, and shall pay the sum due to the defendant, into the court, or shall turn over and deliver up any personal property of the defendant's that may have been in his possession, as required by law, or shall answer truly that he owes the defendant nothing, if the garnishee shall have to incur any expense in making his or her answer to the garnishment, or in turning over said personal property, the amount so incurred, shall be taxed in the bill of costs, under the approval of the court, and be paid, by the party cast in the suit, as other costs are now paid."

It is claimed that under this section, there are now but three cases in which a garnishee may have taxed in the costs of his expenses in answering, namely: First, where the garnishee makes a true answer as now required by law, and shall pay the sum due to the defendant into the court; second, where like answer is made, and the garnishee shall turn over or deliver up any personal property of the defendant that he may have in his possession, as required by law; and, third, where the garnishee answers truly that he owes the defendant nothing. At the time of the passage of this act, (1873,) one or the other of these three things it was the duty of the garnishee to do; and it is as if there had been a proviso to the statute that a garnishee should have his expenses for answering a garnishment, provided he did his duty in the premises. The allowance to him is for the expense of filing his answer, and the qualification or condition is that he himself complies with the law. It is not for bringing the sum due to the defendant into court, or for turning over and delivering up any personal property of the defendant, or for telling the truth in case the garnishee claims to owe nothing, that the allowance is made to him by the statute, but it is for the expense of filing his answer; and this expression in the statute, which, it is claimed, embraces the only cases of the garnishee's right to have his expenses allowed, is nothing more than a requirement that the garnishee must himself have complied with the law and its terms, as it then stood, before he could ask aid of the court to reimburse him for his outlay in answering. Now, the act of 1885 was passed, and by the terms of that act the garnishee was required to answer, notwithstanding the fact that the garnishment had been dissolved; and if he answered that he owed the defendant, as in the case now before the court, the effect of the answer was simply

to enable the parties to determine the amount due on the garnishment, and which the bond to dissolve was conditioned to pay. The garnishee could not pay the money due into court, because, when the garnishment was dissolved, he had, presumably, already paid the money over to the defendant. The garnishee having been required by the terms of this last act to answer, notwithstanding the fact that the garnishment had been dissolved, and he had paid over whatever he owed to the defendant, can the garnishee have the expenses for answering allowed, under the term of the section of the Code of Georgia above discussed? If the above construction of the connecting section of the Code of Georgia is correct, it seems entirely clear that he can. The allowance to him is for any expenses he may have incurred in making his answer to the garnishment; and when, by subsequent statute, the garnishee is required to answer in a manner and under circumstances not then provided for, it seems that the terms of the statute should apply to him, as much as to one who had been originally covered by it.

The next question raised here is that the act of 1885, by its terms, does not apply to garnishments by attachment. By the Code of Georgia, which was adopted in 1862, section 3532 provides, "In case where suit is pending or where judgment has been obtained, the plaintiff shall be entitled to process of garnishment in the following regulation;" and then follows the method of suing out garnishments. This is garnishment at common law. Garnishment at common law, it was provided by the Code, (section 3540,) might be dissolved, as has been stated, by giving bond for the payment of the amount due on the judgment, or which might be recovered in the action. By an act of March 4, 1869, it was provided that:

"From and after the passage of this act, in all cases where summons of garnishment has issued by attachment and served as now provided by law regulating attachments, said garnishments may be dissolved as if same had been at common law, any law or usage to the contrary notwithstanding."

The act of 1885, by its terms, very clearly applies to garnishments at common law. The language is that:

"From and after the passage of this act in any case now pending or hereafter brought, when garnishments have been or are issued when suit is pending or judgment has been obtained, the defendant may dissolve such garnishment upon filing in the clerk's office of the court where suit is pending or judgment was obtained," etc.

The similarity of the language here used, and the language of section 3532 of the Code in reference to garnishment at common law, is apparent. But it is claimed that, the act of 1869 having placed garnishments by attachments upon the same footing, as to the method in which they might be dissolved, with garnishments at common law, that this act of 1885 also embraces and applies to garnishments by attachment. That the act of 1869 had the effect claimed, up to the time of the passage of the act of 1885, may be conceded, but it is entirely clear that the intention of the legislature was to confine this act of 1885 to garnishments at com-

mon law. Garnishments by attachment and garnishments at common law, as to the method of dissolution, stood upon the same footing, at the time of the passage of this act of 1885; and yet the legislature, with this knowledge, confines the effect of this act, which clearly applies it by its terms, to garnishments at common law. It is entitled "An act to amend the garnishment laws of this state;" and garnishments by attachment are part of the attachment laws of the state,—a different chapter and series of laws, entirely, in the Code. It applies to cases when suit is pending or judgment has been obtained,—the identical language of the Code, as applied to garnishment at common law. It seems impossible that the legislature, with the knowledge of what the law was then, which it must have had, would have used the terms it did, if it had intended to embrace garnishments other than those at common law. In addition to this, very strong reasons can be seen why the legislature would have passed this act in reference to garnishments at common law, and not with reference to garnishments by attachment, or, rather, to express it more clearly, to attachments by garnishment. Attachments are issued for extraordinary reasons,—for nonresidents, for removal of person or property, absconding, and fraud, and it is not at all unreasonable to conclude that the legislature would not allow a defendant who had placed himself in a position to justify an attachment against him to dissolve the garnishment by simply giving a bond for the amount that might be found to be due on the garnishment. But it would be entirely unreasonable to believe that it would leave such a defendant in the position he was under the old law, namely, to give bond for the eventual condemnation money.

One other question is raised under section 3320 of the Code of Georgia, in reference to attachments against foreign corporations. The section is as follows:

"When an attachment shall be levied on the property of an incorporation not incorporated by the laws of this state, it shall be lawful for any agent of such incorporation to relieve the property levied on, or discharge the summons of garnishment that may issue, by giving bond to the levying officer, conditioned to pay the amount that may be recovered in said case; which bond the levying officer shall return to the court to which the attachment is made returnable, and judgment may be entered up in like manner against the principal and security upon said bond for the amount the plaintiff may recover against such corporation."

It is claimed that this being a distinct and separate provision of the statutes in reference to foreign corporations, and the method by which they may dissolve garnishments, in any view that might be taken of the matter, on the line just discussed, it would not apply to garnishment in attachments against foreign corporations. It is unnecessary to discuss this, in the view that has been taken of the act of 1885; because, if it does not embrace attachments at all, of course it does not embrace attachments against foreign corporations; and it would be a waste of time to consider, if it applied to garnishments by attachments generally, whether, in view of this special statute as to foreign corporations, it had the effect of changing or modifying it as to the method of dissolving garnishments.

The views of the court have thus been given upon all the phases of this matter, as it is said there are many cases in which the question will be raised. The case now before the court, and the other cases which have been argued in connection with it, and any other similar cases, will be controlled by the following propositions:

1. Answers in suit at common law, where garnishments are taken out and answers filed under the terms of the act of 1885, the garnishee is entitled to his expenses of answering.

2. Where suits were commenced by attachment, and answers were filed by the garnishee in accordance with the provisions of the act of 1885, at the request and by the direction of the counsel for the defendant, the defendant is estopped from denying the right of the garnishee to have the expenses of answering, especially as it was a new question, and a garnishee might well be in doubt as to his duty in the matter.

3. Where suits were commenced by attachments, and answers were filed under the terms of the act of 1885, and no such directions or requests were made by the counsel for the defendant, the garnishee is not entitled to his expense for answering the garnishment.

KIRCHER v. MURRAY et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 173.

1. DESCENT AND DISTRIBUTION—WHO ARE HEIRS—SPANISH LAW.

Under the Spanish laws in force in Texas in 1836, a wife could not be heir to her husband, and under no circumstances could succeed to his separate property, except to the marital one-fourth, when necessary as relief against poverty. 54 Fed. 617, affirmed.

2. TEXAS BOUNTY LANDS—CERTIFICATE—EQUITABLE INTEREST—PATENT—COMMUNITY PROPERTY.

The right of one who held a certificate from the state of Texas, under the act of February 15, 1853, for bounty lands for service in the army in 1835-36, was an equitable right, as was also the right of his widow, after his death, to one-half thereof as community property; and, on the subsequent issuance of a patent in his name, the legal title, by force of Rev. St. Tex. art. 3961, became vested in his heirs, and, as the widow was not an heir, her interest remained an equitable interest, which she could not enforce by action at law in a federal court. 54 Fed. 617, affirmed.

Error to the Circuit Court of the United States for the Western District of Texas.

Augusta Kircher filed this suit on the 10th of September, 1891, against R. G. Murray and five others, to recover title and possession from them of 433 acres of land described in her original petition. On the 12th of February, 1892, R. G. Murray and his codefendants answered, setting up fully the claims of plaintiff and defendants, and contending that under the facts, as pleaded, defendants were entitled to judgment. The facts being uncontroverted, the plaintiff, by demurrer and special exceptions, raised the issues in the case as to the legal effect of the given facts. The court, having heard the parties upon the issues raised, gave its written opinion sustaining the defendants' contention, and, a jury being waived, rendered judgment in the case conformable to its opinion. 54 Fed. 617. The plaintiff, in

open court, excepted to the rulings and judgment of the court, and, by proper procedure, now brings the case to this court for revision and correction of the alleged errors of the trial court.

The facts of the case are as follows: Gustave Bunsen, while in the service of the Texas army, died on the ——— day of February, 1836, in Texas, intestate and without issue. He left surviving him, as his widow, the plaintiff, Augusta Kircher, (then Bunsen,) they having been married in 1834. While her husband served in the army, Mrs. Augusta Kircher (then Bunsen) lived in St. Clair county, Ill. He also left surviving him his mother, Charlotte Bunsen, and two brothers, Carl and George Bunsen, and no other kin. Charlotte Bunsen and Carl Bunsen were, when Gustave Bunsen died, and up to their respective deaths, citizens of the empire of Germany. Charlotte died December 2, 1847, and Carl died April 2, 1839. George Bunsen was, when Gustave Bunsen died, and up to the time of his death, in 1872, a citizen of the state of Illinois. Charlotte Bunsen left George Bunsen and the issue of Carl Bunsen as her heirs at law. The land in controversy was located by a certificate issued to Gustave Bunsen by the state of Texas, as bounty for service in the army of 1835-36, under an act of the legislature of the state of Texas dated February 15, 1858, and a patent thereto issued on the 14th of July, 1876, to "Gustave Bunsen, his heirs or assigns." The defendants have a chain of title to the land from the said George Bunsen and the heirs of Carl Bunsen, and through them claim the same. Augusta Kircher claims it as the wife and survivor of Gustave Bunsen.

The plaintiff in error contends in this court:

(1) That, as the heir of Gustave Bunsen, she ought to recover the entire tract of land in controversy.

(2) That, if she is not the heir of Gustave Bunsen, then that, the land having been acquired by Gustave Bunsen during their marriage, it was community property, and the legal title to one-half of same vested in her absolutely, and she ought to have judgment for this one-half, independently of any other issue in the case.

The defendants in error contend:

(1) That Augusta Kircher, the plaintiff herein, was, when Gustave Bunsen died, a citizen of Illinois, and an alien to the republics of Mexico and Texas; hence she could not take the property as the heir of Gustave Bunsen, and hence ought not to recover.

(2) That under the Spanish law in force when Bunsen died, in 1836, the plaintiff was not the heir of Gustave Bunsen, but that his mother and brothers, under whom they hold title, were his heirs, and hence ought they to recover the land.

(3) That the land, under the law then in force, was not the community property of Bunsen and wife, but, if it was, the plaintiff, upon his death, held only an equitable interest in one-half of same, to recover which she must sue on the equity docket of the court, and not the law docket, as herein attempted.

(4) And against the community interest plead that they were purchasers in good faith, without any notice of plaintiff's equitable title.

A. H. Willie, West & Cochran, and Barnard & McGown, for plaintiff in error.

D. W. Doom, for defendants in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) Conceding that the mother and two brothers of Gustave Bunsen, by reason of their alienage, could not take the land in controversy as heirs of Gustave Bunsen, and that, therefore, said Gustave Bunsen left neither descendants, ascendants, nor collateral relations capable of taking as heirs, could and did the plaintiff in error, the wife of

Gustave Bunsen, inherit and take as heir under the law in force in Texas at the time of said Bunsen's death? The trial judge, in a very elaborate opinion, answered this question in the negative, and gave the following reasons:

"The plaintiff, therefore, was entitled, at Bunsen's death, to one-half of the land in controversy, by virtue of her community right. Did she, or could she under any circumstances, assuming that her husband left neither descendants, ascendants, nor collateral relations capable of taking as heirs, inherit, under the Spanish law then of force, the remaining half of the community, which at his death formed part of Bunsen's separate estate? After giving this question attentive consideration, the conclusion reached by me is that the adjudication of the Texas courts resolve it against the right of the wife to inherit her husband's estate. Under some circumstances she succeeded to the marital fourth. But that feature of the present case may be eliminated, as the claim of plaintiff is not asserted to the fourth 'as a relief against poverty.' She claims the right to take the separate estate of Bunsen (the other one-half of the community remaining at his death) as his heir. In *Babb v. Carroll*, 21 Tex. 771, the supreme court, speaking through Mr. Justice Hemphill, says: 'L. X. The law (Nov. Rec. 1, tit. 28, lib. 10) declared that where there were no heirs, ascendants, or descendants, the property of the deceased should go to the treasury. There were previous laws which secured the surviving husband or wife in the succession of the deceased under certain contingencies: The law (Nov. Rec. 11, tit. 2, lib. 4) of the *Fuero Jurgo*, which gave the inheritance to the surviving husband or wife when there were no other relations of the deceased to the seventh degree, and the law (Nov. Rec. 6, tit. 13, p. 6) by which the surviving husband or wife succeeded to the estate, when there were no relations within the tenth degree. But these laws were, by commentators generally, supposed to be impliedly repealed by the law above recited from the *Recopilacion*, although some were of a different opinion, on the ground that the terms of the law in the *Recopilacion* were general, and did not refer specifically to the former laws on the rights of surviving husband or wife under those laws. The received opinion of commentators has been held as the rule in Texas, namely, that under the Spanish law the surviving husband or wife under no circumstances succeeded to the whole estate of deceased as his heir, and only to the marital fourth when necessary as a relief against poverty.' In *Van Sickle v. Catlett*, 75 Tex., at page 409, 13 S. W. 31, the rule announced in *Babb v. Carroll* is approved in these words: 'At the time William G. Logan died, his wife did not inherit his estate.' Referring to the facts of that case, it will be seen that Logan died in the year 1835.

"But the plaintiff's counsel insist that the rule is otherwise declared by the supreme court of this state in *Hill v. McDermot*, Dall. Dig. 419, and by the supreme court of Louisiana. A reference to *Hill v. McDermot* will conclusively demonstrate that a decision of the question was wholly unnecessary in that case, and that the judgment of the court was based altogether on other grounds. Furthermore, the court did not decide it, nor intend to decide it. What is said by the court in that case upon the point is in the nature of a query, with a brief citation from *Partidas* subjoined, and is embodied in the following extract from the opinion, (page 423:) 'Whether he [referring to the husband] died testate or intestate, or with or without a devisee or heir, was not shown; and whether the witness was or was not mistaken as to knowledge of ownership can alone rest on supposition and conjecture. If Sledge died without an heir of any class under the Spanish law; if, too, no one had obtained administration of the succession,—in the absence of any proof showing that the husband had had the sole right, was not his widow the sole heir and owner, and entitled to sue for restoration? "If no relation exist, [such as might inherit,] and the deceased leave a legitimate wife, she will inherit the whole of his estate; and we say that the husband will inherit from his wife in like circumstances." 2 *Partidas*, 1101, 1102.'

"A number of decisions of the Louisiana supreme court have been examined; but they appear to be founded upon the Code of that state, and not upon the Spanish law, and hence they can scarcely be said to have application to the present subject to discussion. The opinion of the distinguished jurist, Chief Justice Hemphill, in *Babb v. Carroll*, with its subsequent approval by the supreme court in 75 Tex. and 13 S. W., should be regarded as decisive of the question by courts sitting in this state. In support of it, however, reference will be made to two additional authorities. In Schmidt's Civil Law of Spain and Mexico (page 259, c. 1, art. 1212) it is said: 'The intestate heirs are (1) descendants; (2) ascendants; (3) collateral; and, wanting all those, (4) the public treasury.' 'When there are no descendants nor ascendants, either legitimate or natural, and no collaterals within the tenth degree, inclusive, the treasury inherits ab intestato.' Id. p. 270, art. 1266. Upon the same point Judge Johnston says: 'In default of descendants, ascendants, and collaterals, the crown or exchequer (la real camara) succeeds to the property of an intestate.' Johns. Civ. Law, marg. p. 121. The plaintiff, therefore, was not an heir of her husband, and did not inherit his estate."

After a careful examination of the authorities cited by the learned judge, and in the light of the very able briefs submitted in this case, we concur in the reasoning and conclusion reached, and the more readily because in *Branch v. Manufacturing Co.*, 6 C. C. A. 92, 56 Fed. 707,—a case where descent was cast March 13, 1838,—this court had occasion to consider and determine the Spanish law of descent in force in Texas prior to the act of the republic of Texas, (December 18, 1837,) in the decision of which case McCormick, circuit judge, delivering the opinion of the court, declared as follows:

"In the first years of the existence of Texas as an independent state, the Spanish law governing testaments and inheritances was in force. By that law, legitimate descendants were necessary or forced heirs to a distinct portion of the estate of decedents. The owner of an estate, if he had legitimate descendants, might, by will, transmit only one-fifth of his estate to persons who were not forced heirs. He could, by his will, transmit to a designated one or ones of his children or grandchildren one-third of the balance of his estate, after deducting the one-fifth mentioned above, and both of these powers of disposition by will could be exercised in favor of a child or grandchild, if the fifth were not, or so far as it was not, disposed of to other uses. As to the residue of the estate, it descended in equal shares to the children, or, through the children, to the later descendants. In default of descendants, the parents, or, in their absence, grandparents, were necessary or forced heirs, to the extent, at least, that only one-third of the estate could be disposed of freely by will. In default of descendants and ascendants, collaterals or persons related by blood inherited, and, in default of descendants, ascendants, and collaterals, the estate went to the public treasury. 1 White, Recop. bk. 2, tits. 3, 4. In certain conditions, not necessary to be here defined, a portion of the estate of a husband or wife went to the surviving spouse, but under no circumstances did the surviving husband or wife succeed to the whole estate of the deceased, as heir. *Babb v. Carroll*, 21 Tex. 765. Such was the law in force in Texas up to December 18, 1837."

The trial judge having decided that, although the plaintiff in error did not take as heir of Gustave Bunsen, she was entitled, at Bunsen's death, to one-half of the land in controversy by virtue of her community right, the second and remaining question is whether, under the circumstances of the case, the title thus taken was and is such a legal title as will enable her to maintain the pres-

ent action on the law side of the court. The circumstances of the case are that Gustave Bunsen served in the Texas army of independence in the year 1835, up to February —, 1836, when he died; that under the tenth section of the ordinance of December 3, 1835, (Pasch. Dig. art. 4039,) he acquired a right to a bounty of 320 acres of land offered for volunteers in the auxiliary corps for three months' service; that thereafter, on March 14, 1860, a certificate was issued, in accordance with an act of the legislature of the state of Texas dated February 15, 1858, to Gustave Bunsen, for 960 acres of land, bounty for service in the army 1835-36, and said land was patented to "Gustave Bunsen, his heirs or assigns," July 14, 1876. In relation to this matter the trial judge held as follows:

"The plaintiff acquired a real, beneficial interest in and to one-half of the land in controversy by virtue of her community rights; but the interest and title thus acquired were equitable. The legal title to the land passed by the patent to Gustave Bunsen. This principle is so well established by the more recent decisions of the supreme court of this state that the court will content itself with a mere reference to the authorities. *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, and 5 S. W. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909. See Rev. St. Tex. art. 3961; 1 Pasch. Dig. art. 4288; *Gould v. West*, 32 Tex. 349.

"In this court, 'where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued,' the action of trespass to try title 'can only be sustained upon the possession by the plaintiff of the legal title.' *Gibson v. Chouteau*, 13 Wall. 92; *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83; *Sheirburn v. De Cordova*, 24 How. 423; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87; *Bennett v. Butterworth*, 11 How. 669; *Bagnell v. Broderick*, 13 Pet. 436; *Hooper v. Scheimer*, 23 How. 235. The plaintiff, having only an equitable title to one-half the land in controversy, and no claim whatever to the remaining half, cannot maintain this suit. Her proper forum is a court of equity."

The authorities cited sustain the correctness of the proposition that the title of the plaintiff in error to the community property is an equitable, and not a legal, title, if the Spanish law in force in Texas in 1836 in regard to the wife's title to community property (for which, see Sayles' Early Law Tex. art. 118, §§ 7, 8; *White*, New Recop. p. 61 et seq.; *Schmidt*, Civ. Law Spain and Mexico, arts. 43, 44) was the same as under the present statute of Texas, which has been in force since 1848, (see Pasch. Dig. art. 4642; Rev. St. Tex. art. 2852.)

From the examination we have made, we are inclined to think that, as to the matter in hand, the law of 1848 made no substantial change; but we do not find it necessary to base our decision on that ground. Gustave Bunsen's title, and a fortiori his wife's title, to the land in controversy at the time of Bunsen's death, was, beyond question, an equitable title, and not a legal title. It continued to be an equitable title after the certificate was issued, in 1860, under the act of 1858, and up to the issuance of the patent by the state of Texas in July, 1876. Under the patent, the legal title theretofore vested in the state passed to, and became vested in, the heirs and assigns of Gustave Bunsen; and this, by the express

terms of the instrument, and by force of the act of December 24, 1851, (article 3961, Rev. St.,) which provides:

"That all patents which have heretofore been issued by the authorities of the republic, or the state of Texas, in the names of persons deceased at the time of issuing such patents, and all patents for lands which may be issued hereafter by the authority of the state of Texas and in the names of persons deceased at the time of which such patents may be issued, shall be to all intents and purposes as valid and effectual to convey and secure to the heirs, or assignee as the case may be, of such deceased persons, the land so patented or which may be so patented, as if such deceased person had been in being at the time such patent bears date."

This statute is well known as being intended to prevent a patent for land from being void on account of being made to a grantee dead at the time of the grant, and to place the title in his heirs at law, whoever they may be, or in his assignee in case the grantee named has made an assignment of the land before his death. The plaintiff in error, as has already been shown, is not an heir at law of Gustave Bunsen; no serious contention can be made that she is the assignee of Gustave Bunsen; in short, her relation to the patent actually issued "to Gustave Bunsen, his heirs or assigns" is the same as, and no better than, if the patent had named Carl, George, and Charlotte Bunsen as the grantees.

The judgment of the circuit court was correct, and it is affirmed.

UNITED STATES v. FLETCHER.¹

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 57.

APPEAL—WRIT OF ERROR—REVIEW—CLAIMS AGAINST THE UNITED STATES.

A petition filed in the circuit court under the act of March 3, 1887, by a clerk of court, to recover fees, is properly regarded as an action at law when debt or assumpsit would lie on the facts stated therein; and the judgment can only be reviewed by writ of error, and not by appeal.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Petition by A. K. Fletcher against the United States to recover certain fees for services rendered as clerk of the United States district and circuit courts. Judgment was rendered for plaintiff, and an appeal allowed on petition of the United States.

A. J. Montague, U. S. Atty., for appellant.

O. B. Roller, for the United States.

Before GOFF, Circuit Judge, and SEYMOUR and SIMONTON, District Judges.

GOFF, Circuit Judge. The plaintiff below filed his petition under the act of congress approved March 3, 1887, (24 Stat. 505,) against the United States, to recover certain sums claimed to be due him as fees for the performance of services rendered as clerk

¹Rehearing denied February 16, 1894.

of the United States district and circuit courts. The petition was filed in the United States circuit court for the western district of Virginia, at Harrisonburg, on the 20th day of August, 1891, the plaintiff claiming that the sum of \$1,399.73 was so due him by the United States. The district attorney appeared and conducted the defense. The case was finally heard by the court on the 8th day of March, 1893, when judgment was rendered for the plaintiff for the sum of \$1,173.53, with interest thereon from that date at the rate of 4 per cent. per annum, and costs. The United States, acting by the district attorney, on the 18th day of August, 1893, presented a petition for an appeal from said judgment, together with an assignment of errors, and an appeal was allowed to this court.

It is claimed by the appellee that an appeal did not, under the law and the rules of court, lie to this court from said decision; that the proceeding in the court below was not a suit in equity, but an action at law, and, as no bill of exceptions was taken at the time judgment was rendered, and no writ of error ever applied for and obtained, that the judgment must be affirmed.

The mode of procedure, under the act mentioned, in the district and circuit courts of the United States, has not been uniform. In some instances the suits have been conducted as actions at law, and in others as petitions in equity. They were doubtless regulated by the rules of the courts, respectively, in which they were determined, the act referred to giving the courts the power to make and modify rules special to such cases. In the court in which this case was tried, no special rules under said statute had been adopted, and the general laws and rules thereunder applied to all actions instituted therein.

The congress certainly intended that suits at law, in equity, and in admiralty might be brought under this act. The provisions that the plaintiff shall file a petition, and that the case shall be tried by the court without a jury, do not of themselves, as is claimed, make all proceedings under said legislation suits in equity, and do not regulate the manner of proceeding after suits shall have been instituted, which is to be determined by the well-established rules of practice and the laws applicable to the cases so provided for. That the distinctions existing, when the act was passed, between suits at law, in equity, and in admiralty, were preserved, is plain, and that the proceedings under it were to be regulated by then existing laws and rules, so far as the same were applicable to such suits at law, in equity, and in admiralty, unless modified by rules adopted under the authority of said act, is, we think, equally clear. The writ of error is provided for in order to correct errors in the trial court in actions at law, and an appeal is allowed in equity and admiralty cases, it being especially provided in said act that such proceedings shall be as is usual in like causes.

This case was properly, we think, regarded by the trial judge as an action at law. Debt or assumpsit could have been maintained on the facts recited in the petition. It cannot be held that equity, under the general and usual rules and grounds of jurisdiction, could entertain such a suit, and we do not find that the juris-

diction is specially given in said act. The action contemplated by the third section of the act would be on the equity side of the court; but the facts and circumstances, the property claimed or proceeded against, as set forth in the petition filed in the cases elsewhere provided for by said legislation, would determine the character of the litigation and its place upon the dockets of the court.

It does not appear that the defendant excepted, at the time, to either the rulings, findings, or judgment of the court, or that a bill of exceptions was presented, signed, and made part of the record, as required by law and the rules made thereunder. As the case was properly on the law side of the court, and as it is now too late to remedy said omissions, it follows that this court cannot grant the relief prayed for, even if error has been committed, as to which, under the circumstances, no opinion is expressed. The order purporting to grant an appeal was improvidently awarded.

For the reasons given, the judgment of the court below is affirmed.

ASHLEY v. BOARD OF SUPERVISORS OF PRESQUE ISLE COUNTY.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 116.

1. COUNTIES—BONDS.

Certain bonds were regularly issued by the board of supervisors November 1, 1871, and the proceeds applied to the erection of county buildings. The organization of the county had been authorized March 31, 1871, at which time it contained but one township, but a second township was created July 29, 1871, by the board of supervisors of the county to which it had been attached as an unorganized county. The supreme court having ruled (*People v. Maynard*, 15 Mich. 463) that there could be no valid organization of a county containing but one township, an act was passed (April 9, 1875) under which the county, in form at least, was newly organized. *Held*, that the act March 31, 1871, was provisional, and not void upon its face; that it would be presumed that the organization of the county was subsequent to the organization of the second township; that the question of the legal existence of the county could not now be raised, in a private litigation; that the act of April 9, 1875, could not operate to divest rights which had been acquired while the county was exercising the power it had assumed; and that, therefore, in view of all the circumstances, the bonds issued in 1871 were valid.

2. SAME—REFUNDING BONDS—NOTICE TO PURCHASER.

Refunding bonds, payable to bearer, recited that they were issued by the board of supervisors in conformity with the provision of an act authorizing the county to issue such bonds and provide for the retirement of outstanding bonds. *Held*, that the purchaser was not bound, in the face of the recitals borne by the bonds, to investigate the nature of the refunded indebtedness.

3. SAME—BONDS NEGOTIABLE IN FORM.

Statutory authority to issue and market bonds, which are to run for a long period of time and bear interest, *held* to authorize, by implication, bonds negotiable in form.

4. CIRCUIT COURT OF APPEALS—JURISDICTION—PRACTICE.

The circuit court of appeals will, upon writ of error, remand a case, with directions that it be dismissed, when it appears that such case has been brought within the jurisdiction by means of collusion; but to

justify such action the proof must be clear and unequivocal; otherwise, if the question has not been passed upon by the court below, the court of appeals, on reversing the judgment, will direct the trial and determination of that matter at the circuit.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action brought by William J. Ashley against the board of supervisors of the county of Presque Isle to recover upon certain county bonds and coupons. The court below directed a verdict for defendant, and entered judgment accordingly, and plaintiff brought the case, on error, to this court.

In this case the plaintiff sued to recover upon bonds Nos. 5 and 6, and several interest coupons belonging to those and other numbered bonds in the same series, being part of an issue of 18 bonds for the sum of \$1,000 each, with coupons for interest in the usual form, made by the county of Presque Isle on the 26th day of March, 1885. The bonds were payable to the bearer, and carried interest at the rate of 7 per cent., payable annually, according to the terms of the coupons.

In addition to special counts, the declaration contained the common counts; and there were appended copies of the obligations sued upon, together with a notice that they would be given in evidence under the money counts. This was in accordance with the practice in the courts of the state. The defendant pleaded the general issue. The case went to trial before a jury, and under an instruction by the court, at the conclusion of the evidence, that the supposed obligations were void, as matter of law, a verdict was returned for the defendant, and judgment was entered accordingly. The facts necessary to a proper understanding of the case may be stated as follows:

Prior to March 31, 1871, the county of Presque Isle was one of the unorganized counties of Michigan, and was attached to the organized county of Alpena for judicial and municipal purposes. On that day an act was passed by the legislature of the state providing for its organization with the same territory which it had previously embraced, and with the powers and privileges common to the other counties of the state. Provision was made for the election of the usual county officers, fixing the county seat, for a seal and proper record books, and for the holding of courts. The date fixed for the election of officers, which was the first step in organization, was the first Monday in April following; but it was further provided, by section 5 of the act, that, in the event that the election should not be held at the date named, it might be held at any time thereafter, upon giving the prescribed notice.

At the date of this act there was but one township in the county, namely, the township of Rogers. On the 29th day of July, 1871, the board of supervisors of the county of Alpena, under the authority conferred by general statutes, organized another township in Presque Isle county, by the name of Presque Isle.

At some time prior to September 16, 1871,—but on what date does not appear from anything in the record,—the election contemplated by the above-mentioned act took place; and it is shown that on the said 16th day of September there were two township supervisors, one for each of the townships of Rogers and Presque Isle, who assumed to act as such in their respective townships.

Upon the organization of the county under the act of March 31, 1871, it assumed the functions of an organized county, under the constitution and laws of the state, and continued to exercise them. It was recognized as such by various officials of the state, and dealt with as such in departmental business; and on March 28, 1873, the legislature passed an act to organize three counties, and to add certain territory to three other counties,—among them, Presque Isle. The language of the fourth section of that act was this: "That township number 37, north of range number 2, east, is hereby attached to the organized county of Presque Isle." In the progress of events,

questions arose as to the validity of the act of 1871, under which the organization of the county had taken place, in view, probably, of the ruling of the supreme court of the state in *People v. Maynard*, 15 Mich. 463, that there could be no valid organization of a county having but one organized township within its limits, and so no sufficient material for making up a board of supervisors to execute the functions of a county. And on the 9th day of April, 1875, an act was passed by the legislature entitled an "Act to organize the county of Presque Isle, and the townships of Presque Isle, Posen, Belknap, Rogers and Moltke," in that county. This act, in accordance with the scope of its title, purported to organize the territory of the then county of Presque Isle into a county of that name, and to subdivide the whole thereof into the organized townships above named, and provided a detail of proceedings for organization of county and townships. Such proceedings were had, and the county, in form, at least, was newly organized.

Recurring to the original organization of Presque Isle county in 1871, the record shows that, having no courthouse or county jail, the then board of supervisors, consisting of the supervisors from the townships of Rogers and Presque Isle,—the county clerk, the proper officer for that purpose, attending,—passed a resolution declaring it was necessary to raise \$9,000 for building a courthouse and \$6,000 for building a jail, and providing for the submission to the electors of the county of the question whether these sums should be raised by loan for those purposes. On the 21st of September the clerk issued the notice for an election on the 23d day of October following, and on the last-mentioned day the electors voted, in their several townships last named, on the question submitted. On the succeeding day the votes were canvassed by the proper officers, and it was found and declared by the proper canvassing board that a majority had voted in the affirmative. Shortly thereafter the board of supervisors again convened, and resolved to issue 30 10 per cent. bonds, of \$500 each, in pursuance of the vote of the electors, and to provide a sinking fund to liquidate the loan, setting apart yearly for that purpose the sum of \$1,000 from the sum raised by taxation for county purposes.

Thirty bonds were issued November 1, 1871, in the sum of \$500 each, payable to bearer, with interest at 10 per cent., payable annually on presentation of the coupons attached. They were in the usual form of such bonds, stated the purpose of their issue, and represented that they were "issued in conformity with chapter 10 of the Compiled Laws of the State of Michigan, and authorized by a legal vote of the qualified voters of the county at a special election held in said county on the 23d day of October, 1871." They were signed by the chairman of the board of supervisors and the treasurer of the county. The bonds were sold for their full face value, and the money received for them was used in the building of a courthouse and jail, which the county occupied thereafter for the holding of the state circuit court, and for county offices and all the purposes to which such buildings are usually appropriated. These bonds passed into the hands of purchasers, bona fide and for value, before maturity.

On March 17, 1875, the Brunswick Savings Institution, of Brunswick, in Maine, being the holder of a considerable portion of the bonds, brought suit in the circuit court of the United States for the eastern district of Michigan upon 34 of the coupons. Judgment by default was rendered thereon May 1st, following. In March, 1878, a motion was made to set the judgment aside, and for leave to defend. The principal ground of the motion was that the county of Presque Isle had no lawful existence when the bonds were issued, and that they were void. The motion was overruled, but for what reasons does not expressly appear. In July, 1878, a mandamus was issued, requiring the board of supervisors to spread a tax upon the tax rolls of the county to pay the judgment. The judgment was paid in October, 1879. On November 21, 1878, another suit by the same plaintiff was brought in the same court against the county on 64 other coupons. Judgment for the plaintiff was rendered thereon in 1879, and was paid. In February, 1875, one Collingwood brought suit against the county in the same court upon warrants of the county issued in the years 1871-72-73. There were the like proceedings to the rendition of the judgment for the plaintiff, and for the collection thereof,

as in the first of the above suits of the savings institution. All these judgments were subsequently purchased by George J. Robinson, who also became the holder, for himself or others, of many or all of the bonds which had been issued as above stated.

Records of the judgments were offered in evidence upon the trial of the present case. Upon an objection that there was no county of Presque Isle at the date of the alleged service of process in those cases, they were excluded. Upon this exclusion the plaintiff tendered an exception, and now assigns error.

After the rendition of those judgments, and in December, 1884, the board of supervisors of the county passed a resolution that they deemed it expedient to provide for the retiring of the outstanding county bonds by a new issue of bonds bearing a less rate of interest, and running over a series of years, to give the taxpayers time to meet the payment, and appointed a committee to procure an act of the legislature permitting the board to issue such new bonds. Responding to this, the legislature passed an act, on February 16, 1885, empowering the board of supervisors to issue bonds upon the faith and credit of the county, and to provide for the payment of the same by tax upon the county; and it was provided in the act that the bonds to be issued might be exchanged at their par value for the outstanding bonds, or be sold at not less than their par value, and imposed upon the county treasurer the duty of applying the new bonds and the proceeds thereof to the payment and retiring of the outstanding bonds and the interest thereon, and to no other purpose. There was no evidence that there were any other bonds of the county outstanding, except those already referred to as issued in 1871.

On the 25th day of March, following, the board of supervisors passed a resolution reciting that the amount of outstanding bonds, with interest, was about the sum of \$18,000; that the same was about to fall due; that it would be easier for the taxpayers to make a new arrangement, which had been satisfactorily agreed upon, for the retiring of the bonds,—and declaring that by the authority and in pursuance of the act of February 16, 1885, the board thereby authorized and directed the issue of coupon-bearing county bonds in the sum of \$18,000, \$1,000 of which should become due in each of the 18 years beginning with 1887. The bonds and coupons were to be payable at the Wayne County Savings Bank, in Detroit, and the rate of interest to be 7 per cent., payable annually. And the resolution further declared that it should be the duty of the chairman of the board and the county treasurer to sign and execute said bonds and coupons, and it should be the duty of the county treasurer to apply such bonds, at their par value, to the payment, retirement, and cancellation of the bonds of the county theretofore issued and then outstanding, and the interest due thereon, and for that purpose the county treasurer should call in said outstanding bonds, by exchanging or paying therefor the bonds thereby authorized.

On the next day, in pursuance of, and in accordance with, the above resolution, 18 \$1,000 bonds, with interest coupons attached, were issued, having been signed by the chairman of the board and county treasurer. Each of them was made payable to bearer, and recited that: "This bond is issued in conformity with the provisions of an act entitled 'An act to authorize the county of Presque Isle to issue bonds and to provide for the retirement of outstanding bonds,' approved February 16th, 1885, and authorized at a meeting of the board of supervisors of said county of Presque Isle, March 25th, 1885." All of this issue of bonds was delivered to Robinson in exchange for the bonds of the former issue, which he then held, and which were claimed by him to be valid obligations of the county. The latter were delivered up to the county treasurer, and were then destroyed.

Those of the new bonds and coupons first maturing were paid, but the evidence tended to show that Robinson sold the 14 bonds last maturing, with the coupons not yet due, to the Wayne County Savings Bank, before the maturity of the bonds, for full par value, and without any notice on the part of the bank of any infirmity therein. Subsequently the bank transferred those of the bonds and coupons now in suit to John R. Whitbeck, of Rochester, N. Y., by whom they were transferred to the plaintiff, who also resided at Rochester. Upon the trial the defendant introduced the depo-

sitions of Whitbeck and Ashley, which had been taken, apparently, for the purpose of showing that the transfers to them were not bona fide, but were made for the purpose of constituting a fictitious plaintiff to bring suit in the United States court. Considerable evidence was introduced on both sides on the question of the good faith of those transfers. The court, however, did not pass upon it, nor submit it to the jury, for the reason, as was stated, that it was not deemed material, the court being of the opinion that the obligations involved in the suit were invalid, because they were issued in violation of the constitutional requirement that expenditures of more than a thousand dollars in any one year should first be sanctioned by a vote of the electors of the county. The court further held that it was precluded from treating the original bonds as valid by the decision of the supreme court of the state in *Pack v. Supervisors*, 36 Mich. 377, and therefore directed a verdict for the defendant.

Levi T. Griffin and Carlos E. Warner, for plaintiff in error.

Henry M. Duffield, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, (after stating the facts.) In regard to the question of the validity of the bonds of Presque Isle county, issued in 1871, the court appears to have held that it was precluded by the decision of the supreme court of Michigan in the case of *Pack v. Supervisors*, 36 Mich. 377, which was supposed to have held that there was no organized county of Presque Isle at the time when those bonds were issued; and, inasmuch as the question of the proposed expenditure was in fact submitted to the electors before the bonds were issued, the ruling of the court below must be construed as recognizing the case referred to as a conclusive adjudication that the county of Presque Isle had no lawful existence in 1871, and therefore had no power to issue such bonds.

We are unable, however, to find in that decision any warrant for giving it so wide a scope. That case arose upon a petition for a mandamus against the supervisors to compel them to provide by taxation for the payment of certain county warrants issued in 1874 and January, 1875, nominally to one Boggs, who was the agent of the relator; the latter being the party in interest, and having knowledge of all the facts relating to their issue. The answer, which was taken as true, denied that there had been any legal organization of the county prior to the act of April, 1875, and assigned reasons for that conclusion. It then proceeded to state the nature of the proceedings upon which the warrants were issued, namely: That the supervisors of the county held a meeting at Crawford's Quarry,—not the county seat,—where it was declared expedient to remove the county seat to the former place, and it was resolved to submit the question of the removal to the electors of the county. That meeting was averred to have been illegal, and without notice to the county clerk, who was not present. The warrants in question, amounting to \$2,740, were issued, all within seven months, upon a contract for the erection of county buildings. That the question of raising money was never submitted to a popular vote, as required by law where more than \$1,000 was proposed to be raised for building

purposes. That no notice was given of the place to which it was proposed to remove the county seat, which is especially required by law when the vote of the electors is taken. And that there were no orders or resolutions authorizing the issue of the warrants.

The supreme court in its opinion, having recited these facts, said:

"Under these circumstances, we are not disposed to discuss the question when the county of Presque Isle was organized, or to enter upon the other questions concerning the townships. A mandamus will not issue to enforce any doubtful right. The answer, for the purpose of the present controversy, is taken as true; and, if true, it shows that these warrants were issued without authority, to a party having notice of their invalidity, and for a purpose which was illegal. It cannot be claimed, as this record stands, that the county buildings were lawfully contracted for, nor that the county seat had been removed, if the county itself was in existence. There has been no legislative recognition of removal, and, even if lawfully removed, the contract for buildings for more than one thousand dollars was unauthorized. Acting upon this answer, as admitted, we must deny the mandamus."

It is manifest that the court declined to go into the discussion of the lawful organization of the county, and rested its decision upon the character of the proceedings under review, without regard to the fundamental question whether the county had been duly organized or not. It is equally manifest, we think, that, when the court say that those "warrants were issued without authority," they refer, not to any want of authority deduced from the consideration of a matter they had expressly refused to consider, but to the defects in the proceedings which they immediately point out. We have given a full analysis of this case, for the reason that it seems to have controlled the action of the circuit court. We conclude that the effect of the decision was misapprehended, and that it does not conclude the question of the lawful authority of Presque Isle county to issue the bonds of November 1, 1871.

But we are required to consider whether the direction given by the court was right, notwithstanding our opinion that the reason given for it was wrong. The proposition insisted upon by counsel is, in the first place, that the statute of March 31, 1871, providing for the organization of Presque Isle county, was unconstitutional and void, because there was but a single organized township within its limits, and therefore there could not be constituted a board of supervisors,—a prime necessity for the exercise of county functions,—and also because it left some of the inhabitants of the county without an opportunity of voting upon questions affecting their interests; and the case of *People v. Maynard*, 15 Mich. 463, (a case which will be discussed in another place,) is cited in support of this proposition. That case does undoubtedly hold that there can be no regular organization of a county, in such conditions; and in that case, where steps were immediately taken after the passage of the act to test the validity of the organization upon a writ of quo warranto by the attorney general to try the right of one assuming to be a public officer in the territory affected by the decision, it was held that the organization was not lawful.

The act of March 31, 1871, was provisional only. It was, in substance, an enabling act. It did not, ipso facto, organize the county.

The county continued attached to Alpena county for judicial and municipal purposes as before, until its organization should be completed. It was not shorn off, and left an independent county, without government, in the mean time. The time within which the organization might take place was left indefinite by the statute. The validity of the law must depend upon the test whether, when it becomes operative, it infringes upon some provision of the constitution. Legislation in prescribed methods is not to be held void unless its operation and effect result in consequences which are forbidden by the supreme law. The law in question was not void upon its face, and would only prove to be so when applied to the subject-matter. *Cooley*, Const. Lim. 163, 164; *Golden v. Prince*, 3 Wash. C. C. 313, Fed. Cas. No. 5,509.

We do not see that it was shown in the court below whether the organization of the county under the act of 1871 took place before or after the organization of the township of Presque Isle. If after, there was then a sufficient number of supervisors to constitute a board, and there is nothing in the record to show that there were in fact any inhabitants outside of the two townships who were entitled to vote. Acting upon the rule of the maxim, "*Omnia praesumuntur rite esse acta*,"—a rule peculiarly applicable to this class of questions,—we ought to presume, in the absence of evidence to the contrary, that the facts necessary to the legal organization of the county existed, and, therefore, that there were in the county two organized townships, and that there were no obstacles, arising from any cause. A like presumption was made in *Rice v. Ruddiman*, 10 Mich. 125, 135, in support of the validity of the organization of the county of Muskegon.

But inasmuch as it may appear, upon a new trial, that the organization of the county of Presque Isle took place while there was yet but one township in it, or under other disabling conditions, it seems necessary to consider the case upon that aspect. Assuming that under the doctrine of *People v. Maynard*, above referred to, the courts of the United States would be bound to hold that such organization was unlawful and void in its inception, it does not, in our opinion, follow that if the county, assuming it to be valid, went on as such, acquired the capacity to be a county, and exercised for years, with the acquiescence of the state government, the functions and privileges of a county, its status and the validity of its acts are to be tested by such rules as would have been applicable in a direct and prompt challenge by the state when those powers and privileges were assumed. In the latter case, the public interests are best subserved by speedy reformation, and no private interest is harmed. In the former, the public interests have been adjusted to the actual condition of things, and private interests have become settled upon the foundations which local authority has laid, with the consent of the state, whose business it was to interfere and prevent the mischief, if any such were feared. It is a matter peculiarly within the province and duty of the state to watch over and prevent the development of political

growths which are likely to be prejudicial to the public interests. When it does not interfere, private individuals are justified in assuming that there is nothing obnoxious in the organization, and that they may treat with it in the character it has assumed.

In the case of a county, after it has gone on for years as such, taxes have been levied and collected under its authority; deeds and mortgages have been registered in its records, and titles have been gained or lost by such registration; the estates of deceased persons have been settled and distributed by its court of probate; the rights of parties have been adjudicated, and remedies awarded, by the circuit court, in sessions at its county seat, and accused persons have been tried, convicted, and sentenced to imprisonment by that court. We do not know that, in this instance, all these particular incidents have happened, but it is reasonable to suppose all may have occurred, and many others of kindred character.

May the foundation on which all these things rest for their security or authority be repudiated and denied by the municipality which assumed the character, has been allowed to act in it, and, agreeably to the law governing it in that character, has pledged its faith to repay what it has received and applied to its advantage, and thus disappoint the expectations of those who have trusted in its representations?

In the case of *People v. Maynard*, a question arose upon the act of February 10, 1857, providing for the organization of the township of Teal Lake. It was suggested to the supreme court that the law was unconstitutional, and therefore void, because, as it was claimed, no such purpose could be connected with the title of the act, which, under the constitution, must indicate the single object to be provided for. But the suggestion was rejected, the court saying:

"If this question had been raised immediately, we are not prepared to say that it would have been altogether free from difficulty. But inasmuch as the arrangement there indicated had been acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations, the acts of parties interested may often estop them from relying on legal objections which might have availed them if not waived. But in public affairs, where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question. See *Rumsey v. People*, 19 N. Y. 41, and *Lanning v. Carpenter*, 20 N. Y. 447, where the effect of the invalidity of an original county organization is very well considered, in its public and private bearings."

In *Clement v. Everest*, 29 Mich. 19, a bill was filed to restrain the collection by the township collector of school taxes in district No. 3 of the township, and it was alleged that the lands on which the taxes were assessed had been detached from that district, and attached to No. 2. One of the grounds of defense was that the

action of the township board of school inspectors in detaching those lands, which had been recently done, was unlawful, for reasons set forth in the answer. In dealing with that objection, the court say:

"It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies, and both law and policy require that they should not be disturbed, except by some direct process authorized by law, and then only for grave reasons." "In such matters as concern the public, and do not interfere with private property or liberty, such action as creates municipal bodies and gives them corporate existence cannot be questioned without creating serious disturbance."

This doctrine is approved and applied in the case of *Stuart v. School Dist.*, 30 Mich. 69, where a bill was filed to restrain the collection of taxes which had been assessed for the support of a high school in the district. Only certain districts, which were specially constituted, were authorized to do this, and it was claimed that the special act which had been passed for the benefit of this district was void for the want of compliance with the constitution in the form of its enactment. But, the district having proceeded for a number of years to exercise the powers attempted to be conferred, the court said they would wholly decline to consider the objection.

Recurring to the case of *People v. Maynard*, it will be seen that the reason for the decision was drawn from the implications of the constitution in regard to the formation of counties. But if the constitution had expressly declared the requirements and the method to be pursued, the fact would remain that the organization which the county had taken on under color of the statute, and in the form of which it acted without question by the state, could not be attacked collaterally. *Cooley, Const. Lim.* 254; *City of St. Louis v. Shields*, 62 Mo. 247.

In *State v. Rich*, 20 Mo. 393, a motion was made to quash an indictment found in the circuit court for Stone county, upon the ground that the statute establishing that county was unconstitutional, in that it reduced Taney county, from which the new county was taken, below the ratio of representation required, and therefore that Stone county was not constitutionally established. It was held that while the court did not intend to raise a doubt of the correctness of a decision previously made that the legislature could not reduce an old county in that way, yet the validity of such an act could not be drawn in question in this way, but only in a direct proceeding for the purpose of testing the validity of the organization of the county.

But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a municipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the state, the powers of a public corporation of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.

But counsel for the defendant lays principal stress upon the doctrine that there cannot be a county *de facto* where there can be none *de jure*; and it is argued that because the law of 1871 was void when enacted, and gave no authority for organization, there was no law under which Presque Isle county could become *de jure* a county, and therefore it could not become *de facto* such. The general proposition is no doubt correct, as a statement of a doctrine of law. But we do not think that proposition, as applied to the case before us, is sound. We doubt whether the premise of the proposition founded on it is true. We have already given some reasons for thinking it is not. But we also think the premise is insufficient. The supreme law of the state recognizes counties as political bodies corporate. Their existence is not only permitted, but is essential to the government which is organized. Their corporate character is not given by the legislature. That body, if it deems the organization consistent with public policy, prescribes a method of organization in form. This law, whether operative or not, signified the approval of the legislature of the formation of the new county, and in so far was in execution of its authority under the constitution; and we apprehend the rule to be that an unconstitutional and void law may yet be color of authority to support, as against anybody but the state, a public or private corporation *de facto*, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law, and the general system of law in the state.

In the case of *State v. Carroll*, 38 Conn. 449, it was held that an unconstitutional law constituted a valid support to official action performed under it before the law had been authoritatively pronounced void. And in the case of *Donough v. Dewey*, 82 Mich. 309, 46 N. W. 782, that doctrine was affirmed, and applied to a case where the legislature had passed a law for the election of a second township school inspector, in the face of the constitutional provision that there should be but one. Under that law the township elected a second inspector, and she was a woman. The validity of the action of the board of which she was a member being called in question, the court held that the rule that there could be no *de facto* officer where there was no *de jure* office was modified by the further rule that an office created by the legislature must be deemed one *de jure*, so long as the law is treated by the public as valid, though it should afterwards be held otherwise; and, applying that rule, the court held the proceedings valid. This case declaring the rule in Michigan, which is applicable to the construction and efficacy of its statutes, in furtherance of its local policy, if not binding upon us, is yet entitled to very high respect and consideration.

Much reliance was placed in argument upon the case of *Norton v. Shelby Co.*, 118 U. S. 426, 6 Sup. Ct. 1121, as supporting the application of the rule invoked to the present case. But an examination will show that it does not declare or indicate anything inconsistent with the views above stated. It was an action against the county upon certain bonds which had been issued in its name by a board of county commissioners. This board had been created by a special

act of the legislature of Tennessee, and empowered to execute the duties which, by the constitution of the state, were devolved upon the county court, composed of the justices of the peace of the county. Within a month after its passage the justices of the peace assailed the validity of the act by filing a bill in their official character, in the name of the state, against the commissioners, charging them with unlawful usurpation of the power of the justices, and praying that they should be enjoined. The case went to the supreme court of the state, where it was held that the act was void. This was in conformity with a decision which had already been made by that court in another case of the same kind from the same county. The board of commissioners was a body not known to the constitution of the state, and was an anomaly in its system of administration of county affairs. For the plaintiff it was contended, in the case of *Norton v. Shelby Co.*, that, although the commissioners did not hold their offices de jure, they were nevertheless officers de facto, and, being such, their acts were valid. The supreme court held otherwise, upon the ground that the commissioners could not be incumbents of an office which could not exist. They could not fill a place which was unknown to the constitution of the state, and which was made in the room of a board expressly authorized by that instrument to discharge the duties of the same office. And the court took pains to distinguish such a case by saying, at page 441, 118 U. S., and page 1125, 6 Sup. Ct.:

"The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy, and necessity for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidences of such officers, and in apparent possession of their powers and functions. For the good and peace of society, their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result, if, in every proceeding before such officers, their title could be called in question. But the idea of an officer implies the existence of an office which he holds."

And the court distinguishes the case of *State v. Carroll*, supra, which is cited with apparent approbation, by the test which it had indicated, and by pointing out that in that case there was an office to fill. Similar reasons and the like rule apply in the case of officers as to that of municipal corporations de facto. *Clement v. Everest*, supra.

On March 28, 1873, the legislature passed a special act attaching township 37 north, 2 east, "to the organized county of Presque Isle." It is said that this act cannot be held to be a legislative recognition of the county's previous organization, because, as is argued, that act was itself unconstitutional, in that, by its title, it had more than one object. We are not prepared to admit that the statute would not have the effect of a legislative recognition, even if it was invalid for the reason stated; but as we are of the opinion that the validity of the original organization of the county cannot be, by itself, assailed in this collateral way, we do not deem it necessary to decide

whether the statute of 1873 was valid or not, or, if invalid, whether it would still operate as a recognition of what had been done.

We do not construe the act of April 9, 1875, as in any sense a repudiation of the original organization. Doubts had arisen in regard to its legality. The public interests required that those doubts should be put at rest, and the legislature proceeded to clothe the county with an unquestionable title. Having regard to what had transpired, it would seem that this statute should be regarded as effecting a reorganization, and giving express sanction for the continuance of a body whose origin was clouded with doubts of its lawfulness. However that might be, the statute could not, upon any construction, operate to divest rights which had been acquired while the county was exercising the powers it had assumed. We are therefore of the opinion that, upon the facts presented by this record, the bonds issued in 1871 were valid.

But, if this were not so, we should still think, in the circumstances of this case, that the bonds issued in 1885 to refund the supposed indebtedness are binding obligations upon the county. The former bonds were more than colorable obligations. Recoveries had been had in the United States circuit court against the reorganized county upon some of them, and the validity of the remaining ones was, to say the least, a fair question for controversy. The county chose not to make further defense to the bonds, and to avail itself of the opportunity to defer the payment of the indebtedness, and to obtain a reduction of the interest from 10 to 7 per cent. It sought and obtained from the legislature authority to refund its debt. It procured the surrender of the former bonds, and issued in their stead, and in consideration of them, the new bonds. If the legislature did not assume the former bonds to be valid, it devolved upon the board of supervisors of the county to determine what were valid obligations of the county, in exercising the authority to issue the new bonds conferred by the act, and such determination would bind the county.

In the case of *City of Cadillac v. Woonsocket Institution*, (argued at the same term with this, and recently decided,) 58 Fed. 935,¹ bonds had been issued, under the guise of a loan authorizing public improvements, for the actual purpose of aiding a railroad company. The bonds were in the hands of one who knew of the fraudulent evasion of the constitution of the state, and no action could have been maintained upon them by him. But they were negotiable, and might have been put upon the market by him. In this state of affairs, the common council of the city, upon the request of a large number of its citizens, and upon considerations deemed by the council to justify it, issued new bonds to take up the former ones under the provisions of the Michigan statute for refunding municipal indebtedness. The new bonds were exchanged for the old, and passed into the hands of bona fide holders, who brought suit upon them. One question involved in the case was whether a buyer of the bonds—which, on their face, were re-

funding bonds—was bound to go back of the issue of the new bonds, which were regular on their face, and contained recitals that they were issued in conformity with law, and ascertain the nature of the refunded indebtedness.

The refunding statute did not, in terms, declare who should determine the fact of previous indebtedness. But Judge Lurton, in delivering the opinion of the court, said:

"Power was conferred upon the common council to issue new bonds to take up old ones falling due. The question as to whether there were any such bonds is referred to the council. The old bonds, on the facts found, were at least colorable obligations. The council determined to issue new bonds to take them up. It seems to me that, under these circumstances, it did not devolve upon the purchaser of the new bonds to look into the validity of the funded old bonds;" citing *Coloma v. Eaves*, 92 U. S. 484; *Hackett v. Ottawa*, 99 U. S. 86; and *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216.

In the present case the force of these suggestions is augmented by the fact that, by an express provision of the constitution of Michigan, boards of supervisors are empowered to adjust all claims against their respective counties, and from their decision there is no appeal. This jurisdiction is not exclusive, but, as against the county, any one having demands against it could obtain from the board a conclusive determination upon them. To require a purchaser of refunding bonds to scrutinize the successive issues in which the debt has been refunded, to its root, would seriously impair the market value of the bonds, and thus work injuriously to the interests of the municipality issuing them.

It is further objected that the act of 1885 did not authorize the issue of bonds negotiable in form, the contention being that that requires express authority, whereas this statute authorizes the issue of bonds, without more; and the cases of *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, and *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, are cited, in which it was held that a statute authorizing a municipality to borrow money did not, by implication, carry with that authority the power to issue negotiable bonds. In the present case the power is given to issue bonds running for a long period of time, and bearing interest, and it appears on the face of the act that the bonds might be put upon the market and sold. We cannot doubt that negotiable bonds were intended. The same question was made in the *Cadillac Case*, above referred to; and it was held by this court, upon a statute of like kind, though not quite so clear in its implication, that the power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations, and that the doctrine of *Brenham v. Bank* did not apply.

The act of 1885 is also attacked upon the ground that it is unconstitutional, in that it attempts to confer special powers upon the board of supervisors of a single county, and also because it authorizes them to borrow more than a thousand dollars in a year for constructing public buildings without a vote of the people. As to the first ground of objection, we find nothing in the constitution of the state which clearly, or by any necessary implication, limits the power of the legislature in the manner supposed.

Therefore, by a familiar rule on this subject, we cannot, upon that ground, hold the act invalid. The cases in Wisconsin (*State v. Riordan*, 24 Wis. 484, and *State v. Supervisors*, 25 Wis. 339) were decided upon the special provision of the constitution of that state, requiring a uniform system of local government, and have no application. And, in regard to the second, the bonds were issued to refund a debt, and not to raise money to erect public buildings. The purchaser, as we have already held, was not bound, in the face of the recitals borne by the bonds, to go back, and trace the indebtedness refunded.

We do not find it necessary to decide whether the judgments upon some of the first issue of bonds rendered by the circuit court of the United States created an estoppel against the county of Presque Isle, precluding it from denying the validity of the other bonds of that issue. Nor is it necessary to express any opinion upon the contention of counsel for defendant that the plaintiff, having taken the bonds and coupons in suit after their maturity, is, notwithstanding he derived them through one who was a bona fide holder for value and without notice, exposed to the assertion of any equities which the county had in reference to the bonds, for we conclude that it had none to assert.

There are a number of assignments of error relating to the admission and rejection of testimony; but, as they are not likely to arise upon a new trial, we think it best to pass them.

Another matter requiring attention is presented by the evidence recited in the bill of exceptions which was introduced by the parties upon the subject of the bona fides of the transfer of the bonds in suit as affecting the jurisdiction of the court. No issue of any sort was framed in the court below on the subject, but a question arose for the action of the court under the fifth section of the judiciary act of March 3, 1875, which requires the court, on its own motion, to dismiss the action, if it shall appear at any time that it has been collusively brought. The circuit court declined to make any express decision of the question, but it must be deemed, in legal effect, to have negatived the suggestion of collusion; otherwise, it could not properly have gone on, in the exercise of the jurisdiction, to the taking of the verdict and the rendition of the judgment. It is clear that such a question is an independent one, and cannot properly be confused with the issue on the merits; otherwise, it could not be determined from the verdict whether it was founded on a question of jurisdiction, or of the cause of action. It was not a question for the jury, as the pleadings stood, but was one which the court was bound to decide before submitting the case upon its merit. On the face of the record, the court had jurisdiction, and the question may not arise upon another trial. It would seem that, in a case of fair doubt, the question was one for the trial court, though, undoubtedly, the court of appeals could and would deal with it, if the fault clearly appeared.

In the present case, upon reversing the judgment, we shall direct the circuit court to permit, in its discretion, an amendment

of the pleading of defendant by appending to the plea a plea in abatement, in accordance with the rules of practice of the circuit courts of the state, of the matter touching the jurisdiction, whereon a separate verdict can be taken; or, if it should be deemed best, to leave the question for its own disposition under the act of 1875.

The judgment must be reversed, and the case remanded to the court below, with directions to award a new trial, and for further proceedings in conformity with this opinion.

On Rehearing.

(February 5, 1894.)

SEVERENS, District Judge. In support of this application, four reasons are assigned by the petitioner:

First. It is suggested that the opinion of the court, as announced in regard to the original organization of Presque Isle county, proceeds upon the theory that the later organization in 1875 continued the previous one, whereas, it is urged, the people of the county, from the first, treated the act of 1871 as invalid, and the legislature, by the act of 1875, recognized the invalidity of the former act. The only action of the people of the county, which is referred to as being in repudiation of the original organization, consists of their applications to the board of supervisors of Alpena county in July, 1871, first for the annexation of territory to the township of Rogers, and second, for the formation of Presque Isle township, upon both of which applications the latter board took favorable action, to which no objection was made, but, on the contrary, it was acquiesced in. As to this, it is to be observed that we were of opinion that the act of 1871 provided for an organization thereafter to take place, the consequence of which was to leave the county of Presque Isle in its existing governmental relations with the county of Alpena until such organization should be effected. It was entirely consistent with this that, if the organization of the new county had not then been had, the people thereof should have made these applications to the Alpena county board, and that the board should have acted upon them, as it did. Indeed, it may be that these applications were made for the very purpose of qualifying the county to organize under the act.

In regard to the supposed disregard of the previous organization under the act of 1871 by the legislature in 1875, we do not think it necessary to repeat what was said in the former opinion. What was then said was aimed, not so much to demonstrate that the legislature affirmatively recognized the organization already made as a valid one, as to show that in our judgment there was no good reason for treating the later act as a repudiation of what had been done by the county, and further to express our opinion that rights which had in the mean time become vested could not, at all events, be defeated by this legislative action, however construed.

Second. It is said that the decision already made is in irreconci-

lable conflict with the decision of the supreme court in *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121. Having already fully considered that case, and, as we think, shown the distinction between it and this, we do not think it necessary to go over the ground again. All the cases and reasons mentioned by the petitioner on this head were presented by the brief and arguments on the original hearing, and have been carefully considered by the court.

Third. The reason next assigned why a rehearing should be had is that the holding of the court "that because the bonds were issued to refund a debt, and not to raise money to erect public buildings, no vote of the people was necessary," is based in part upon the fact that the board of supervisors has sole power to pass upon claims against the county. This, it is said, is in direct conflict with the recent decision of the supreme court of Michigan in *Supervisors v. Warren*, 56 N. W. 1111. In passing, we observe that the petitioner's statement of our own opinion is rather broader than our language warrants. But if it be restricted to the proposition that, in the exercise of the authority conferred by the act of 1885 upon the board of supervisors to issue the new bonds, it was, by necessary implication, empowered to determine the validity of the refunded debt, we accept it as correct.

We have attentively examined the late decision of the supreme court of Michigan, above referred to, but are quite unable to find in it the alleged conflict with our own. In that case the court was asked to compel, by mandamus, the chairman of the board of supervisors to issue bonds to the amount of \$30,000 to raise money for the support of the poor of the county, which bonds had been voted by the board without a popular vote. The object for which the money was to be raised on the bonds was one involved in, and covered by, the current expenses of the county. There was not, as here, any special act of the legislature authorizing such action of the board as had been taken, and the question of its authority depended upon the construction of the general statute which confers its powers. Judge McGrath, delivering the opinion of the court, after analyzing the subdivisions of the section of the statute which authorize the expenditure of county funds by the board for various purposes, and prescribe the means by which such funds may be raised,—whether by borrowing or by taxation,—points out that by subdivision 10, § 483, How. St., provision is expressly made for the raising of money for the current and contingent expenses of the county. And it was held that as this subdivision had no meaning or effect, unless it was construed as contemplating the raising of money for that particular class of expenses by tax only, it must be construed as having that effect, and to exclude the power to raise money for current expenses by borrowing which for other purposes was conferred by other provisions in the section, and the mandamus was therefore denied.

No question of the kind involved in this ground for rehearing was involved in, or decided in, that case. To the further suggestion that it would follow from the decision delivered by this court

that the board of supervisors might audit fraudulent claims, and issue bonds for them, and the county be remediless, it may be answered that responsibility of this kind must be devolved upon somebody, and it would seem that the interests of the county would be as likely to be safely guarded by their own representatives as by any other protection.

Lastly. It is claimed that the court made a mistake in remitting to the circuit court the question whether the suit was collusively brought, and it is alleged that our action is in conflict with the decisions of the supreme court of the United States, and the same cases in the reports of that court are cited in support of this contention, as were discussed in the brief and argument upon the former hearing. We have carefully considered them, and do not think it probable that any new light would be afforded by further discussion. It may be proper to add a few words to what we said upon this subject. We indicated our opinion to be that the duty of passing upon a question of this sort was devolved by the statute, in the first instance, upon the trial court, but that, nevertheless, the appellate court, in a clear case, would take notice of the fact, and would remand the case, with directions to dismiss it. But the court would deal with such a question as it does, on writ of error, with any other question of fact; that is to say, proof of the fact must be clear and unequivocal, in order to justify the court, upon a writ of error, in assuming the fact to be so. Such was the case in every instance which has been brought to our attention. It either appeared from the record itself, or was conclusively shown by the proof brought up in the bill of exceptions. In this case, as is implied from our opinion, we did not think the proof so clear as to justify such action in the appellate court.

The court below, when the question was before it upon the trial, failed to pass upon it expressly. As we were constrained to order a new trial upon the merits, and the question would be in its former position, where it could be dealt with in the court where questions of fact which are fairly controvertible are properly to be determined, we remitted the whole case to be tried and determined *de novo*. Upon reflection, we are satisfied that this was correct.

We think the petition for rehearing should be denied.

BARBER ASPHALT PAV. CO. v. ODASZ.

(Circuit Court of Appeals, Second Circuit. February 26, 1894.)

No. 54.

MASTER AND SERVANT—DEFECTIVE MACHINERY—EVIDENCE.

In an action against an employer to recover damages for injuries by means of defective machinery, evidence of the making of improvements and safeguards after the accident is incompetent. *Railroad Co. v. Hawthorne*, 12 Sup. Ct. 591, 144 U. S. 202, followed.

In Error to the Circuit Court of the United States for the Eastern District of New York.

At Law. This was an action by the Barber Asphalt Paving Company against Frances Odasz, as administratrix of Frank Odasz, to recover damages for negligence alleged to have caused the death of her intestate. There was a verdict for plaintiff, and, to review the judgment entered thereon, the defendant brings the case here on writ of error.

Daniel Noble, for plaintiff in error.

Wales F. Severence, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This was an action at law, brought in the circuit court for the eastern district of New York by Frances Odasz, as administratrix of Frank Odasz, to recover damages for injuries resulting in the death of the intestate, a day laborer in the service of the defendant corporation. The injuries were alleged to have been directly caused by defective and improper machinery or appliances which, through the negligence of the defendant, were permitted to be used in its business. A verdict for the plaintiff was rendered by the jury, and, judgment having been entered, the cause was brought to this court by writ of error.

The defendant, a manufacturing corporation in Long Island City, was in the habit of receiving loads of sand in scows at the dock at the foot of its yard. This sand was hoisted from the scow, and dumped into a self-righting V-shaped car, upon a tramway about 22 feet above the ground, and running on a level through the yard, and was then dumped from the car wherever it was needed. The gauge of the track was 30 inches; the car hopper was 60 inches at the top, and 5 feet 6 inches in height. The car was shoved into the yard by two men, who raised a lever at its end when the place of dumping was reached. At the time of the accident the entire load in the car was not discharged when the dumping took place, and the men shook the car to rid it of all the sand, when it fell over and upon the plaintiff's intestate, who, with others, was shoveling the sand underneath, and killed him. There was no framework around the track, nor platform alongside of it, at the time of the accident. Afterwards, a platform was placed on the side of the track.

The theory of the plaintiff was that the employer, being under obligations to provide a reasonably safe place for his employes to work in, negligently did not make such provision; that the yard under the tramway was unsafe by reason of the liability of the unstable V-shaped car, when shaken, to fall off from a tramway which had no guard rail; and that, from the nature of the case, the danger was, or should have been, apparent to the employer. The important disputed facts which the plaintiff strove to establish were the dangerous character of the tramway, and that it ought to have been known, and therefore avoided, by the employer. The law upon the subject of the liability of an employer for the consequences of dangerous appliances which he furnishes to or for his workmen has been recently stated by this court as follows:

"An employer does not undertake absolutely with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all reasonable care and prudence to provide them with appliances reasonably safe and suitable. His obligation towards them is satisfied by the exercise of a reasonable diligence in this behalf. Before he can be made responsible for an injury to an employe inflicted by an appliance adequate and suitable, ordinarily, for the work to be performed with it, there must be satisfactory evidence that it was defective at the time, and that he knew, or ought to have known, of the defect." *Steamship Co. v. McDonald*, 59 Fed. 479.

The liability of an employer, and the corresponding duty of an employe, have also been succinctly summarized as follows:

"An employe cannot recover for an injury suffered in the course of his business from defective machinery, unless the employer knew, or ought to have known, the fact, and the employe did not know it, or had not equal means of knowing it." *Hayden v. Manufacturing Co.*, 29 Conn. 548.

The plaintiff, having the burden of proving negligence, asked her witnesses, in her testimony in chief in the circuit court, whether they could tell a way by which the accident could have been prevented. One witness answered: "There is a platform made there now, but it was not there then, to prevent the car from falling." Another witness said that "the tramway is made different from its construction when Odasz was killed." Each of these answers was objected to, was admitted, and exceptions were taken to the rulings. When a juror asked the direct question whether any improvement had been made to the tramway for the safety of the men working under it, the question was excluded.

The effect of the answers which were excepted to was to inform the jury that safeguards were placed by the defendant after the accident, as a fact bearing upon the question whether the omission to place them before was not a negligent omission, and as also an admission of prior negligence. The judge excluded the questions when directly and formally asked for the purpose of showing negligence before the accident, but the quoted answers slipped in, ostensibly in reply to the question whether the track was capable of a construction which would prevent accidents. The testimony was wanted by the plaintiff's counsel for the purpose of proving negligence. The answers showed the jury that changes had been made after the accident for the purpose of preventing similar calamities in the future. A plausible but untrue inference from this class of testimony is apt to be that the subsequent act, for the purpose of securing perfect safety in the light of past experience, is an admission of a previous omission to take proper precautions, and has an effect to call the minds of the jury away from the real issue, which is that of reasonable, but not extraordinary, care at the time of the accident, in view, among other considerations, of previous and universal experience. The incompetency of this class of testimony in actions for negligence has recently been decided by the supreme court, upon the ground that:

"The taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and

to create a prejudice against the defendant." *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309.

We think that the answers, having been objected to, should not have been permitted to go before the jury, for, with the tendency of juries, in actions for injuries to the person, to find the fact of negligence upon insufficient grounds, this class of acts of the employer is received by them as significant proof of an admission of prior neglect. Although the judge did not intend to allow the testimony upon the theory that it tended to prove negligence, we think that its admission had an injurious effect, and that a new trial should be had.

The judgment is reversed, with costs, and the case remanded to the circuit court with directions to set aside the verdict and to order a new trial.

UNITED STATES v. ROSENSTEIN et al.

(Circuit Court of Appeals, Second Circuit. February 26, 1894.)

No. 77.

CUSTOMS DUTIES—CLASSIFICATION—"SEELIG'S COFFEE"—CHICORY.

"Seelig's coffee," or "coffee extract," a compound containing about 68 per cent. in weight, and 44 per cent. in value, of chicory, and used as a substitute for, or sometimes as an adulterant of, coffee, is dutiable, as such substitute, under paragraph 321 of the tariff act of 1890, and not as chicory root, under paragraph 317. 56 Fed. 824, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by *Rosenstein Bros.*, importers, from a decision of the board of general appraisers, sustaining the action of the collector in the classification of certain imported merchandise. The circuit court reversed the decision of the board, (56 Fed. 824,) and from its decree the government appeals.

Thomas Greenwood, Asst. U. S. Dist. Atty.

Albert Comstock, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1891 the appellees, who are partners by the name of *Rosenstein Bros.*, imported into the port of New York sundry invoices of merchandise packed in small paper rolls, invoiced as chicory, and styled on the wrappers, "*Emil Seelig's Kaffee*," and "*Finest Seelig's Coffee*." The collector classified the article as "chicory," and assessed a duty thereon at two cents per pound, under the provisions of paragraph 317 of the tariff act of October 1, 1890. That paragraph is as follows: "Chicory root, burnt or roasted, ground or granulated, or in rolls, or otherwise prepared, and not specially provided for in this act, two cents per pound." The importers protested that the goods should have been classified under paragraph 321 of the same act, which reads as fol-

lows: "Dandelion root and acorns prepared, and other articles used as coffee, or as substitutes for coffee, not specially provided for in this act, one and one-half cents per pound." The board of general appraisers sustained the action of the collector. New testimony was taken, the circuit court reversed the decision of the board of appraisers, and thereupon the United States appealed to this court.

The board of general appraisers found that the article was a preparation of which chicory is the chief component part in quantity and value, invoiced as "chicory," and known, commercially, either as "coffee extract," "Seelig's coffee," and "chicory," that it is probably true that it is a substitute for coffee, and that it is chicory, ground, granulated, or otherwise prepared. The testimony upon which the board relied is not contained in the record. The additional testimony which was taken shows that their finding was erroneous in some particulars. The merchandise is a well-known article, composed of chicory or chicory root, (which are commercially convertible terms,) beet root, olive oil, and syrup. It is manufactured in Germany by grinding these ingredients together, and, when imported, is in the form of rolls or cylindrical sticks, each of which is inclosed in a wrapper, upon which the following directions are printed: "Use one part of this preparation to two or three parts of coffee. Pour boiling water over the mixture. Let it draw five minutes, and strain." Chicory is about 68 per cent. of the weight, and about 44 per cent. of the value, of the compound article. It, like at least two other similar compounds made by other manufacturers, is used to some extent to flavor coffee, and more largely, both in Germany and in this country, to mix with coffee, or as a substitute for coffee, for purposes of economy. It is sold for about six cents per pound. Chicory is also used by dealers, as an adulterant, to mix with ground coffee, and by consumers to mix with, or as a substitute for, coffee. Seelig's coffee is not known commercially as "chicory." Upon the foregoing facts, this manufactured article of divers ingredients, which contains only 44 per cent., in value, of chicory, and is not known commercially as "chicory," cannot be properly classified as that article, if it also is enumerated under the provisions of another paragraph which aptly describes its use and the purpose for which it is manufactured. The article has a distinctive place of its own; it is not merely chicory presented under another and more attractive name, but it is a distinct compound, which possesses its own peculiarities. The classification which was specified in the protest was the proper one, and the decision of the circuit court is affirmed.

UNITED STATES v. DUNBAR.

(District Court, D. Oregon. February 8, 1894.)

Nos. 3,420 and 3,580.

1. CUSTOMS DUTIES—SMUGGLING—INDICTMENT.

An indictment for smuggling under Rev. St. § 2865, alleged, substantially in the words of the statute, that the defendant "smuggled and

clandestinely introduced into the United States opium subject to a certain duty, which should have been invoiced, without paying or accounting for such duty, and without having such opium invoiced." *Held*, that the indictment is sufficient without alleging that defendant knew that the duty on the smuggled opium had not been paid.

2. SAME—EVIDENCE—SECONDARY—TELEGRAMS.

On such indictment, telegrams received by the prosecuting witness, and purporting to have been addressed to him by defendant, were admitted in evidence as corroboration of the testimony of such witness as to verbal admissions made by defendant. *Held*, that these telegrams were competent as admissions; and the principle that the original telegrams are the only competent evidence of their contents does not apply.

At Law. On motion for new trial.

This was an indictment against William Dunbar for smuggling, in violation of Rev. St. §§ 2865, 3082, which provide substantially as follows:

"Sec. 2865. If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass through the custom house any false, forged or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisonment for any term not exceeding two years, or both, at the discretion of the court."

"Sec. 3082. If any person shall fraudulently or knowingly bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy or sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years or both."

The defendant, being found guilty, moves for a new trial. Motion denied.

Daniel R. Murphy, for the United States.

Alfred F. Sears, Jr., for defendant.

BELLINGER, District Judge. A motion for a new trial is made in this case upon the following grounds: Insufficiency of the indictment, except as to the ninth count, in not alleging knowledge on the defendant's part that the duty due on the smuggled opium had not been paid; error in admitting in evidence certain telegrams purporting to have been sent by the defendant from San Francisco to Blum, the prosecuting witness, at Portland, in this state, and absence of any evidence tending to show that the defendant knew that the opium, of which he is charged in the ninth count with having facilitated the transportation, had been illegally imported into the United States.

In the case of *U. S. v. Carll*, 105 U. S. 612, it is held that in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended

to be punished. The several counts of the indictment in this case, in which the defendant is charged with smuggling, allege that the defendant smuggled and clandestinely introduced into the United States opium subject to a duty of \$12 per pound, which should have been invoiced, without paying or accounting for such duty, and without having such opium invoiced. This contains all the elements of the crime of smuggling.

The cases of *U. S. v. Slenker*, 32 Fed. 691, and *U. S. v. Chase*, 27 Fed. 807, cited in support of this motion, are cases involving violations of the postal laws by depositing obscene matter in the mails. The indictments charged the defendants with having knowingly deposited in the mails certain obscene papers. This was held insufficient. A person may knowingly deposit a letter or paper in the mails without knowledge of its obscene character. The averments of such an indictment may therefore be true, and yet the defendant be innocent. These cases do not apply to the case to be decided. The word "smuggle" has an accepted bad meaning. It conveys the idea of a secret introduction of goods with an intent to avoid payment of duty. *U. S. v. Claffin*, 13 Blatchf. 184, Fed. Cas. No. 14,798. The indictment charges that the defendant smuggled and clandestinely introduced the opium in question into the United States without paying or accounting for the duty required by law, and without having such opium invoiced. These allegations are inconsistent with an innocent bringing of these goods into the country. The defendant was required to pay the duty. If he clandestinely, and with intent to defraud the revenues, brought these goods here without invoicing them or paying such duty, he is guilty of a crime. It is not necessary to allege that he had knowledge of his own act. The obligation was upon him to pay the duty. The fact that he did not pay such duty could not be unknown to him.

The two dispatches claimed to have been sent from San Francisco to the defendant by Blum were admitted in evidence for the reason that Blum testified to conversations with the defendant, upon the latter's return to Portland, concerning these dispatches, and that the latter "confirmed" them. The tendency of this testimony was to establish the authenticity of these dispatches by the admission of the defendant. The objection is urged by the defendant's attorney that such admissions cannot be allowed, because the law has made the original telegrams the only evidence admissible as to their contents. And as to this the case of *Canal Co. v. Hathaway*, 11 N. Y. Com. Law, 495, is cited. The doctrine of that case is that where documentary evidence is made indispensable, unless its absence is legally accounted for, to prove a fact, the admission of a party will not suffice to dispense with the production of such document. In this case the telegrams in question have no other effect than as admissions by the defendant tending to establish the charge against him. It is not a question of dispensing with solemn documentary testimony, but merely one of statements, having the effect of admissions, of a party made in a writing, the genuineness of which has been admitted by the party against whom it is offered.

The fact of the writing adds nothing. The statements would have been just as effective as evidence had they been made orally. The defendant's admissions as to the dispatches entitled them to be received in evidence. *Whilden v. Bank*, 38 Am. Rep. 4. There is evidence going to show that the opium mentioned in the ninth count came out of a stock that had accumulated in Berg's house, and that this stock of opium had been smuggled into the country at different times with the defendant's assistance or connivance. The motion is denied.

FIRST NAT. BANK OF BLAINE v. BLAKE.

(Circuit Court, D. Oregon. February 19, 1894.)

No. 1,976.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—NOTICE.

Defendant executed his promissory note to C., and delivered it upon condition that it was to be surrendered to him upon C.'s failure to perform stipulated acts. C. immediately transferred this note by indorsement to a bank of which he was president and general manager. *Held* that, as C. himself was the sole representative of the bank in the transfer of the note to it, the bank is chargeable with his knowledge of the condition to which it was subject, and so cannot sue on the note until that condition is performed.

At Law. On demurrer to answer. Action by the First National Bank of Blaine against J. W. Blake. Demurrer overruled.

Harrison G. Platt, for plaintiff.

Franklin P. Mays, for defendant.

BELLINGER, District Judge. The complaint alleges that on April 18, 1890, the defendant made and delivered his promissory note to N. A. Cornish, whereby he promised to pay, on April 2, 1892, after date, to the order of Cornish \$3,419.50 with interest. This note was indorsed and transferred by Cornish to the plaintiff before maturity, and the plaintiff is alleged to be the owner and holder of it for value. The answer alleges that the note was executed and delivered on the 2d day of April, 1891, and was in consideration of a contract entered into at the same time between the defendant on the one part and Cornish and others of the other part, by the terms of which it was agreed, in effect, that if Cornish and those associated with him in his contract with the defendant, failed to protect certain real estate, which was a subject of speculation between the parties, (and on account of which the defendant had paid such parties \$3,419.50, and gave the note in question for a further like sum,) from the lien of a certain mortgage, thereby forfeiting the title and interest of Cornish and the other parties of the one part in said contract to such real estate, the promissory note in question should be surrendered up to the defendant. It is alleged that the note and contract were parts of one transaction; that Cornish and his associates failed in their agreement as to the land in question, in consequence of which the defendant lost

the \$3,419.50 paid by him, and became entitled to have the note sued on surrendered, the consideration therefor having failed. It is further alleged that, at the time of the transfer of the note to the plaintiff, Cornish was the duly elected, qualified, and acting president and general manager of the plaintiff bank, and that both he and the plaintiff had full knowledge of all the facts alleged. The plaintiff demurs to the answer.

In order that there may be a complete determination of the rights of the parties upon the demurrer, it was agreed upon the argument that the court may consider the following additional facts as if they were set out in the answer:

"(1) During all the times in question Cornish was the president and general manager of the plaintiff bank, and as such was duly authorized to discount notes, and, generally, to act for the plaintiff in such matters. (2) Cornish, immediately upon receipt of the note, with full notice of its imperfection, transferred it by indorsement to plaintiff. (3) In the transfer of such note, Cornish was the sole person who acted in behalf of any one."

Upon these facts, is the plaintiff a bona fide purchaser of the note sued on? It is claimed, in support of the demurrer, that the knowledge which Cornish had cannot be imputed to the bank, because he acted for himself in the transaction; that his interest was opposed to that of the bank, and that, therefore, there is no presumption of a communication by him against his own interests; but that the presumption is the other way,—that he concealed the knowledge which he had of the infirmity of his own title. A large number of cases are cited in support of this view, and it is well settled that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be to his interest to conceal, and the corporation or principal is not chargeable with such knowledge. But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction. If Cornish was the sole representative of the bank in the transaction with himself, there was no one from whom information could have been concealed, or to whom it could have been communicated. If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interests, however much his conduct may have been. He necessarily knew as much in one capacity as he did in the other. The bank is charged with the knowledge which Cornish had. *Holden v. Bank*, 72 N. Y. 286; *Bank v. Cushman*, 121 Mass. 490; *First Nat. Bank v. Town of New Milford*, 36 Conn. 93; *Loring v. Brodie*, 134 Mass. 453; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496; *Bank v. Irons*, 8 Fed. 1; *Bank v. Smith*, (Tex. Civ. App.) 22 S. W. 1056. The delivery of the note to Cornish by the defendant was not absolute. It was a conditional delivery, to become complete on the performance of the condition upon which the defendant's obligations to pay the note depended. While in this condition, it could not be the subject of a bona fide purchase by any one having knowledge of the facts. While that condition remained unper-

formed, Cornish could not have maintained an action upon the note, although the time for payment stipulated therein had arrived; and the bank, taking the note with full knowledge, is in no better position. The question, therefore, as to whether the right of Cornish and his associates in the land in question has lapsed, and as to whether there may be performance hereafter of their agreement, so as to make the consideration for the note good, is immaterial. There can be no recovery upon this note until the condition upon which it was given is performed. The demurrer is overruled.

HERRICK et al. v. TRIPP GIANT LEVELLER CO.¹

(Circuit Court of Appeals, First Circuit. October 12, 1893.)

No. 60.

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Objections to the form of the bill, whether original or supplemental, and to the sufficiency of the allegations thereof, cannot be taken in the appellate court for the first time.

2. PATENTS—VALIDITY—BEATING-OUT MACHINES.

The Cutcheon patent, No. 384,893, for beating out the soles of boots and shoes, is valid as to claims 1 and 3. 52 Fed. 147, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Suit by the Tripp Giant Leveller Company against George W. Herrick, Frederick W. Herrick, and George H. Herrick, doing business as George W. Herrick & Co., for infringement of letters patent No. 384,893, issued June 19, 1888, to Cutcheon & Johnson, as assignees of James C. Cutcheon. The patent, which is for a machine for beating out the soles of boots and shoes, was sustained by the court below, and infringement declared. See 52 Fed. 147, where the opinion below is reported under the title of Cutcheon et al. v. Herrick et al. Defendants appeal. Modified and affirmed.

Charles Allan Taber and Thomas W. Porter, for appellants.

Alexander P. Browne, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. The objections made by the appellants touching the form of the bill, whether supplemental or original, and those as to the sufficiency of the allegations of the bill, were not raised in the court below, and cannot be taken for the first time in this court.

The court below was right in holding that the first and third claims of the Cutcheon patent were valid, and were infringed by the machine used by the appellants; that the iron last in the appellants' machine was a mechanical equivalent for the jack of the patent; and that there was no sufficient proof that the stop mechanism of the third claim was in use by others prior to October 28, 1887,

¹Rehearing denied November 16, 1893.

the date of the application for the patent. See the opinion of the court below in *Cutcheon v. Herrick*, 52 Fed. 147.

As only the first and third claims of the patent were in controversy, the decree of the court below is to be modified so as to extend to those claims only; otherwise, the decree of the court below is affirmed, with costs.

JONATHAN MILLS MANUF'G CO. v. WHITEHURST et al.

(Circuit Court, S. D. Ohio, E. D. February 3, 1894.)

No. 631.

LACHES—PATENT SUITS—DELAY IN SETTING UP DEFENSE.

In a suit for infringement of a patent the doctrine of laches does not apply to delay short of the statutory limitation in setting up the defense that plaintiff had no right in the patent which he sues on.

In Equity. Suit by the Jonathan Mills Manufacturing Company against M. C. Whitehurst and others for infringement of letters patent No. 267,098, issued November 7, 1882, to Jonathan Mills, for an improvement in machines for bolting flour. A decree for complainant was heretofore granted. 56 Fed. 589. Heard on motion for rehearing. Granted.

Poole & Brown, for complainants.

George J. Murray, for respondents.

SAGE, District Judge (orally). This cause is before the court upon a petition for rehearing, setting forth that after the opinion was filed defendants' counsel for the first time learned that in a suit in the circuit court for the county of Wayne, state of Michigan, in chancery, it was determined that patent No. 267,098, upon which this suit is based, was the property of the George T. Smith Middlings Purifier Company, and that in fraud of its rights it had been transferred by George T. Smith, he holding the title, as its trustee, to his wife, Eliza B. Smith, and by her to Charles H. Plummer, whose executor was a defendant in said suit.

It was further determined that both said assignments were in fraud of the George T. Smith Middlings Purifier Company and its creditors, and the defendants were, by the decree in said cause, ordered to make the necessary transfers to vest the title to said patent (together with other patents, which had been by said George T. Smith fraudulently assigned) in the complainants in said suit, who were the receivers of said George T. Smith Middlings Purifier Company. It was also ordered that the decree itself should operate as an assignment, transfer, and release of all the right, title, and interest, legal or equitable, owned or claimed by said Eliza B. Smith, George T. Smith, or said Plummer, or any of them, at the time of filing the bill in said suit, to wit, August 13, 1890.

The petition for rehearing further sets forth that it appears from the assignment from Jonathan Mills to the complainant herein—that is to say, to the Jonathan Mills Manufacturing Company—

that said complainant had full notice of the rights of the George T. Smith Middlings Purifier Company at the time when it procured said George T. Smith to make the transfer of said patent to George Wardlow (Exhibit No. 11) on August 15, 1892, and also when it took from said Wardlow the transfer (Exhibit No. 12) on the 23d day of August 1892; that it also appears from the records of the patent office that prior to the assignment by said Mills to the complainant (Exhibit No. 13) he had on March 13, 1884, and February 1, 1886, assigned all his right in the patent upon which this suit is brought to the Cummer Engine Company of Cleveland, Ohio. It is set forth in the petition that none of said matters were known to defendants prior to the hearing and decision in this case, and that they were not ascertained, notwithstanding careful researches were made bearing upon the question of the title of said letters patent. Without entering upon details, it is sufficient to say that the affidavits filed in support of the petition support its averments. It is, however, objected that the defendants have been guilty of laches, whereby they should be barred. The objection is not well taken. If the facts be as set forth in the petition for rehearing, the complainants have no standing in court upon their suit for infringement, as they were bound to know. The doctrine of laches does not apply to such a case, unless the statute of limitations would be a bar. The rule is well stated in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 239, quoted with approval by Lord Blackburn in *Erlanger v. Phosphate Co.*, 3 App. Cas. 1279, as follows:

"The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted,—in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

The petition for rehearing will be granted.

CARPENTER STRAW-SEWING MACH. CO. v. SEARLE et al

(Circuit Court of Appeals, Second Circuit. February 26, 1894.)

No. 46.

1. PATENTS—REISSUES—VALIDITY.

A reissue after long delay, during which adverse equities have arisen, cannot be sustained, even if the claim is technically narrowed instead of broadened, when the original patent did not indicate, or even hint at, the invention of the reissue, as an invention, although the patentee did actually make it, but, through ignorance of its nature or other mishap, failed to describe it in the specifications. 52 Fed. 809, affirmed.

2. SAME—STRAW BRAID SEWING MACHINES.

The Hooper reissue patent, No. 10,600, for an improvement in machines for sewing straw braid, is void, as to the fifth claim, as covering an invention not disclosed in the original patent. 52 Fed. 809, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decree of the circuit court for the southern district of New York, which dismissed the appellant's bill in equity founded upon the alleged infringement of the fifth claim of reissued letters patent No. 10,600, dated May 26, 1885, to Mrs. Mary P. C. Hooper, formerly Mary P. Carpenter, assignor to the complainant, for improvements in machines for sewing straw braid. The original patent was dated January 4, 1876. The reissue was applied for on January 30, 1885.

M. B. Phillips, for complainant.

Howson & Howson, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The defenses set up in the answer, and supported by testimony, were the invalidity of the reissue, insufficiency of the description of the patented and infringed combination, lack both of novelty and of invention, and noninfringement. The circuit court held that the first defense was clearly sustained. The considerations which led to that conclusion were so fully stated by Judge Coxe, in his opinion, as to obviate the necessity of a lengthy discussion at this time. 52 Fed. 809.

The fifth claim of the reissue is as follows:

"5. The combination of the presser foot, F, the lever guide, K, carrying the presser foot, the roller guide, E, and the lip, substantially as described."

The original fifth claim omitted the words "and the lip." The statement of the invention covered by this claim, in the original specification, is as follows:

"The invention further consists in the combination of a presser foot, a lever carrying the presser foot, and a roller guide."

The same sentence is contained in the reissue, with the addition of the words "and a lip." The office, the peculiarities, and the location of the lip are scantily described in the original patent, as follows:

"Said strips of braid are introduced under a front lip, and from thence under a presser foot, F. * * * The front lip, under which the braid is introduced, the guide wheel or roller, E, and the presser foot, F, are all carried by a lever, K, pivoted at g to the work-table carrier, D," etc.

Neither the metal stock which supports the lip, nor the lip, was shown in the drawings or the model, and, as a matter of course, the lip was not referred to in the specification by letter.

The specification in the reissue is a little more definite upon the subject of the lip. The sentence which was first quoted above was modified so as to read, "The back strip of braid is introduced under a front lip," etc. The complainant asserts that this altera-

tion simply amended a defective specification, so as to show the fact that the lip is a separator, which separates the two pieces of braid in advance of the presser foot, and thereby prevents the upper strip from running beneath the guide; while the defendant asserts that the idea of separation, which confessedly is contained in the quoted words of the reissue, is a palpable departure from the intentional statement in the original that "said strips of braid are introduced under a front lip." The lip is not shown in the drawings of the reissue, which, however, were modified in the following respect: The original drawings, and the statement that the strips (both strips) were introduced under a front lip, were apparently in harmony. In the drawings of the reissue, the parts of the braids which projected beyond the table, and which were there apparently separated, were removed, and thus the inconsistency between the original drawings and the reissue was mitigated. We shall not rest a decision of the case upon the mere fact of this alteration of the reissue, but upon the broader ground that the lip, whatever its office was, had no place in the invention which was made the subject of the original fifth claim. The reissue was applied for nine years after the date of the original patent. During the first three years 107 machines were made under an arrangement with Messrs. Kelly & Gallagher. Six were used by a firm called the Carpenter Straw Sewing Machine Company, while others were licensed to manufacturers in New York, Philadelphia, Newark, and Chicago. The firm was then incorporated, but litigation ensued with Kelly & Gallagher, which, although it terminated in a compromise, resulted in crippling the ability of the patentee to make money by means of licenses, or to build new machines. In 1878 she went to England, and sold her English patent for the machine, and afterwards, for three years, the United States patent was involved in an interference with an application of one Palmer for a reissue, one of the issues relating to the original fifth claim. This interference was decided in favor of Mrs. Hooper. The Wilcox & Gibbs Company, the real defendant in this case, during the years 1879 to 1884, inclusive, made and sold machines which are claimed to be infringements of the fifth claim of the reissue.

The argument of the appellant is based, substantially, upon the alleged fact that the claim of the reissue is narrower than the corresponding claim of the original patent. It contends that, inasmuch as the combination of the fifth claim of the reissue is one of four elements, whereas the corresponding combination in the original contained three elements only, the reissued claim is for a narrower invention than that described originally, that the error in making a broad claim arose from inadvertence and mistake, and that laches in an application for a narrowed reissue creates no valid objection to its issuance. This statement presupposes that a comparison of the two patents shows that the invention of the narrowed claim is the same invention which the original patent indicated was the one which the patentee made, and which she intended to apply for and secure, for, as it is tersely stated in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, a prerequisite to a valid

reissue is "that it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original."

In this case the lip, which was vaguely described in the original patent, was a part of the machine, but was not a part of the invention for which the patentee sought a patent. It was omitted in the statement of invention, the claim, the drawings, and the model. It was referred to in the specification as an incidental detail of the mechanism, but with no hint that it formed a part of the combination in which novelty consisted. In fact, the patentee's testimony very feebly supports the idea that the original patent did not contain her own theory of her invention. After the patent was granted, she made contracts and granted licenses. She procured and sold an English patent for the same machine, and for three years was engaged in an interference in the patent office of this country, in which one of the issues related to the original fifth claim. It is impossible to suppose that, if she had an idea that the lip belonged to her invention, she should not have discovered the omission during the repeated examinations of the patent which must have become necessary in her business relations. She never discovered an omission, but when the subject of the prospective litigation with the Wilcox & Gibbs Company was being examined, the expert for the complainant discovered that the Sidney S. Turner patent, No. 94,046, dated August 24, 1869, which contained no lip, stood in the way of any valuable novelty in the fifth claim. A reissue was therefore applied for, which not only introduced the lip into the combination, but which specified, or which was designed to specify, its distinctive office and character as a separator of the two strips of braid.

Under this state of facts, there is no room for the contention that the invention described in the original patent is not the invention which the patentee sought and intended to secure. It is said, however, that the error and mistake arose from the patentee's ignorance of the state of the art, and consisted in an erroneous supposition as to the true character of her invention. The combination of the new fifth claim is said to have been an advance upon the previous art, and an invention, in that, while the Sidney S. Turner patent, No. 133,553, dated December 3, 1872, showed a "front lip performing the function of the front lip described in the Carpenter reissue, it was not combined with a guide and presser foot, so as to be with them simultaneously and yieldingly movable to and from the work table," as in the Carpenter reissue; that this arrangement was novel and beneficial, and entitled her to a patent, but that her want of knowledge of the exact prior condition of the art led to a too broad claim, and that therefore a limitation of the claim in a reissue was valid. We are not prepared to admit that, assuming that a new claim simply diminished the breadth of the original claim, the state of facts which has been described would justify limitation in a reissue, after the patent had been in existence and under repeated examination for nine years, and after individuals and the public had ac-

quired adverse equities, which would be destroyed by a reconstruction of a void claim. This case does not call for a decision of that naked question.

While in this case it is true that the fifth claim contains four elements, while its predecessor contained but three, and therefore it is, in a certain sense, a narrower claim, that statement contains but half a truth. The remaining half is that the new claim is for a different and previously unrecognized invention. As the writer has previously, in substance, said upon another reissue, the new claim was not a different mode of describing that which was specified in the original patent,—it was not a limitation and narrowing of the invention which was described therein,—but it described an independent invention, and thereby, after an unreasonable delay, the patent was in fact enlarged. If the original patent did not indicate,—much more, if it did not hint at,—the invention of the reissue, as an invention, the grant of the reissue is not justified by the fact that the patentee actually made its invention, but by some mishap omitted to describe it in the original.

In the case of *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. 38, the valuable improvements which the patentee had actually made in clock movements were not described and not claimed in his original patent, but the defect was attempted to be corrected in a reissue. The patentee's and appellant's position was that the fact that the invention of the reissue was his actual invention was shown in the original model, and therefore that the new description simply corrected a misstatement in the original specification. It is true that it was a very bald case of an invention not disclosed in the original patent, but it was also a case in which the patentee had actually made a valuable invention, which his solicitor entirely mistook and therefore failed to describe. The supreme court was not controlled by the hardship to an actual but heedless inventor, but laid down a broad and general proposition, as follows:

"There is no warrant for the view that, *ex vi termini*, what was suggested or indicated in the original specification, drawing, or patent office model is to be considered as a part of the invention intended to have been covered by the original patent, unless the court can see, from a comparison of the two patents, that the invention which the original patent was intended to cover fairly embraced the things thus suggested or indicated in the original specification, drawings, or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent."

Under this just and, in view of adverse equities, equitable construction of the statute, in regard to reissues, the fifth claim of this reissue is invalid.

The decree of the circuit court is affirmed, with costs.

BRIGGS v. CENTRAL ICE CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 47.

PATENTS—ANTICIPATION—ICE PLANERS.

In letters patent No. 367,267, granted July 26, 1887, to John N. Briggs for improvements in apparatus for planing cakes of ice, the claim was for the combination, with the cutter head and the racks directly attached thereto, of the guides for both cutter heads and racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks and the levers or arms for operating said pinions, so that the depth of the cut may be directly and positively regulated by means of the levers. *Held*, that the patent is invalid, for the combination claimed required only a modification—within the ordinary skill of a mechanic—of the device for adjusting wood planers, for which a patent was granted to T. B. Butterfield, May 17, 1859; the later patent differing from the earlier only in the omission of a feed roller, located above the cutter head, and designed to aid in moving the wood through the planing machine.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a bill filed by John N. Briggs against the Central Ice Company for the infringement of a patent. There was a decree below for defendant, (54 Fed. 376,) and complainant appealed. Decree affirmed.

Lee & Lee, (Benj. F. Lee, of counsel,) for appellant.

Waters, McLennan & Waters, (Edwin H. Brown, of counsel,) for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The learned judge who decided this cause in the court below suggested in his opinion that it was doubtful whether there was any patentable novelty in the combination of the first claim of the patent, the only claim in controversy; but he preferred to place his decision upon the ground that the claim must, in view of the prior state of the art, be limited to the combination of the precise devices of the patent, and, upon such a construction, was not infringed by the apparatus of the defendant. The claim is for a combination of devices which are designed to facilitate the adjustment of the cutter or planing tool in an ice elevator. In harvesting ice, it is desirable to remove the snow and impurities which have accumulated upon the upper surface, and it is convenient to do this after the ice has been cut into cakes, and immediately before it is to be stored in the ice house. It was customary to plane the ice, while it was upon its passage by the elevator to the storehouse, by means of cutting devices so arranged with reference to the carrying instrumentalities of the elevator that, as the cakes were presented to the planing devices, a portion of the upper surface would be removed. Prior to the application for the patent in suit, ice elevators for carrying ice in blocks upon an inclined railway to

the storehouse, and provided with cutters for planing the ice while on its passage, were well known and had been described in numerous patents. The prior patents describe several kinds of cutter-adjusting devices, consisting essentially of a cutter head, adapted to carry the planing tool, mounted above and extended over the track or guide way of the elevator, and means for raising and lowering it, so as to bring the planer in contact with the ice, graduate the depth of cut, and hold the planer to its work. The cutter-adjusting devices of the patent in suit consist of a cutter head adapted to carry the planing tool, and racks, pinions, and guide frames for adjusting and controlling the cutter head. The cutter head is a cross shaft extending over the track and arranged so that its ends will play up and down in guide frames. The guide frames are slotted standards, and there is one on either side of the track, arranged perpendicularly to the plane of the track. Attached to each end of the cutter head is a rack and pinion, and these are connected together by a cross bar. The cross bar is provided with arms or levers for operating the pinions. The racks project from the ends of the cutter head, and are controlled by the guide frames so that their teeth mesh with the pinions. Thus the standards are guides for both the cutter head and the racks. The claim is as follows:

"1. The combination, with the cutter head and the racks directly attached thereto, of the guides for both cutter head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks and the levers or arms for operating said pinions all constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, as herein specified."

Assuming that the ice elevator, although not specifically mentioned, ought to be regarded as an element of the claim, and recognizing the fact, as we must upon the proofs, that the other devices of the claim were never before assembled together in an ice elevator, nevertheless, we are of the opinion that the claim is destitute of patentable novelty. It is conceded in the patent that the ice elevator, in which the cutter-adjusting mechanism is to be used, "is of the form commonly used for raising cakes of ice to the house in which they are stored." Not only was the ice elevator old, including, of course, its mechanism for carrying the ice to the planer, but planer-adjusting devices for performing in ice elevators the functions of the adjusting devices of the patent, were also old. Of the prior patents describing different kinds of planer-adjusting devices for ice elevators, it will suffice to refer to three. The patent of 1883 to Chaplin, No. 271,220, describes the elevator of the patent in suit, and planer-adjusting devices, which consist of a cutter head arranged over the track, guided by standards on each side of the track, and controlled by a lever and weights. The cutter head, instead of being a cross shaft, like that of the patent in suit, is a rectangular frame. The standards or guides, instead of being two in number, are four in number, one at each corner of the frame. The patent of 1884 to Smith, No. 310,093, describes the elevator. It de-

scribes, as the cutter-adjusting devices, a cutter head arranged over the track, hung by pivoted arms to an outer frame, and controlled by a lever. The outer frame is mounted in slotted standards, and can be raised and lowered by bolts. The lever plays in a sector, by which it can be locked at will, to hold the cutter head rigidly in place. When the cutter head is raised and lowered by the lever, it swings on the pivoted arms. The patent of 1885 to Loring & Giles, No. 329,400, describes the elevator. Its planer-adjusting devices are a cutter head arranged over the track, attached at each side to a vertical standard, and counterbalanced by weights. The adjusting devices of the first two of these prior patents do the same work, in substantially the same way, as the adjusting devices of the patent in suit. In the Loring & Giles apparatus they work automatically, and are designed to cut a definite depth into each cake of ice. In operation, the cakes of ice raise the cutter head, and after the planer has done its work the cutter head falls by gravity to its normal position. In the Smith apparatus the range of adjustment of the devices is not as great as in the patent in suit. In the apparatus of Chaplin they are not controlled so positively as in that of the patent in suit. It cannot be disputed, and, indeed, it is obvious, that the adjusting devices of the patent are preferable to those described in any of these prior patents. They enable the operator to do his work of planing the ice with more certainty, ease, and speed. Because this is so, we reach the conclusion that the claim is invalid with reluctance. But the patentee was not the first to use the adjusting devices of the claim for the purpose of enabling a planing tool to do its work. Precisely the same combination, found in the complainant's patent, of cutter head, guides, racks, pinions, and levers, is described in a patent for a planing machine granted May 17, 1859, to T. B. Butterfield. In this machine, which is a wood planer, there is a feed roller, located in the cutter head above the planing tool, which is designed to bear against the shaving and assist in moving the piece of wood through the machine. It is obvious that this device would be unnecessary in an ice-planing machine. It could be omitted without the slightest readjustment of the other parts. If retained, it would not affect their mode of co-operation. If omitted in the Butterfield machine, its absence would not affect in the least the co-operation of the parts for the adjustment of the planing tool. All the advantages ascribable to the patented combination are due to the assembling together of an old elevator and an old cutter-adjusting mechanism. This could be affected without requiring any modification of the parts which was not an obvious one, and within the ordinary skill of the mechanic. In contemplation of law, the patentee merely transported the devices of Butterfield into the old elevator, and cut away the useless feed roller. When thus assembled together, the elevating mechanism performs no new functions, and the adjusting cutter mechanism performs precisely the functions it did in the Butterfield machine. It is wholly immaterial that the adjusting devices of Butterfield were designed to be used in a machine for planing wood. The applica-

tion of an old organism to an analogous use is not patentable. *Blake v. City and County of San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220; *Steiner Fire Extinguisher Co. v. City of Adrian*, 59 Fed. 132. It is not invention to use an old combination of devices in a new location to perform the same operations, when no changes or modifications are required to adapt it to the new use, or when only such are required as can be made by the exercise of ordinary mechanical skill. The case of *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24, is an apposite illustration of the rule.

The conclusion that the claim is invalid renders it unnecessary to consider the question of infringement, and leads to an affirmance of the decree. The decree of the circuit court is affirmed, with costs.

BUTTE CITY ST. RY. CO. v. PACIFIC CABLE RY. CO.

(Circuit Court of Appeals, Ninth Circuit. January 15, 1894.)

No. 148.

PATENTS—INVENTION—COMBINATION—TRACK BRAKE FOR CARS.

The Root patent, No. 304,863, for a track brake for railway cars, shows a patentable combination which was not anticipated by the patents for baling presses, issued to Godwin, to Patterson, and to Huntington & Carter. 52 Fed. 863, affirmed.

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Bill by the Pacific Cable Railway Company against the Butte City Street-Railway Company for infringement of letters patent No. 304,863, issued September 9, 1884, to Henry Root, for a track brake for railway cars. The circuit court sustained the patent, and declared infringement. 52 Fed. 863. Defendant appeals. Affirmed.

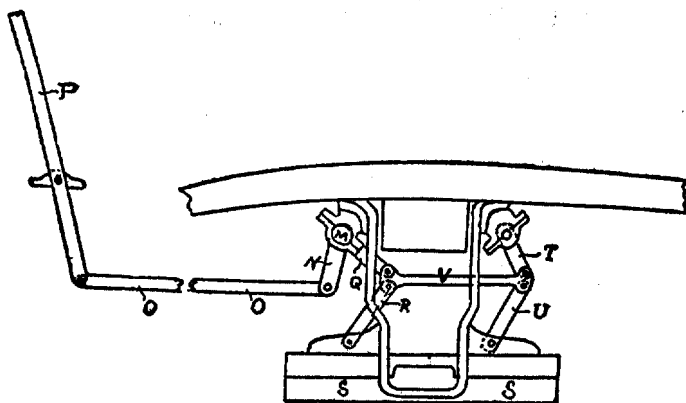
Warren Olney, (Geo. H. Knight, on the brief,) for appellant.
Wm. F. Booth, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and ROSS, District Judge.

McKENNA, Circuit Judge. This is an action for an alleged infringement of a patent for car brakes, issued to one Henry Root, and assigned to appellee. There is but one claim in the patent, and it reads as follows:

"In a car, the combination of the knee levers suspended from the truck frame, having their angles united by a connecting rod, V, the track shoes suspended from the lower ends of said levers parallel with the track, the transverse shaft, M, connected to the upper end of one pair of the levers, the crank arm, N, the connecting rod, O, and the operating lever, substantially as described."

The device is exhibited in the following cut:



The appellant contends that it is not a patentable combination. We do not think the contention is supportable. All the parts of the device operate to produce one result, and it is easily distinguishable from that claimed in *Reckendorfer v. Faber*, 92 U. S. 347, and *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66. In the former case the pencil and rubber performed different and independent things. In the latter the hinge attachment to the lantern was a substitute for a detachable fastening, and went no further.

The appellant also contends that the patented device was anticipated by a patent to one J. B. Godwin for an improvement for baling cotton, patented June 17, 1873, and a patent for baling presses to Huntington & Carter, issued May 7, 1872, and one to Patterson, issued September 25, 1883. The patent sued on has some similarity in some of its parts to the Godwin patent and the Huntington & Carter patent, but its purpose and application are different; and therefore, under the evidence in the case, and the presumptions allowed to the patent, we cannot say that it was anticipated by them. As to the Patterson patent, the court below found (and the finding appears to be sustained by the evidence) that the Root device preceded it in invention. The differences between the appellee's device and that of the appellant we do not think are substantial.

The judgment and decree of the circuit court are affirmed.

GEORGE L. THOMPSON MANUF'G CO. v. WALBRIDGE.

(Circuit Court, S. D. New York. March 7, 1894.)

1. PATENTS—INVENTION—CURLING IRONS.

There is no invention in substituting, in a curling-iron, a drawn rod for a cast rod performing the same function, or in displacing a round spring by a flat spring, which is a mere equivalent.

2. SAME.

The Thompson patent, No. 460,709, for a curling-iron is void for want of invention.

In Equity. Suit by the George L. Thompson Manufacturing Company against John H. Walbridge for infringement of a patent for a curling iron. The bill is dismissed.

Lysander Hill and C. Clarence Poole (Taylor E. Brown on the brief), for complainant.

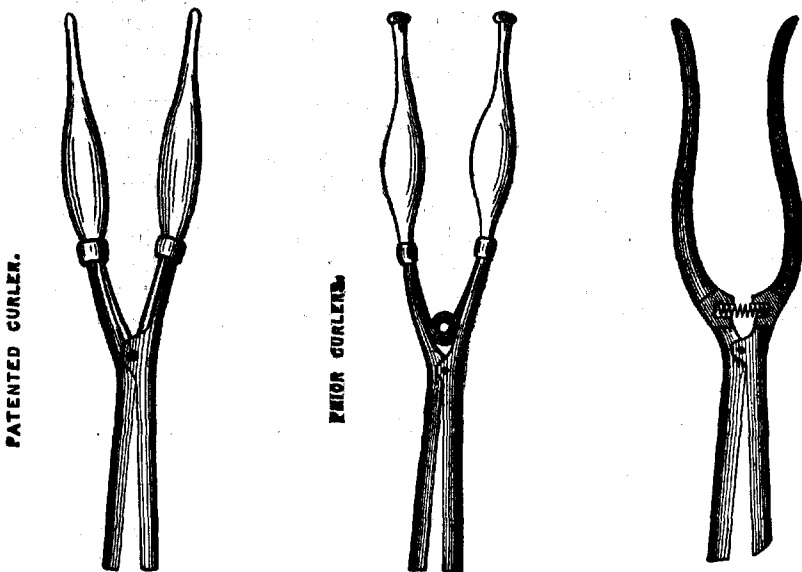
Edwin H. Brown, for defendant.

COXE, District Judge. This action is founded upon letters patent No. 460,709 granted to George L. Thompson, October 6, 1891, for a curling iron. The first claim only is involved. It is as follows:

"1. A curling-iron comprising a mandrel, a clasp pivoted thereto, said mandrel and clasp being each provided with a relatively-long outwardly-deflected shank, a plate-spring bent upon itself and secured at its ends near the rear ends of said shanks, said spring being suitably bent so as to come into contact with the said shanks only at their points of connection with the same, and handles arranged upon said shanks, substantially as described."

The second claim differs from the first only as it provides for wooden handles, and, as such handles on curling-irons were admitted to be old at the date of the patent the second claim was abandoned or withdrawn at the argument.

The defendant contends that the patent is void for lack of invention. This question can best be illustrated by comparing a diagram of the patented curler with diagrams of two curlers selected from the many similar devices shown in the prior art.



This comparison is a demonstration. After the Campbell and Bissell curlers there is not a shred of patentability left in Thompson's patent. He has substituted a plate-spring for the spiral and bent wire springs of the prior patents; but there could hardly be

a better illustration of the use of one equivalent for another. In other respects his structure is almost the exact counterpart of curlers made years before.

It is said that he was the first to use a plate-spring bent upon itself and a mandrel made of steel rod, and it is argued that their use involved invention sufficient to sustain the patent. This proposition is unfounded both in fact and in law. The answer is four-fold. First. The specification says that the rod may be "drawn, rolled or otherwise formed." The claim says nothing whatever on the subject. It is broad enough to cover any mandrel no matter how constructed. Second. There was no invention in substituting a drawn rod for a cast rod, both performing precisely the same function. Third. Thompson was not the first to use a drawn rod for a curling iron. In 1885 Hinde and Bown, both Englishmen, made curlers of steel wire. Fourth. As already seen there was no invention in the substitution of a flat spring for a round spring, but Thompson was not the first to use a flat spring. The prior art shows many instances where flat springs have been employed in similar tools to perform identically the same function. If I had a particle of doubt upon this subject the patent should have the benefit of it, but I have not.

The bill is dismissed.

CONSOLIDATED BUNGING APPARATUS CO. v. METROPOLITAN BREWING CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 49.

1. PATENTS—LIMITATION OF CLAIM.

Where "a mechanical fit valve" is one of the elements of a combination claim, the mere fact that one of the drawings and its description show a fit valve having a knife-edge bearing does not confine the claim to that form of fit valve, when there is no other reference, either in the claims or specifications, to a knife-edge bearing. 46 Fed. 288, reversed. Consolidated, etc., Co. v. Woerle, 29 Fed. 449, disapproved.

2. SAME.

In a claim covering an automatic relief apparatus for beer barrels, consisting of a fit valve in combination with a surrounding water chamber, and water therein to prevent fouling of the valve, the water cannot be considered as a separate element, and the combination consists of the two elements,—a fit valve, and a water chamber surrounding the same.

3. SAME—ANTICIPATION.

A patent for a mechanical combination is anticipated by a prior device containing the same elements, although the inventor of the latter did not describe or appreciate the advantage of using the combination in the way pointed out in the patent.

4. SAME—VALVE FOR BEER BARRELS.

The Zwietusch & Heitmann patent, No. 222,975, for an automatic pressure-relief apparatus for beer vessels, was anticipated by the Schaefer patent, No. 313,040. 46 Fed. 288, reversed.

Appeal from a final decree of the circuit court, eastern district of New York, affirming the validity of letters patent No. 222,975,

issued December 23, 1879, (application filed December 7, 1878,) to Zwietusch & Heitmann for improvement in automatic pressure-relief apparatus for beer vessels.

Edward N. Dickerson, for appellant.

Ephraim Banning, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. In the manufacture of beer it is desirable that the pressure generated within the cask by the process of fermentation should be relieved before it accumulates to such an extent as to burst the cask. This is accomplished by the use of a vent bung, or bunging apparatus, provided with a valve arranged to resist such pressure up to a certain point, and then automatically to open and allow the gas to escape. Various forms of safety valve have been invented and used for this purpose. While beer is in the fermenting stage, hop tar and other sticky substances are expelled from the cask, and this, of course, makes it desirable that the apparatus be so constructed as to provide against injurious effects from sticking or fouling of the valve. The inventors in their specification state that the object of their invention is—

"To provide an automatic pressure-relief valve, adapted to be used on fermenting casks containing beer and like material, which will not foul, and whereby the automatic action of the valve is made more certain; and our invention consists—First, in a pressure-relief apparatus provided with a mechanical fit valve surrounded by a body of water; and, secondly, in a pressure-relief apparatus having a body of water interposed between the pressure generator and a mechanical fit valve in the line of the escaping gas, and through which it passes."

Thus, as the specification states, the inventors "surround the valves with a liquid medium, preferably water, whereby the hop tar is diluted, so as not to stick the valves." The water chamber or chambers are, as complainants contend, the distinguishing feature of the patent,—the water chamber above the valve seat being the subject of the first claim; that below the valve seat, the subject of the second claim. Infringement of the first claim only is charged. That claim reads as follows:

"(1) In an automatic pressure-relief apparatus, a mechanical fit valve, in combination with a surrounding chamber, K, for containing water to prevent the valve fouling, for the purpose set forth."

The chamber, K, is so located that water placed therein will be above the valve seat. This patent was before the circuit court, northern district of Illinois, in Consolidated, etc., Co. v. Woerle, 29 Fed. 449, which construed this first claim as for a combination of the particular kind of mechanical fit valve known as a "Knife-Edge Bearing Valve," with the water chambers. The circuit judge, in the suit at bar, apparently followed this construction, for, in a brief reference to the evidence, he says no one "invented or used the combination of the knife-edge mechanical fit valve with the surrounding water chamber of this claim, prior to its invention by these patentees."

There are, as complainant's expert himself testifies, many different kinds of mechanical fit valves; the definition of that term being given by him as "a valve which fits its seat so as to close tightly by contact, and does not depend upon any liquid to form a tight joint." The drawings annexed to the specification show two modifications of the patented device. Of these the one is described as follows, (so much of the description as does not refer to the valve and its action being omitted:)

"T is a tap to enter the cask; * * * N. a T-pipe joint, having inserted in the lower end a depending pipe, P, [which, with an elbow,] enters a bulb, O. * * * Screwed into the upper end of the bulb is a short pipe, R, having a broad threaded flange, S, which serves as a support or base for the mechanism of the relief valve proper. A broad groove in flange, S, immediately surrounding the upper end of pipe, R, contains a rubber packing, a, which forms the seat of a valve, B, *having its stem made in a cross shape and having a knife-edge bearing*. Surrounding the base of the valve is a cylindrical guide, slotted so as to make a series of posts, * * * and outside of this guide lies a rubber or other annulus, b, as a packing for the lower end of a glass cylinder, H. * * * On the upper end of the valve stem is placed any desirable weight, g, to set the valve at any given pressure," etc.

The modified device is thus described:

"X is a tap; * * * a prolongation of the tap pipe, p, enters some distance into a chamber, R, formed by a metallic cylinder, 5. This cylinder has a diaphragm, 6, corresponding in construction to flange, S, in Fig. 2, and from this diaphragm depends a pipe, 7, which passes," etc.

In the last-quoted description there is no reference to a valve "stem made in a cross shape and having a knife-edge bearing," nor do the drawings therein referred to show such a structure.

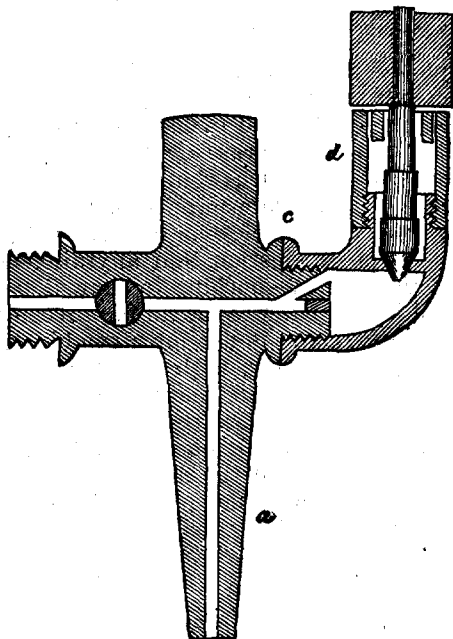
Except for the italicized phrase quoted in the first of these descriptions, there is no reference whatever in the specification to a knife-edge bearing valve. Nowhere is there pointed out any advantage arising from the use of that particular form of mechanical fit valve. There is no suggestion that anything depends upon the bearing being of this shape,—nothing to show that such a construction was regarded by the patentee as an improvement, to be covered by his patent; and the claim is not for a combination with a knife-edge bearing valve, but for one with a mechanical fit valve, which term, as has been shown, covers many other bearings besides the knife-edge. This case is, in these respects, similar to *Delemater v. Heath*, (decided by this court October 17, 1893,) 7 C. C. A. 279, 58 Fed. 414, and a construction of the first claim which will confine it to knife-edge bearing valves cannot be sustained.

The knife-edge bearing being thus disposed of, the next question to be settled is whether this first claim covers a combination of three elements, or of two. Is it for (1) a mechanical fit valve, (2) a water chamber surrounding the valve seat, and (3) water in such chamber; or, for (1) a mechanical fit valve, and (2) a chamber adapted to contain a body of water surrounding the valve seat, without special regard to whether water be actually used in such chamber or not? Before answering this question a brief reference to the state of the art is desirable. Several varieties of vent bungs and bunging apparatus have been put in evidence, and considerable testimony given

as to the manner in which they were used, with the customary conflict as to dates. It is unnecessary, however, to refer to the entire body of proof. A single alleged anticipation will be sufficient for the purpose of this decision. The apparatus used by defendant is made by the Schaefer Safety Valve Company, of which John C. Schaefer is vice president, under a patent (No. 318,040) for safety valve for beer casks, taken out by him in 1885. It presents the combination of a mechanical fit valve with a chamber, surrounding the valve seat, for containing water or other lubricant. Schaefer has for many years been experimenting with vent bungs, or safety valves for beer casks, manufacturing, and selling them. In 1872 he was manufacturing a safety faucet, which is described in a publication known as "Der Amerikanische Bier Brauer," issue of June 1, 1872. The evidence abundantly shows that such faucets were made, sold, and used, and one of them is an exhibit in the case. It contains the combination of a mechanical fit valve with a chamber above and surrounding the valve seat. The annexed cut illustrates the apparatus better than a written description would:

DEFENDANT'S EXHIBIT.

Schaefer Valve, American Bier Brauer, 1872, as Made up to 1874.



Whether this form of safety valve was used, with water introduced above the valve seat, prior to the date of complainant's invention, is a matter of contention between the parties; but, whatever uncertainty there may be as to the date, the evidence leaves no doubt that it is capable of such use. Witnesses, who themselves repeatedly in-

roduced water into the chamber, have so testified, and actual experiment with the exhibit before this court shows that when the valve is closed, even though the stem, S, be unweighted, and water is poured into the apertures, x, x, in the top of the screw cap, d, it will remain for an indefinite time within the chamber, W. Manifestly, therefore, if the first claim of the patent is for a combination of two elements,—viz. the mechanical fit valve and the chamber adapted to contain water,—it is anticipated by this Schaefer valve of 1872. It is no doubt true that the chamber in the Schaefer valve of 1872 was not intentionally contrived for the express purpose of holding water. It is highly improbable that, had Schaefer appreciated the importance of introducing water, he would have neglected to refer to such mode of use, either in the description he gave to the publisher of the Bier Brauer, or in a subsequent patent which he took out in 1879 for a modified form of a similar combination. But, with whatever intent the chamber above the valve seat was constructed, once it was combined with the other parts, there was formed a complete combination of mechanical fit valve and chamber adapted for containing water,—a mechanical combination in no way altered by the manner in which such combination is used. When the complainant's assignors,—assuming, for the purposes of the argument, that they were the first to intelligently appreciate the importance of lubricating the valve seat, and that there was any invention involved therein,—pointed out to the world that such valves were less liable to foul, and that their automatic action would be more certain when kept constantly lubricated, what they discovered was not a new combination, but a new method or process of using an existing one. So far as they devised new apparatus for introducing the water and keeping it in situ, they might obtain a patent for such new apparatus; but the difficulty with the first claim now under consideration is that it is not restricted to such new apparatus. It is broad enough to cover the very Schaefer valve of 1872, with its simple combination of a mechanical fit valve and a chamber, in which the lubricant may be contained, above the valve seat. As thus construed, the claim is too broad, and cannot be sustained. And, in our opinion, it cannot be construed as a claim of three elements. The apparatus is the same apparatus, whether water is used in it or not. The method of use does not change it, and an inventor who employs a new process of using it does not thereby invent a new apparatus. Upon the construction contended for by complainant, the manufacturer and seller of the apparatus would not infringe, in the absence of an understanding and intent that water shall be supplied by another, as neither puts water in the chamber. The only relief the patentee could obtain would be against the user who did avail himself of the process of lubricating the valve when in action. Whether or not the complainant's assignors were the first to discover and disclose to the world the desirability of keeping the safety valves of beer casks constantly lubricated above the valve seat, they made no claim, and, so far as the record shows, took out no patent for that process. Their patent for an apparatus must be

construed as a patent for the mechanical combination, irrespective of its method of use, and, as the only mechanical combination pointed out in the first claim was old, such claim cannot be sustained.

The decree of the circuit court is reversed, and cause remanded, with instructions to dismiss the bill, with costs of both courts.

BRICKILL et al. v. MAYOR, ETC., OF BALTIMORE.¹

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 56.

1. PATENTS—INFRINGEMENT—DAMAGES—ABSENCE OF LICENSE FEE.

Where there is no evidence to show that any license fee has ever been paid or demanded, the jury, in estimating the damages, should consider the utility and advantage to the defendant of the use of the patented device, as compared with any other means of obtaining similar results whose use was open to it, and may compare the cost of using the one to the cost and saving in the use of the other.

2. TRIAL—INSTRUCTIONS—DAMAGES.

After correctly instructing as to the evidence to be considered in estimating damages, it is proper to refuse instructions which characterize certain parts of such evidence as "important," "material," and "controlling."

In Error to the Circuit Court of the United States for the District of Maryland.

At Law. Action by William A. Brickill, Peter M. Kafer, James M. De Lacey, James E. Dunn, Rosina W. Da Cumba, and Edward Van Orden against the mayor and city council of Baltimore, for infringement of letters patent issued to William A. Brickill. Judgment of the court below affirmed.

For opinions delivered below upon demurrer to the declaration, and also on demurrer to a plea of the statute of limitations, see 50 Fed. 274, and 52 Fed. 737.

Raphael J. Moses, Jr., for plaintiffs in error.

Thomas G. Hayes, for defendants in error.

Before GOFF, Circuit Judge, and SEYMOUR and SIMONTON, District Judges.

GOFF, Circuit Judge. This was an action at law for the infringement of letters patent issued to William A. Brickill August 18, 1868, for "improvement in feed-water heaters for steam fire engines." The cause was tried before a jury, and a verdict rendered February 18, 1893, for the plaintiffs, for two cents damages. Plaintiffs moved for a new trial, which the court refused, and entered judgment for the damages so found and the costs. The case comes to this court on writ of error to the circuit court of the United States for the district of Maryland. Plaintiffs in error insist that the court below erred in refusing to give to the jury

¹ Rehearing denied, February 17, 1894.

certain instructions asked for by them, and in charging the jury as to the law applicable to the case before it. No exception was taken to the action of the court in giving the instruction asked for by defendants. A large number of witnesses were examined by both plaintiffs and defendants below, and their evidence was considered by the jury, and made part of the several bills of exceptions taken by the plaintiffs below. The plaintiffs claimed damages for the use by defendants, for a number of years, of the heating apparatus patented to Brickill, which was claimed to be substantially a coil of pipe detachably connected at both ends with the boiler of a steam fire engine, one end above the other, placed below the engine, and heated by a coal fire in a stove near by. The object was to keep the water in the boiler of the engine hot, so that the steam fire engine could be used on short notice. The plaintiffs' evidence tended to prove that there was no established license fee for the use of said patent, and that a certain sum of money had been saved to the defendants by the use of plaintiffs' combination. The plaintiffs then claimed that in establishing the value of said use, and the extent of the same by defendants, they had shown the amount of actual damages they had sustained, and that the court should have instructed the jury to render a verdict for the plaintiffs in a sum at least equal to that amount. The defendants claimed, and offered evidence tending to prove, that they never made nor used the contrivance patented by Brickill, which it was claimed by them was useless and without utility; also, that a feed water heater to maintain the water in the boilers of the steam fire engines used by defendants was not essential to the successful operation and efficiency of the engines; and that, if there had been any saving to defendants by the use of the heating apparatus on defendants' fire engines, it was due, not to the patent claimed by plaintiffs, but to certain improvements thereon, as made and found in the patents of Rodgers, Codd, Gould, and Sutton. On issues so made, and on evidence tending so to prove, the case went to the jury, and it found virtually in favor of the contention of defendants. The jury believed the evidence so offered by defendants, and so it only found nominal damages for plaintiffs. The court that heard the evidence refused to set the verdict aside. The following instructions, given by the court at the request of defendants, to which the plaintiffs did not except, justified the finding of the jury, if it found the facts to be as claimed by defendants:

"The court instructs the jury that the Brickill patent, as construed by the court, is broadly for a circulating heater, connected with detachable connections with a boiler of a steam fire engine; and if the jury should find that the Brickill patent had utility, and possessed novelty and patentable invention, and that the defendant has infringed said patent, then the jury, in considering the question of profits, if any, made by the defendant in the use of the heaters testified to in this cause, if they should find that the heaters used by the defendant contained Brickill's invention, with an improvement on the same, and that the utility of the Brickill invention was increased by said improvement, and that the profits made by the defendant in the use of said heaters was attributable entirely or partly to the said im-

provement, then, in arriving at such profits, the jury are not to consider the profits, if any, made by the defendant, from the use of the improvement, as distinct from the Brickill invention."

Plaintiffs in error insist that the court below erred in refusing to give the following instructions, asked for by them, as set forth in their bills of exceptions:

"The jury are further instructed that, if they shall find in favor of the plaintiffs, then the damages to which the plaintiffs are entitled is such a sum as will compensate them for the injury which they have sustained by the infringement, and the jury may consider the fact that the defendant chose to make and use the patented combination as evidence from which they may find that the defendant regarded the invention as of value to it; and, in the absence of an established license fee, the main and controlling evidence to be considered by the jury in determining the actual damages of the plaintiffs caused by the infringement will be the saving of the defendant by the use of the patented invention over what it would have cost to have used any other device or method for accomplishing a similar and an equally beneficial result, which was open to the defendant to use at the date of the patent."

"The jury are further instructed that, if they find on the first prayer in favor of the plaintiffs, then the plaintiffs are entitled to recover an amount which will compensate them for the injury to which they have been subjected by the infringement; and the fact that the defendant chose to make and use the patented combination is evidence that it regarded the invention as a valuable one; and, in the absence of an established license fee, an important and strongly controlling element by which to determine the plaintiffs' loss is the profits or saving of the defendant by the use of the patented device over the cost of using any other device which was open to it to use, and which would have produced a substantially equal beneficial result, and may also consider legal interest on such sum so found from the date at which they shall find it should have been paid had defendant purchased the right to use the Brickill patent in its several engine houses, instead of unlawfully appropriating it, if they find such appropriation."

"The jury are further instructed that, if they find on the first prayer in favor of the plaintiffs, then the plaintiffs are entitled to recover an amount which will compensate them for the injury to which they have been subjected by the infringement, and the fact that the defendant chose to make and use the patented combination is evidence that it regarded the invention as a valuable one; and, in absence of an established license fee, an important element by which to determine the plaintiffs' loss, and what sum of money should be awarded the plaintiff in this case to be paid to him by the defendant as damages for the use of his patent, is the profit or saving of the defendant by the use of the patented device over the cost of any other device that was open to it to use, and which would have produced a substantially equally beneficial result; and, if the jury further find that the plaintiffs have presented all the evidence on the question of damages which could reasonably be expected of them, and the defendant offers no evidence on the subject, then the jury are to estimate the damages on the evidence before them, and, in making such an estimate, the jury ought to resolve every point of uncertainty against the defendant."

"The jury are further instructed that if they shall find from the evidence that the use of some method of maintaining the water in the engines at a boiling temperature was a necessity to the defendant, and shall further find that, after numerous experiments, the only two practical methods of accomplishing this result were by burning a gas fire, either in the fire box of the engine or under a coil attached to the side thereof, and the Brickill method, and the defendant has used the Brickill method without license, then, if you find the patent valid, you may consider the difference in cost between heating the water with gas and by the Brickill method as a main, if not controlling, evidence of the loss of the plaintiffs."

"The jury are instructed that if they find for the plaintiffs that the plaintiffs' patent is valid, and that it has been infringed, then they are enti-

tled to the actual damages which the plaintiffs have sustained; and, in arriving at the actual damages the plaintiffs have sustained, they shall take, at least, the amount of saving which the defendant has made by the use of the patented invention over other methods open to the defendant to use for the same purpose at the date of the patent, or such subsequent improvements made during the period of the infringement as do not infringe on the plaintiffs' patent."

In considering these rejected instructions, relating to the question of damages, it is proper to refer to the prayer given by the court at instance of the plaintiffs on the same subject, which reads as follows:

"The jury are further instructed that, if they find in favor of the plaintiffs, then the damages to which the plaintiffs are entitled is such a sum as will compensate them for the injury which they have sustained by the infringement, and the jury may consider the fact that the defendant chose to make and use the patented combination as evidence from which they may find that the defendant regarded the invention as of value to it; and, in the absence of an established license fee, the jury should consider what pecuniary advantage and saving there was to the defendant in using the plaintiffs' patented contrivance over the cost of using any other device open to it, to use which would have produced an equally beneficial result, in order to enable them to ascertain what would be a fair compensation to the plaintiffs for the injury to them by the infringement of their patent."

Also the court's charge on that point, in these words:

"This is an action at law for the damages sustained by the plaintiffs for the alleged infringement, and in such actions, when there has been proved an established royalty or license fee, which has been customarily paid to the owner of the patent by those who desired to use it, such regular price for a license is the primary and true criterion of the plaintiffs' damage; but in this case there is no evidence of any license fee ever having been demanded or paid by any one; and so, if you find in favor of the plaintiffs, you should consider the utility and advantage to the defendant of the use of the patented device, as compared to any other means of obtaining similar results which were open to the defendant to use, and you may consider the cost of using one as compared with the cost and savings to the defendant of using the other; and from these data, if proven to you, you should ascertain, in the exercise of a sound judgment, what would be a fair compensation to the plaintiffs for the damage which they have sustained by reason of the defendant having infringed, instead of having purchased the right to use, the invention."

The plaintiffs correctly presented in their prayer, as given by the court, the law relating to the question of damages applicable to the case then before the jury; and this was supplemented by the court's charge, amplifying the same, and alluding to the facts as presented by the evidence, as well as the character of the action the plaintiffs had instituted. This, under all the circumstances of the case, we think, was eminently proper, and we hold that the plaintiffs' exceptions to the charge of the court were not well taken. The rule now well established, relative to the question of damages, in cases of this kind, was properly given by the court to the jury. The case was at least an unusual one, the evidence showing that the plaintiffs had never established a license fee for the use of, nor had they ever made or sold one of, their patented machines. The difficulty consisted in determining the damages due, if any, or in applying the facts of the case to the rule for the

measure of damages; and this was the duty of the jury, in the discharge of which they found merely nominal damages. The supreme court of the United States, in the case of *Suffolk Co. v. Hayden*, 3 Wall. 315, 320, says:

"This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment, both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention and the extent of the use by the infringer, a jury will be in possession of material and controlling facts, that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss, to the patentee or owner by the piracy, instead of the purchase of the use, of the invention."

In this case of *Suffolk Co. v. Hayden*, the court below, in its charge to the jury, used the following language, which the supreme court approved:

"Then you will look at the value of the thing used, and ascertain that value by all the evidence as to its character, operation, and effect. You will take into view the value of that which the defendants have used belonging to the plaintiff, to aid you in forming a judgment of the actual damage the plaintiff has sustained."

In the case of *Sessions v. Romadka*, 145 U. S. 29-45, 12 Sup. Ct. 799, Mr. Justice Brown, in delivering the opinion of the court, said:

"This court has, however, repeatedly held that, in estimating damages in the absence of a royalty, it is proper to consider the savings of the defendant in the use of the patented device over what was known and in general use for the same purpose anterior to the date of the patent. Thus, in *Mowry v. Whitney*, 14 Wall. 620, 649, it was said by Mr. Justice Story that 'it is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account.'"

The language used by the court below, in the charge to the jury, was in substance the same as that employed by the supreme court in like cases, and is free from error. Nor do we think that the court erred in rejecting the prayers submitted by plaintiffs in error, hereinbefore quoted in full. It will be well to consider in connection with these rejected prayers the following portion of the court's charge:

"In this case the owners of the patent never attempted either to manufacture the heaters themselves, or to license any one else to make, so far as the evidence discloses, and sell them. This is an action at law for the damages sustained by the plaintiffs for the alleged infringement; and in such actions, when there has been proved an established royalty or license fee, which has been customarily paid to the owner of the patent by those who desired to use it, such regular price for a license is the primary and true criterion of the plaintiffs' damage; but in this case there is no evidence of any license fee ever having been demanded or paid by any one; and if so, if you find in favor of the plaintiffs, you should consider the utility and advantages to the defendant of the use of the patented device, as compared to any other means of obtaining similar results which were open to the defendant to use, and you may consider the cost of using one as compared with the cost and savings to the defendant of using the other; and from these data, if proven to you, you should ascertain, in the exercise of a sound

judgment, what would be a fair compensation to the plaintiffs for the damage which they have sustained by reason of the defendant having infringed, instead of having purchased, the right to use the invention."

The instruction given at the request of plaintiffs in error is in substance the same as the rejected prayers, except that in the latter the claim was made that the court should advise the jury that it was to regard certain parts of the evidence as of a character that was to be considered "important," "main," "material," and "controlling." That the jury was fully advised as to the weight it should give the evidence, and that the plaintiffs in error have no valid ground for complaint relative thereto, is shown by the extract from the charge of the court that we have just called attention to. It was the province of the jury to find the actual damages, if any, that the plaintiffs below had suffered on account of the use by defendants of the patent, as claimed by plaintiffs; and in so finding it was their duty to consider all the evidence relating to that question. Keeping in view the character of the evidence before the jury, to which we have heretofore alluded, and considering the instructions given, as also the court's charge, we are of the opinion that the said prayers were properly rejected.

We find no error in the judgment of the court below, and it is affirmed.

ALASKA PACKERS' ASS'N v. ALASKA IMP. CO.

(Circuit Court, N. D. California. January 29, 1894.)

1. TRADE-MARK—INFRINGEMENT—DEFENSES—FALSE STATEMENTS BY ASSIGNEE.

Where a trade-mark is a mark of special qualities, due to superior material, processes, skill, and care exercised by the originator thereof, an assignee of the business, who continues to use labels which contain the false statement that the goods are prepared by the originator, is not entitled to relief against an infringer.

2. SAME—CORRECTING FALSE STATEMENTS.

Correcting false statements after the suit is filed, by attaching an additional explanatory label to the goods then being sold, does not help the case of one who, because of such false statements, had no right to relief at the time the suit was filed.

In Equity. Suit by the Alaska Packers' Association against the Alaska Improvement Company for infringement of a trade-mark. Order to show cause why a preliminary injunction should not issue. Injunction denied.

Estee & Miller, for complainant.

Daniel Titus, for respondent.

McKENNA, Circuit Judge. This is an action for the infringement of a trade-mark. The plaintiff is the assignee of the Aleutian Islands Fishing & Mining Company, who has established a station for canning salmon and other fish on the island of Kodiak, Alaska. The bill alleges that said Aleutian Islands Fishing & Mining Company used only the best quality of salmon, employed the best machinery, appliances, processes, and exercised great care, skill, and

expertness in processing and packing said salmon, and putting on the market canned salmon of the best known quality and value, and the same acquired a high reputation as such throughout the various markets of the world, and said company sold many millions of said salmon so prepared and packed, and built up and secured a large, extensive, and remunerative business therein, which was of great value. And it is further alleged that, in order to designate the origin and ownership of the canned salmon so prepared and packed as aforesaid, and to distinguish the same from the canned salmon of all other packers and dealers, said company adopted and appropriated to its exclusive use as a trade-mark for its canned salmon a certain label or brand, a copy of which is attached to the bill. That said label was printed at a large cost and pasted to the cans containing the salmon, and said company sold many millions of cans of said salmon in trade and commerce with foreign nations, each of which had such label attached, and that said salmon became well known throughout the markets of the world as the "Kodiak Brand," and as such were recognized and known to dealers as the canned salmon of said Aleutian Islands Fishing & Mining Company. That said label was duly registered in the patent office. That said company leased its properties to complainant, with all their appurtenances, and assigned the good will of said business, labels, brands, trade-marks, and copyrights, and complainant has since conducted said business. That defendant is using a label and brand in imitation of complainant's label and brand.

The label used by complainant contains the following statement: "Packed at Karluk, Kodiak Island, Alaska, by the Aleutian Islands Fishing & Mining Company, San Francisco, California."

The defendant contends, among other things, that this statement is false, and that complainant therefore is not entitled to relief in equity. As I think this is true, it will not be necessary to consider the other points made by respondent. See *Hazard v. Caswell*, 93 N. Y. 268; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Symonds v. Jones*, 82 Me. 302.¹ The complainant does not contest the point that, if the representations of the label are false, equity will not relieve against its imitation, but urges that an assignee must state in his labels that he is assignee only "where," to quote from counsel's brief, "the reputation and value of the article to which the mark is attached is due to some peculiar, personal, individual skill or genius of the originator of the mark; but in the case of an ordinary article of manufacture, which one manufacturer can make as well as another, where the entire plant is transferred to another, together with the good will, trade-marks, and all its assets, a continuation in the use of the old trade-marks at the old place, is nothing more than a representation that the goods are the product of the old factory, and are of the same quality as before."

The allegations of the bill bring complainant within the admission. It alleges, as we have seen, not only that the best salmon, machinery, and processes are used, but care, skill, and expertness

¹ 19 Atl. 820.

in processes and packing were exercised which gave the salmon a high reputation throughout the markets of the world, and that the label or brand designated the origin and ownership of the salmon, and distinguished the same from the canned salmon of all other packers. It was a mark, therefore, of special qualities, exercised by the Aleutian Islands Fishing & Mining Company, which distinguished its products from the products of other packers,—any old or any new packers. To correct the misstatement of the label, complainant, since the commencement of the action, has attached a circular label to the top of the can, stating that the salmon is packed by it as assignee of the Aleutian Islands Fishing & Mining Company. I do not think this cures the defect of the original label. It is the facts which existed before the suit was brought which make the cause of action, and entitle to relief.

THE ECLIPSE.

ANDERSON et al. v. MARTIAL et al.

(Circuit Court of Appeals, Ninth Circuit. July 17, 1893.)

No. 100.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel by Thomas Martial and others against the ship Eclipse (Andrew Anderson and others, claimants) for balance of seamen's wages. Decree for libelants. 53 Fed. 273. Claimants appeal. Affirmed.

S. Bloom, for appellants.

H. W. Hutton, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. The facts of this case are fully and clearly stated in the opinion of the learned judge of the lower court, (reported in 53 Fed. 273). In his reasoning and conclusions we concur, and therefore adopt his opinion as the opinion of this court.

The decree of the district court is affirmed.

STEEL et al. v. McNEIL.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 163.

SHIPPING—INJURY TO STEVEDORE'S EMPLOYE—DEFECTIVE APPARATUS.

A ship is liable for injuries caused to a stevedore's employe by the slipping of the pin from the eye of a shackle furnished and rigged by the crew, because of defects therein noticed and pointed out to the mate

by one of the stevedore's men, although the shackle was so rigged while the heavy hoisting apparatus prepared by the ship was being exchanged for a lighter gear insisted upon by the stevedore, and arranged in a manner directed by him; it appearing that such arrangement required no unusual strength of materials, and that the substitution was not unreasonable, in view of the fact that the original apparatus was much heavier and more cumbersome to handle than was required by the work in hand. 56 Fed. 241, affirmed.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel filed by Hugh McNeil against the steamship Para, of which Steel, Young & Co. are claimants, to recover damages for injuries sustained while working on board as one of a stevedore's gang. There was a decree in his favor for \$5,000, (56 Fed. 241,) and the claimants appeal.

This is an appeal from the decision of the district court for the eastern district of Louisiana in a suit in admiralty brought against the steamship Para for personal injury received by libellant while working on board that vessel, in a stevedore gang, discharging cargo, and alleged to have been caused by the defect and insufficiency of a shackle,—one of the appliances furnished by the ship for the performance of such labor. The ship arrived at the wharf in New Orleans on the morning of July 2, 1890, at about 1 o'clock. Arrangements had been made with a stevedore—whose foreman, with his men, were at the wharf upon arrival—to receive her, and prepare for discharging cargo. There is a conflict of testimony whether or not there was any derrick or boom up at the time of her arrival, for hoisting the cargo; the witnesses for the vessel claiming that the vessel was fully rigged for that purpose, with iron blocks, and a chain fall passing through an iron hoisting block at the end of the boom, thence to a leading block (also iron) made fast to the mast, thence to the winch, while the witnesses for libellant state that no such apparatus was rigged, but that the boom was lying on the iron rests. The rigging arranged that way, whether up or not, was not satisfactory to the stevedore, as it required an extra hand at the guy to haul each sling load of cargo over the vessel's side as it was hoisted from the hold, and was a heavy gear fitted for hoisting several tons, while the cargo to be discharged was light; and he insisted upon having the hoisting gear rigged with a rope fall leading from the winch through a block at the mast, thence through one made fast to a ring bolt in the starboard side of the deck, thence to the hoisting block at the head of the derrick. The effect of this arrangement was to permit the cargo, when hoisted from the hold, to swing to the starboard side by its own weight, and the slacking of the guy on the port side. In putting up this hoisting gear, the stevedore furnished the large blocks, but the ship furnished the guys, falls, shackles, winch, and all other materials. The putting up, rigging, and getting all the gear ready was done by the ship's boatswain and crew, under charge of the chief officer or first mate. In doing this it was necessary to use a shackle at the heel of the derrick or boom to secure the block through which the rope passed to the mast. This shackle was furnished by the ship, put in place by the boatswain and two of the crew. It was a shackle with a pin which passed through an eye at one side, and was supposed to screw firmly into a socket in the other. The libellant was winchman, and, when at work, stood a few feet from the heel of the derrick, nearly in a line between the winch and the block upon the starboard side. Upon the afternoon of the second day the pin of the shackle worked loose, the shackle spread so that the block became free, flew, and struck libellant on the head, fracturing his skull, breaking his collar bone, and causing other injuries of a serious and permanent character. Upon a hearing in the court below, a judgment was given for libellant in the sum of \$5,000, from which decree an appeal has been taken by claimants of the vessel.

J. McConnell & Son, for claimants.

Henry L. Lazarus and Peter Stifft, for libelant.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) The law is too well established to require argument that a vessel is bound to furnish rigging and appliances reasonably safe for the use of those employed in receiving or discharging her cargo, although they may be in the immediate employ and pay of the stevedore, and that an action in rem will lie for damages arising from defects and imperfections in such appliances furnished, whenever the defect was such that a careful examination at the time could have detected it. *The Carolina*, 30 Fed. 199; *The Rheola*, 19 Fed. 926; *The William Branfoot*, 48 Fed. 914; *The Protos*, Id. 919; *The Serapis*, 49 Fed. 393.

In this case, it is not disputed that the shackle which finally gave way was furnished by the steamship, and was put in its place, and fitted and prepared for use, by its crew; but it is claimed in defense that it was in good condition when furnished and delivered to the stevedore's gang, and that it was through their neglect that it was permitted to give way. It is also claimed that the manner of rigging the hoisting apparatus as insisted upon by the stevedore brought an unusual strain upon the shackle, that caused it to give way, and that on account of such arrangement the course of the block which struck the libelant was changed from what it would have been, so that he was injured, when otherwise he would not have been, even had the shackle parted with a different manner of rigging. The testimony as to whether the usual hoisting rigging of the ship was in place upon her arrival, and so tendered to the stevedore, is conflicting; the officers of the ship stating that it was, but some of them modifying their statements by saying that it generally was rigged before coming into port, or was usually so, while the stevedore's men deny that the rigging was up, but declare the derrick boom was resting upon the stand. But we do not consider this an important question in the case. It is clearly shown that the manner of rigging was at the request of the stevedore, and was insisted upon by his men. It appears that the second mate protested against the change, but, when told that they would go to the captain and get an order to have it done, he yielded. We do not consider that the stevedore and those working under him assume the risk of any imperfect or faulty appliance which was furnished by the ship because arranged in a peculiar manner insisted upon by him, when such manner is not unreasonable, nor requiring unusual and extraordinary strength of material. It is strongly contended that, had not this manner of rigging been adopted, this disaster would not have occurred; and with equal force may it be urged that it would not have occurred, had hand or horse power been used for hoisting, instead of steam. But that cannot, we consider, relieve the vessel from the responsibility

of furnishing reasonably good and sufficient means to perform the work. The testimony is that the rigging tendered by the ship was a chain and iron blocks, heavy, and capable of hoisting from three to four tons. The cargo to be discharged demanded no greater strength at any time than sufficient to hoist about 800 pounds. The stevedore said that he wanted a lighter rigging, and we do not consider it unreasonable for him to endeavor to avoid, if possible, the swinging of the heavy derrick and chain rigging back and forth by hand, and unnecessarily using the chain hoisting fall in the hold. In regard to the condition of the shackle when furnished by the ship, it is in testimony that its appearance was such before they went to work that it attracted the attention of one of the stevedore's men,—the derrick man in charge of the hatch,—who spoke to the mate about it, and complained that the bolt of the shackle did not go through, but that the mate examined it, and said that it was all right,—to go ahead,—and that after they had been at work he again remarked that it looked as if the bolt was drawing out, but that the mate again assured him that it was all right. There is nothing to deny or contradict these statements, although the mate says that he saw the shackle properly screwed in; and, in the light of future occurrences, we must consider that there was at that time some defect, which, although not enough to justify one in refusing to work, should have been recognized, had a more careful scrutiny, and been corrected.

From the testimony in the case, and the appearance of the shackle as presented, it is plain that there was a defect in the threads of the screw of the shackle bolt, which permitted it to work loose, and that the strain upon the bolt when the end had escaped from the socket was sufficient to twist it into its present shape. It is impossible for us to arrive at any other conclusion, from an examination of it. Nor do we consider that there was any extraordinary, unusual, or unreasonable strain brought to bear upon the shackle by the manner of rigging insisted upon by the stevedore, which in any way contributed to the negligence which caused the damage. The shackle is shown to have been capable, in its perfect condition, of sustaining certainly many times as much weight as was put upon it at any time during this service. The only additional strain that could have been caused by using it with three blocks, instead of two, was the increased friction of the extra leading block, and the variation of the direction of the strain from directly aft was but a few degrees to the starboard, as is plainly shown in the photograph in evidence. Neither of these conditions, it is believed, could have been sufficient to cause the pin to work out, with the strain that was upon it, had it been securely and completely screwed into its place. If it were screwed in, as is stated in the testimony, with a marline spike, the subsequent events conclusively show, we consider, that there must have been at that time some obstacle which prevented its being screwed well home, as it should have been.

Questions of fact, in admiralty, cannot, at all times, be determined beyond a possibility of doubt; but in this case we consider, by a careful examination of the shackle and the photographs of the hoisting gear, as presented, and the entire testimony in the case, that the probabilities, beyond a reasonable doubt, are that the spread of the shackle was so great, either on account of the thickness of the eye on the mast hoop to which the shackle was made fast, or some other cause, that the pin was insufficient in length for its thread to hold firmly in the socket, where it was intended. In the photograph presented, the shackle bolt distinctly appears, projecting some distance beyond the socket in which it is firmly held. Had there been such a bolt to this shackle, we are confident no disaster would have happened. It is contended that there was a jerking motion caused by the third block which tended to loosen the pin of the shackle. The entire force of the hoisting gear came from the winch, and such force producing the strain could have been no more irregular, uneven, or jerking with three blocks than with the two. The manner of rigging appears to be, under the circumstances found in this case, one usual and customary in this port, and a more rapid and economical way of discharging cargoes; and we find no ground for considering it unreasonable, or requiring extraordinary or unusual strength in the appliances used. No disaster resulted from the same manner of rigging at any of the other hatches, nor would there have been here, had not the pin withdrawn from the socket into which it should have been more securely fastened. The testimony shows that at first there was an appearance of an insufficient security of the bolt; and its final coming out, and permitting the escape of the block, shows that such appearance was not without foundation. Whether or not the block would have struck the winchman, had the appliances given way with some different manner of arrangement, we do not consider has any weight in this case. The shackle was furnished, fitted, and arranged by the ship, and, after a small amount of ordinary service, gave way. There was no latent or hidden defect, or sudden and unforeseen breaking, as of a rope or hook apparently sound, strong, and sufficient; and the prima facie case made for the libellant we do not consider has been at all overcome or explained away by the evidence for appellant. It is certain that, had there been no defect in the shackle in question, or in the manner of its being made fast, the damage which we are considering would not have been caused. In furnishing such defective appliance, or so insecurely fastening it, there must have been such negligence as should make the vessel liable.

We have examined and considered the testimony as to the former and present condition of the libellant, his ability to earn a livelihood previous to the injury and since, and do not consider the damages allowed by the court below unreasonable nor excessive. But it appears that for a long time after filing the libel there was no prosecution of the suit, taking of testimony, or seeking for a trial, and we do not consider that interest should be com-

puted until the decree. The judgment below should be so far amended as to allow interest from the final decree in the court below, rather than from the date of judicial demand; and in all other things the judgment of the court below should be affirmed, with costs herein, and it is so ordered.

THE MARY L. CUSHING.

KOCH et al. v. THE MARY L. CUSHING.

(District Court, S. D. New York. February 26, 1894.)

COLLISION—INEVITABLE ACCIDENT—MOORED VESSEL—INSECURE SPILE—GALE.

A ship had been for a long time moored at a wharf in a customary and apparently a safe manner, but, on the occasion of a very heavy gale, shifting to the quarter which bore most heavily upon the ship, the spile to which she was moored, and of whose insecurity she could have had no knowledge, gave way, and the ship went adrift and damaged another vessel. *Held*, that the accident was inevitable, or at least without fault of the ship.

In Admiralty. Libel for collision.

Wing, Shoudy & Putnam, for libelant.

Goodrich, Deady & Goodrich, for claimants.

BROWN, District Judge. In the heavy storm of August 24, 1893, the ship Mary L. Cushing, of 1,575 tons net register, which was moored at the Erie basin, broke adrift, and was carried against the libelant's bark, Eolus, a somewhat smaller vessel, moored on the opposite side of the slip, and caused damages, for which the above libel was filed. The steamer was made fast by an anchor chain leading forward from the hawse pipe to a spile directly ahead, and standing a little inside of the bulkhead, in line with the ship; also by two chains leading from a cavil near the fore mast through a chock a little forward of the fore rigging, and about 15 feet abaft the hawse pipe; one leading directly across the pier to a spile, and the other leading forward; she had two other fastening lines aft. The spile forward to which the hawse chain was attached, pulled out; and after that gave way, the cavil, to which the two lines through the next chock were secured, was also carried away, and then, the other lines aft. No similar accident is shown from mooring to the spile at the Erie dock in the way the Cushing was moored. She was ordered there by the harbor master, and moored in a manner that, so far as the evidence shows, no one before the accident suspected to be insufficient. No one supposed the spile was insecure, or that its situation in reference to the ship was such as made it likely to be pulled out. No usual fastening lines were omitted. By experts she was considered well moored.

It is difficult for me to see why, under such circumstances, negligence should be ascribed to the ship. She broke away in consequence of the insecurity of the spile, of which the ship could have no knowledge, in conjunction with a very high tide, and an extraordinary gale shifting to a quarter which bore most heavily upon the ship. So far as I can see, neither those in charge of the

ship, nor any persons connected with the basin, or the shipping there, apprehended any injury from lack of due fastening before the accident. She had lain moored there for four months, and apparently well moored for any gale that was to be reasonably expected.

In the case of *The Johannes*, 10 Blatchf. 478, Fed. Cas. No. 7, 332, which, upon a cursory reading, appears to be somewhat similar to this case, the sole ground on which the ship was found in fault was, that she had out no breast line forward, and consequently swayed back and forth. On examining the record in that case, I find abundant testimony that such fastening by breast lines was usual, and considered necessary. The decision of the district court was based solely upon that ground; and on that ground alone, the judgment was affirmed in the circuit court.

In the present case, besides the hawser chain, there were two breast chains out forward, one of them leading straight across in the usual way. They were both fastened to spiles on the dock, and on board the ship to the cavil. There were thus three chains forward, to hold the ship in place. There is no evidence that the cavil was defective. But after the spile gave way, it was scarcely to be expected that against such a gale the cavil alone should hold the ship. No usual precaution is shown to have been omitted; and hence, though the cases are few in which I have been led to ascribe disaster to inevitable accident, this case, I think, fairly comes within that description; at least, as appears to me, she was without fault. *The Morning Light*, 2 Wall. 550; *The Grace Girdler*, 7 Wall. 196, 203; *The Mabey and Cooper*, 14 Wall. 215; *The Austria*, 9 Fed. 916, 14 Fed. 298; *The Worthington and Davis*, 19 Fed. 836; *Neel v. Blythe*, 42 Fed. 457; *The Olympia*, 52 Fed. 985; *The Transfer No. 2*, 56 Fed. 313.

Libel dismissed, with costs.

THE DIMITRI DONSKOI.

THE HEIPERSHAUSEN.

THE B. T. HAVILAND.

EMPEROR OF ALL THE RUSSIAS v. THE HEIPERSHAUSEN and
THE B. T. HAVILAND.

(District Court, S. D. New York. March 1, 1894.)

1. COLLISION—ANCHORED VESSEL—LAUNCH AT END OF BOOM — LIGHTS — PROJECTION OF BOOM.

A Russian man of war, the *D. D.*, was lying at anchor in New York harbor on proper anchorage ground, and was exhibiting proper lights. Her steam launch was made fast to a boom nearly 60 feet long, projecting from the side of the ship. During the night the launch was run into and sunk by a tow which the evidence showed was in charge of defendant tugs. *Held*, that the launch was not required to exhibit a light of her own, that the projection of the boom was not unusual or unreasonable, and that the two tugs were liable for the collision.

2. COSTS AND FEES—EXPENSES OF IDENTIFYING COLLIDING VESSEL.

Expenses of identifying a colliding vessel are not warranted as an item of recovery in a collision case.

In Admiralty. Libel for collision.

Goodrich, Deady & Goodrich, for libelant.

Carpenter & Mosher, for claimants.

BROWN, District Judge. During the Columbian Naval Exhibition of June, 1893, the Russian man of war, Dimitri Donskoi, lay at anchor in the North river, off Forty-Eighth street. At about 12:15 a. m. on the morning of June 12th, while thus lying at anchor in the ebb tide, with her steam launch resting upon the water, but suspended from her boom, which projected nearly 60 feet from the ship's starboard side, and was about 16 or 17 feet above the water, the launch was struck and sunk by some tow coming down the river between the ship and the New York shore, and her boom at the same time was carried round against the captain's gig, doing that also some damage. The above libel was filed to recover for the loss, claiming that it was caused by the tow of which the Heipershausen and Haviland were in charge.

The defendants contend that the ship was not anchored in a proper place; that the projection of her boom was negligent and unjustifiable; that the launch showed no light to indicate her position; and that the identity of the tow that caused the damage is not sufficiently established.

The place of anchorage is proved by a great preponderance of evidence on the libelant's behalf, showing that she was anchored on the prescribed anchorage ground, from 700 to 900 feet from the New York shore. The ship exhibited proper lights. No rule required the launch to exhibit any additional light; nor did the boom project an unusual or unreasonable distance for such a ship, nor beyond the distance of 20 yards, which is the distance prescribed by statute for vessels passing each other. 1 Rev. St. N. Y. p. 684, § 7.

The evidence shows that the tow of the Heipershausen came down between this man of war and the New York shore at about the time when this accident happened, and that at least one of the boats in her tow came in collision with the boom and received some damage from it. In the face of this fact, and of the other testimony, neither the mere circumstance that the drifting of this tow against the chain, as charged, is not proved, nor the other slight circumstances of supposed difference, are sufficient to create a reasonable doubt that it was the Heipershausen's tow that caused the damage to the launch and the gig, in the absence of proof of any other tow coming in that passage at about the same time. I do not understand, in fact, how it was possible that the proved collision with the boom could have occurred without striking the launch also, unless the launch had been already run into and capsized by the forward boats of the same tow. It is immaterial, as regards the liability of the claimants' tugs, by which of the boats in the tow the launch or boom was struck.

Not finding any reasonable doubt as to the identity of the tow, the libelant is entitled to a decree, with a reference to compute the damages. I do not think an allowance of the expenses incurred in identifying the tow is warranted.

JACKSON & SHARP CO. v. PEARSON.

PEARSON v. LOUISVILLE SOUTHERN R. CO.

(Circuit Court, D. Kentucky. May 31, 1892.)

1. FEDERAL COURTS—JURISDICTION—CHOSE IN ACTION.

A county subscribed for stock in a railroad company, to be paid by an issue of county bonds under an act which prescribed that the bonds, when executed, "shall be deposited with the trustee, to be held in escrow and to be delivered to the said railroad company when it shall have become entitled to the same" by compliance with the prescribed conditions upon which the subscription was made. *Held*, where the bonds were withheld by the trustee, upon compliance with the conditions, that the right of the railroad company was one "to recover the contents of a chose in action" (Act Cong. Aug. 1888), and therefore, where the railroad company and the trustee are citizens of the same state, an assignee of the company cannot sue to recover the bonds in a federal court.

2. REMOVAL—LIS PENDENS—ASSIGNMENT.

A trustee filed a bill of interpleader in a state court, praying an adjudication of conflicting claims upon the part of a county and a railroad company to certain bonds. The railroad company had parted with all its interest in the subject-matter before the bill was filed, to a construction company, which had not been made a party to the suit. After the bill had been filed the construction company assigned to J. & S., citizens of another state, who were subsequently made parties to the suit by amendment. *Held*, that J. & S. were not lis pendens purchasers, and therefore entitled to have the suit removed, although there was no diversity of citizenship between the parties to the original bill.

3. SAME—CROSS BILL.

The fact that a defendant, against whom affirmative relief was sought in the state court, files a cross bill after removal to the federal court, does not change the relation in which he stood to the suit at the time of removal, and hence it is not necessary that the cause be remanded on the ground that none but defendants can remove.

4. SAME—CODEFENDANTS.

Any defendant citizen of another state from that in which the suit is brought may remove the suit to the circuit court for the proper district on the ground of local prejudice, although there are codefendants who are citizens of the same state as that in which suit is brought.

'At Law. Action by the Jackson & Sharp Company against Isaac Pearson, trustee, to recover possession of certain bonds of Mercer county, Ky., issued to pay a subscription by the county to the capital stock of the Louisville Southern Railroad Company, and deposited with defendant, to be held by him until certain conditions were complied with by said company. Defendant demurs to the petition.

In Equity. Suit brought in a court of the state of Kentucky by said Isaac Pearson, trustee, against said Louisville Southern Railroad Company and said Mercer county, to compel them to interplead, and have determined whether said bonds of the county in his possession should be delivered to the railroad company, or should be canceled. By an amended petition the Jackson & Sharp Company, plaintiff in the action at law above mentioned, and others, were made defendants. That company removed the cause to the circuit court of the United States on the ground of local prejudice. Mercer county and Pearson move to remand.

Richards, Weissinger & Baskin, for Jackson & Sharp Co.
Stone & Sudduth and J. C. Bell, for Pearson.
Humphrey & Davie, for Mercer County.

BARR, District Judge. The first-named case is submitted on demurrer to the petition, and the second on motion to remand to the state court. Both the demurrer and motion to remand raise the question of the jurisdiction of this court over the same matter, and will be disposed of together.

It appears from the petition in the first case, which was filed in this court October 31, 1891, that Mercer county subscribed \$125,000 to the capital stock of the Louisville Southern Railroad Company, and was to pay for it by 5 per cent. coupon bonds of the county. This subscription was made upon certain named conditions, and the bonds were signed and sealed by the proper authority of the county, and deposited with a trustee, to be held by him until the conditions were complied with by the railroad company. Subsequently, the trustee considered the conditions had been sufficiently complied with to allow of the delivery of \$105,000 of the bonds of the county. This was done by the trustee, with the assent of the county authorities, but \$20,000 of the bonds were retained to secure a compliance with certain other conditions of the subscription. The petition alleges that the railroad company, prior to August, 1889, had fully complied with all of the conditions of the subscription, and had offered to deliver to said county the remaining stock subscribed for by said county, but the said trustee refused to deliver said bonds. The petition further alleges that said railroad company, on the ——— day of ———, 1887, assigned and transferred, for a valuable consideration, all of its right, title, and interest in and to said bonds to the Southern Contract Company, which is a Kentucky corporation, and that said contract company, for a valuable consideration,—it being at the time the owner of said \$20,000 of bonds,—assigned and transferred to the Jackson & Sharp Company all of its right, title, and interest in said bonds; that said Jackson & Sharp Company is a corporation organized under the laws of the state of Delaware, and thus a citizen thereof. The petition further states that the defendant Pearson holds said bonds wrongfully, and has refused to deliver the same upon demand, and that he is a citizen and resident of the state of Kentucky; and prays for the recovery of said bonds, with the coupons attached, maturing after August, 1889, and for damages for the detention. The demurrer raises the question whether the plaintiff, as an assignee of the Southern Contract Company, a Kentucky corporation, can maintain this action in this court.

The third section of the act under which these bonds were issued by Mercer county provides that, if the county judge shall determine that a majority of the legal votes at the election were cast in favor of the subscription of stock to the Southern Railroad Company, he should enter an order subscribing for the county to the capital stock of the railroad company in accordance with the terms of the proposition voted on, "and he shall therefore cause to be pre-

pared and execute the negotiable bonds of such county * * * which shall be signed by him as county judge, and attested by the county clerk with his official seal affixed thereto." The fourth section of the act provided that "the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its roads through such county," etc. The submission to the vote of the voters of Mercer county had additional conditions to those prescribed by the act, and we understand from the exhibit filed with the petition that the subscription was made upon the conditions prescribed by the order of submission, and that the defendant Pearson holds these bonds in escrow until these conditions are performed. The theory of the Jackson & Sharp Company action is that, when the conditions upon which the stock was subscribed were fully performed by the railroad company, the bonds in the hands of Pearson became the legal and valid bonds of the county of Mercer, and that its right of action arose from Pearson's wrongful detention of these bonds, the title of which has vested in it by reason of the performance of the conditions of the subscription. It may be assumed, on this demurrer, that the railroad company has, as alleged, complied with all of the conditions of the county's subscription to its capital stock, and that this compliance was prior to the assignment by the contract company to plaintiff of the right to these bonds, and that plaintiff is willing and able to deliver to the county of Mercer the \$20,000 of the railroad stock. But is it not equally true that these bonds have never been issued by the county of Mercer, so as to become the binding and existing obligations of the county? If these bonds have never been delivered, and are not existing obligations to pay the money therein according to their tenor and terms, must not plaintiff's rights, whatever they may be, exist by and through the original subscription to the capital stock of the railroad company, which the contract company has assigned to the plaintiff? If these bonds had been delivered, and were subsisting obligations of the county of Mercer, then, under the case of *Deshler v. Dodge*, 16 How. 622, the citizenship of the contract company would not affect the jurisdiction of this court. In that case the supreme court sustained the jurisdiction of the circuit court, upon the ground of diverse citizenship, where a bank in Ohio transferred to a citizen of New York bank notes which had been distrained for taxes due the state of Ohio, and which were in the possession of a citizen and officer of Ohio. This decision was by a divided court, and was under the eleventh section of the act of 1789, which declared:

"Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The court say (page 631):

"It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of the opinion that this clause of the

statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for the wrongful caption or detention, and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned."

The theory of plaintiff's suit is that he is suing for the thing in specie (the coupon bonds), and for damages for their wrongful detention; but as these bonds, as a chose in action, have no legal existence, can the suit be maintained, under the decision? It is evident that these bonds, though regularly signed and sealed, and delivered in escrow to the trustee, are not the valid and binding bonds of the county until the conditions of the subscription have been complied with, and then delivered by the trustee to the railroad company, or those claiming under said company. When delivered, they do not date back to the day of signing, but to the time of the execution of the conditions upon which the subscription was made. The railroad company, or those claiming under it, may have a perfect legal right to have these bonds delivered, because of a full compliance with the conditions upon which the subscription was made; but, unless and until these bonds are delivered, they are not the valid, negotiable bonds of the county of Mercer, which may be bought and sold or transferred without regard to, and disconnected from, the original contract of subscription. It is not an existing bond of the county of Mercer which has been transferred to the plaintiff, but a contractual right to have such bonds issued and delivered to the plaintiff. This right, whatever it may be, comes from the terms of the original subscription of stock by the county of Mercer; and, whatever may be the form of this remedy sought, the right itself comes from and through that original contract between said county and the Louisville Southern Railroad Company. The contract company took its right from the railroad company, and the plaintiff derives its right from the contract company; and the right of both must rest upon the enforcement of the terms of the subscription of stock by the county of Mercer, and its contract with the railroad company, and not otherwise. While it is true the plaintiff is seeking to recover the possession of these bonds, and not the principal or interest thereof, it is nevertheless true that it is seeking, and must seek, to enforce the contract made between the railroad company and the county of Mercer, by which these bonds were put in escrow to await the performance of certain conditions of the subscription of the county to the capital stock of the railroad company. If plaintiff's right to have these bonds delivered to it is assignable under the Kentucky statutes, it must sue as the assignee of the contractual rights of the railroad company, and for the enforcement of those rights. The language of the act of August, 1888, follows that of the act of 1789 upon this subject. It declares that:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

This is substantially the language of the act of 1789, under which the case of *Deshler v. Dodge*, 16 How. 622, was decided. We need not attempt to construe the words, "or if any subsequent holder of such instrument be payable to bearer and be not made by any corporation," as they can have no reference to the case at bar. The use of the word "contents" in the sentence is perhaps unfortunate, but as it was used in the act of 1789, and has been construed by the supreme court, we should have no difficulty in finding its meaning as applied to this case. In the case of *Sere v. Pitot*, 6 Cranch, 335, the supreme court decided "other choses in action" included open accounts; and the court, by Chief Justice Marshall, said the word "contents" is too ambiguous in its import to restrain the general term "choses in action." In the next case (*Smith v. Kernochen*, 7 How. 198) the court held that, in an ejectment brought on a mortgage assigned, the objection to the jurisdiction of the court could not be made on the general issue, but must be made by a plea in abatement. This provision of section 11 of the act of 1789 was not mentioned by the court. But the same court, in another case, soon after that, decided that the assignee of a bond and mortgage, who sues in equity to obtain payment, was within the provision of the eleventh section of the act of 1789, and must show that his assignor was competent to sue. *Sheldon v. Sill*, 8 How. 441. In deciding this case the court say:

"The term 'choses in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action."

The court, in *Deshler v. Dodge*, 16 How. 622, explained that by the phrase "right to recover a personal chattel" was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract, for the breach of it, whether the contract was for the payment of money, or the delivery of a personal chattel. In *Bushnell v. Kennedy*, 9 Wall. 390, Chief Justice Chase discusses this provision of the eleventh section of the act of 1789, and said:

"It has been recently very strongly argued that the restriction applies only to contracts which may be properly said to have contents; not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed."

The court, however, decided that the twelfth section of the act of 1789, in regard to removals, had no such restrictive provision as the eleventh section. The language used by the chief justice was that of Judge Shipman in *Barney v. Bank*, 5 Blatchf. 115, Fed. Cas. No. 1,031, and a further quotation from the opinion of Judge Shipman will make clearer the distinction which he drew. The suit was for damages in failing to protest and give notice in regard to certain drafts which had been sent; the bank sued. The suit was not by the bank which originally owned the drafts, but by another bank, as assignee of the bank, which could not have

sued in the circuit court. The court, after using the language quoted by Chief Justice Chase, continued, and said:

"A suit to compel the performance of that promise or duty by securing to the plaintiff that which is withheld by the defendant is a suit to recover the 'contents' of the chose in action. Grant that in the case before us there was an implied promise or duty, the performance of which the law merchant, as applied to the course of business between the parties, cast upon these defendants; but the suit is not brought to enforce the performance of that promise or duty. It is not to secure the protest and notice of this commercial paper. It is to recover damages for the failure of the defendants to take the proper steps to preserve its value. This suit, therefore, being founded, not on a chose in action, for the purpose of recovering its 'contents,' but a mere right of action to recover damages imposed by law for a delinquency, is not within the prohibition of the statute."

Thus it will be seen that this case, which is the most favorable to plaintiff's contention known to me, does not sustain it, because this suit is to recover the bonds themselves, which are only deliverable under and by virtue of the contract of subscription between the railroad company and the county of Mercer; and whatever damage Pearson may be liable for will be because of a breach of his contract to deliver these bonds, and thus make them valid and binding obligations, when the railroad company had fully complied with the conditions upon which they were to be delivered to that company or its assignees. The language of Rev. St. § 629, was substantially that of the act of 1789; and in *Corbin v. Black Hawk Co.*, 105 U. S. 659, the court held that a suit to compel a specific performance of a contract, and enforce other stipulations, was a suit within that section, and could not be maintained in the circuit court, if his assignor could not have maintained it. See, also, *Shoecraft v. Bloxham*, 124 U. S. 735, 8 Sup. Ct. 686. The language of the act of March 3, 1875, is somewhat different, but the cases thereon will throw some light upon the construction of the act of August, 1888. See *King Bridge Co. v. Otoe Co.*, 120 U. S. 225, 7 Sup. Ct. 552; *Metcalf v. City of Watertown*, 128 U. S. 588, 9 Sup. Ct. 173; *Blacklock v. Small*, 127 U. S. 99, 8 Sup. Ct. 1096. The error in plaintiff's contention is, we think, in assuming that the contract company transferred to it subsisting valid coupon bonds of the county of Mercer, and that the trustee is wrongfully detaining them from it, when, in fact and in law, the contract company has, at the most, only transferred to it the right to have these bonds made valid and binding obligations by a proper delivery. This right to have such delivery must depend upon the compliance of the railroad company with the conditions which are precedent to such a delivery, and a part of the contract of subscription to the capital stock of the railroad company. The suit, although in the nature of an action of detinue, is only maintainable upon the idea that this contract has been complied with; and the court should so declare, and enforce the county's part of the contract by compelling the delivery of the bonds as valid obligations, and giving judgment, not for the detention of valid bonds owned by plaintiff, but for damages for refusing to deliver the bonds in compliance

with the contract of subscription after the railroad company had complied with the condition upon which they were to be delivered.

We cannot concede the force of the argument that these coupon bonds were perfected and valid obligations of Mercer county when the conditions of the subscription were fully performed, without a delivery by the trustee, Pearson, either to the railroad company or some one claiming under it. We think this second delivery was necessary, and such was clearly the intention of the parties, before they (these bonds) became binding and valid obligations of the county. This is shown by the fact that the bonds were to be immediately prepared and signed, and placed in the hands of the trustee as an escrow. This was long before the conditions could have been performed; and it contemplated that the matured coupons should be cut from the bonds before delivery, in the presence of the county judge. This trustee was to be, and was, selected by the county; and, presumably, his judgment as to the performance of the conditions would bind the county, though not the railroad company. There is some conflict in the cases as to the necessity for a second delivery by the holder of the escrow; but the weight of authority is, we think, that a second delivery is necessary. The general rule is, when an instrument is placed in the hands of a third person as an escrow, it takes effect from the second delivery; but such rule does not apply where either justice or necessity requires a resort to fiction in order to avoid injury in the case of intervening rights between the first and second delivery it shall have to relate back, and take effect from its first delivery as an escrow. *Shirley v. Ayres*, 14 Ohio, 307; 4 Kent, Comm. 454; *Stanton v. Miller*, 58 N. Y. 192. Thus, where a grantor died between the first and second delivery of an escrow, it is held the second delivery relates back to the first delivery, and is a valid deed. Here, the plaintiff claims only the rights of the railroad company; and it is clearly not the intention of the original parties that these bonds should be binding and valid from the delivery to the trustee, and thus bear interest from that time. But if we are in error in this, and these bonds became the valid obligations of Mercer county upon the full compliance with the conditions by the railroad, without any delivery by the trustee to it or its assignee, yet there must be, of necessity, some one to determine whether these conditions have been fully determined, and that is the object of plaintiff's suit. Thus, plaintiff's right to these bonds, if right there be, must come from the enforcement of the county of Mercer's stock subscription to the capital stock of the railroad company. These bonds, whenever they may be considered as issued and valid bonds, have not become disconnected with the original contract of subscription, so as to authorize plaintiff to recover them, except by the enforcement of that contract. Plaintiff's right to thus enforce this contract is because of his relation to it as assignee; otherwise, the right of recovery is in the railroad company. *Young v. Clarendon Tp.*, 132 U. S. 345, 10 Sup. Ct. 107, is an interesting and instructive discussion of what is necessary to make a valid and binding municipal bond, but this opinion is already too long to venture on the

consideration of that case. The demurrer should be sustained, and it is so ordered.

In the other case (*Pearson v. Louisville Southern R. Co.*), Pearson brought in the Mercer circuit court a suit in equity, in which he sought to have the railroad company and the county of Mercer to interplead with each other, and have determined whether the \$20,000 of bonds in his possession as an escrow should be delivered to the railroad company, or be canceled. He alleged that the conditions upon which the bonds were deliverable had not been complied with, and stated wherein they had not been, and asked that the parties defendant should interplead, and that the court determine whether the bonds should be delivered to the railroad company, or be surrendered and canceled. This suit was brought January 16, 1891, and the railroad company was served January 18, 1891; and it is admitted by the parties that long before the institution of this suit the railroad company had transferred and assigned, without recourse, to the Southern Contract Company, all of its right, title, and interest in and to said \$20,000 of bonds, and that long before the institution of said suit the Southern Contract Company had assigned in pledge all of its right, title, and interest in said bonds to the Pennsylvania Steel Company, and that D. S. Moore was the predecessor of Pearson, as trustee, from March, 1887, to July, 1888, and that while said Moore was trustee he was given written notice, which he accepted, that the railroad company had assigned all the bonds (Mercer county) to the contract company, and that the contract company had assigned the bonds in controversy to the Pennsylvania Steel Company; that on the 13th of June, 1891, the contract company caused its indebtedness to be paid to the steel company, and the pledge of the bonds was then released, and that on the 30th of October, 1891, the contract company executed a written assignment of said \$20,000 of bonds to the Jackson-Sharp Company, to secure a debt due it; and that the Jackson-Sharp Company brought the suit which has been herein considered October 31, 1891. In the suit then pending in Mercer county, nothing was done until May 4, 1891, when the railroad filed answer, in which, among other allegations, was that the railroad company had long before the institution of the suit transferred and assigned to the contract company all of its interest in said bonds, and that company had assigned them to the Pennsylvania Steel Company, and that said railroad company had, at the request of the contract company, united in the assignment to the steel company, and in a written notice of the assignment to plaintiff Pearson's predecessor, Moore, and which had been accepted. The railroad company disclaimed any interest in the bonds then, or at the commencement of the suit. The plaintiff Pearson filed on the 9th of November, 1891, an amended petition, in which he makes the Southern Contract Company, Pennsylvania Steel Company, and the Jackson & Sharp Company parties defendant. On the same day a warning order for constructive service was entered, warning the Pennsylvania Steel Company and Jackson & Sharp

Company to appear and answer at the next April term, 1892. On the 18th of November, Mercer county appeared, and filed answer and cross petition, in which, among other prayers, it asked that the \$20,000 be surrendered and canceled. The case was removed to this court under a petition, on account of local prejudice, January 23, 1892. These being the material facts, the county of Mercer and Pearson move to remand the cause to the Mercer circuit court. The ground for this motion, as stated in third paragraph of the petition, is that Jackson-Sharp Company had no interest in the controversy, or the bonds held in escrow by Pearson, at the time of the institution of his suit, but acquired its interest from the Southern Contract Company after the institution of the suit.

It is now settled the diverse citizenship must exist at the time of the institution of a suit against a party, as well as at the time of removal, to authorize a removal from a state court to a federal one. But as the Southern Contract Company was not before the Mercer circuit court, and, indeed, had not been made a party by Pearson when the transfer and assignment of these bonds was made to the Jackson & Sharp Company, and that company has always been a citizen of another state than Kentucky, I do not see how this rule can, by analogy, be applied to the case at bar. We do not, however, understand this to be the exact contention of the able and learned counsel. They claim, if we understand their argument, that as Pearson has brought a suit asking an interpleader between the original parties to the contract under which he held these bonds, without knowledge or notice of the interest or claim of the Southern Contract Company or the Jackson-Sharp Company in these bonds, a *lis pendens* was created, which prevented any disposition of these bonds which might deprive the Mercer circuit court from adjudicating the suit thus brought, as between the original contracting parties, and that this adjudication would bind the Jackson & Sharp Company. If Pearson had concluded the conditions of the subscription had been fully complied with, and delivered these bonds to the railroad company without notice or knowledge of the contract company or Jackson & Sharp Company's interest in them, he would not, perhaps, under the authorities, have been liable to them; and in such a state of case the effect of the notice to Moore (Pearson's predecessor) would be material. But here where the inquiry is as to the jurisdiction of the Mercer circuit court by reason of the suit as originally brought, and, whether or not it was a *lis pendens* as to the contract company and Jackson & Sharp Company, the notice to or knowledge of Pearson is immaterial. We are inclined to the opinion that the notice of the transfer of these bonds to the contract company given to Moore (the then trustee) was notice to the county of Mercer of the transfer, and might have bound the trust fund. If the adjudication upon the suit, as it was originally brought, would have bound the contract company in regard to these bonds, it not being a party to that suit, then the Jackson & Sharp Company, as its assignee, would be bound, as a *lis pendens* purchaser from it, but not otherwise. The purpose of this suit was to have the court decide whether or not

the conditions of the subscription had been fully performed, and, if performed, decree the delivery of the bonds; if not fully performed, to have them canceled, and, incidentally, to have the cost of the administration of the trust paid to the trustee. And to such a suit the real owner of these bonds, whether the title was a legal or an equitable one, was an indispensable party. Whether the previous transfer of these bonds to the contract company was a legal assignment, under the statute, under which that company could have sued in its own name for the delivery of the bonds, or only an equitable one, under which the contract company would have had to join the railroad company in a suit for them, in either event the contract company was a necessary party, under the Kentucky practice. The railroad company, having transferred the benefit of all of these bonds to the contract company, could not represent that company, and there was no *lis pendens* as to it by reason of the pending suit against the railroad company. The authorities cited by counsel do not sustain this contention. Thus, in *Hoyt v. Jones*, 31 Wis. 399, the court conceded the holder of the unrecorded legal title was not bound by a judgment in a suit in which he was no party, nor was he bound because the holder of the recorded title was a party, but held that the registration laws required registration of titles; and because this holder of an unrecorded title laid by for years, and did not have his title registered in the proper office, he was estopped from claiming his superior title against a purchaser for value, without notice of his title, from one claiming under the judgment. This case concedes there was no *lis pendens* as to the holder of the unrecorded title, but decides against this title holder upon a construction of the registration law and his own acts as an estoppel. The case of *Norton v. Birge*, 35 Conn. 250, was one where a person loaned money, and took mortgages from a mortgagor, whose title was then sought to be set aside as fraudulent by a pending suit, and the property had been at the time attached. Neither is the case of *Boice v. Insurance Co.*, 114 Ind. 480, 15 N. E. 825, in point. It may be conceded that had the contract company been sued, and before the Mercer circuit court, it could not have transferred its right, title, and interest in these bonds to a citizen of another state during the pendency of the suit, so as to give that citizen the right of removal to this court. This is all the cases cited prove, unless it be the case of *Railroad Co. v. Findley*, 32 Fed. 641. In that case, James A. Findley, as administrator of Elizabeth Findley, brought in August, 1880, an action of ejectment against one Weaver, who was the tenant in possession, as an employe of the Atlanta & Charlotte Railway Company, to recover a lot of land, upon which was located a part of the roadbed, and houses for the use of the company. In March, 1881, the Atlanta & Charlotte Railway Company, which was a Georgia corporation, made a perpetual lease of all of its property to the Richmond & Danville Railroad Company, which was a Virginia corporation. This latter company, in 1884, brought in the Georgia court where the ejectment was pending a bill in equity, and obtained an injunction thereon against James Find-

ley, administrator, and the heirs of Elizabeth Findley. Subsequently the equity suit was, upon motion of the Richmond & Danville Railroad, so removed to the United States circuit court, and a motion to remand to the state court was afterwards sustained by that court. The court says, in its opinion:

"Although it appears that, at the time that the Atlanta & Charlotte transferred its property to the Richmond & Danville Company, it had not made itself a party, formally, to the action of ejectment, it was the real defendant, knew of the action, and was bound thereby. *Rodgers v. Bell*, 53 Ga. 94."

If, by the practice in Georgia, the Atlanta & Charlotte Railroad Company was bound by the judgment in the ejectment suit which was served upon its employe, this case is only what the other cases decided. We conclude that the ground alleged for the motion to remand to the Mercer circuit court is not well taken, and the motion must be overruled, and it is so ordered.

After the overruling of the motion to remand, the same parties again moved to remand the cause, on other grounds, whereupon (July 19, 1892) this court filed this following opinion:

BARR, District Judge. The present motion to remand is upon grounds different from those heretofore considered and overruled. As the grounds presented go to the jurisdiction of this court, they should be considered, although the former motion to remand has been overruled.

These grounds may be stated thus: (1) The attitude of the Jackson & Sharp Company is not that of a defendant, but a plaintiff. (2) That all removals to the circuit court must be of suits of which original jurisdiction could have been taken, and that this suit is one of which the circuit court could not have taken original jurisdiction.

The bill of Pearson is much more than a bill of interpleader. He does not, in the bill, assume the position of a mere stakeholder, but rather that of the representative of Mercer county, who appointed him. The allegations of his bill, if confessed, would entitle him, not only to a decree for his expenses and commissions, with a lien on the bonds in his hands, but also, we think, to a cancellation of the bonds held by him in escrow. This is not a mere bill of interpleader. *Killian v. Ebbinghaus*, 110 U. S. 571, 4 Sup. Ct. 232; *Daniell*, Ch. Pr. 1668, 1669; *Story*, Eq. Pl. § 297. The fact that the Jackson & Sharp Company has filed in this court a cross bill against Pearson, Mercer county, the railroad company, and the contract company, in which it seeks to have a decree for the delivery of the bonds, does not change the relation which that company was in in the state court before and at the time of the removal. It was a defendant there to a bill which sought affirmative relief against it. This removal was had under the local prejudice clause of the second section of the act of 1887, as corrected by the act of August 13, 1888, which is as follows, viz.:

"And where a suit is now pending, or may be hereafter brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant,

being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause; provided that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

It is insisted that the circuit court could not take original jurisdiction of this suit, under the first section of this act, and therefore the court could not get jurisdiction by removal. This court has heretofore decided that the Jackson & Sharp Company could not sue for the delivery of these bonds as the assignee of the Southern Contract Company, because that company, being a Kentucky corporation, could not sue in this court. It may, however, be claimed that this provision of the first section of the act of 1887 is only a limitation upon the jurisdiction of the circuit court when the suit is brought on a promissory note or other chose in action, and does not apply to a removal suit, where the controversy is as to the contents of a chose in action, when the diverse citizenship exists, and the defendant in the state court is a citizen of a state other than the one in which it is brought. See *Bushnell v. Kennedy*, 9 Wall. 390. But we do not think it necessary to consider the question suggested, because, if the parties be arranged according to their interest, considering the suit as one by either Pearson, trustee, or Mercer county, it will be necessary to join at least one Kentucky corporation with the Jackson & Sharp Company. The Southern Railroad Company was the only contracting party with Mercer county, and as such is a necessary party to any suit that either Mercer county or Pearson, trustee, might bring in regard to these bonds; and it is in fact a codefendant with the Jackson & Sharp Company and the contract company in the suit as removed. The inquiry, therefore, must be whether, under the provision of the fourth clause of the second section of the act of 1888, all of the defendants must be citizens of states other than that of the plaintiff, to give jurisdiction of a suit removed because of prejudice and local influence. This is a question that remains undecided by the supreme court, and the decisions of the circuit courts are in conflict. The supreme court has, however, decided that the limitation of \$2,000 applies to cases removed under the fourth clause of the second section of this act. In *Re Pennsylvania Co.*, 137 U. S. 456, 11 Sup. Ct. 141, the court say:

"The fourth clause [the one in question] describes only a special case comprised in the preceding clauses. The initial words, 'And where,' are equivalent to the phrase, 'And when in any such case.' In effect, they are tantamount to the beginning words of the third clause, viz. 'And when in any suit mentioned in this section.'"

But as the third clause gives the right of removal from a state court in a controversy which is wholly between citizens of different

states by one or more of the defendants actually interested in such controversy,—hence, of a suit not within the original jurisdiction of the court,—this language of the supreme court could not have been intended to decide the present question. The previous provisions, which were similar to this one, were declared by the court to give the right to remove the entire suit, although there might be other controversies in which citizens of the state in which it was brought were parties defendant. *Barney v. Latham*, 103 U. S. 205; *Brooks v. Clark*, 119 U. S. 512, 7 Sup. Ct. 301. The subsequent case of *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, shows that the court did not intend either to decide, or lay down a rule which would decide, the present question. In that case there were three defendants who were citizens of the state of Oregon, where the suit was brought, and the other defendants were citizens of California. The citizens of California had removed the case from the state court to the circuit court, and the trial judge had, in an able and elaborate opinion, construed this fourth clause, and held that it authorized the removal from the Oregon state court, although the plaintiff and three of the defendants were citizens of that state. The supreme court reversed the case, and directed it to be remanded to the state court, not because the circuit court had no jurisdiction, but because the petition and removal were too late. This decision was by a divided court, and we cannot presume the court would have thus disposed of the case, on a point of practice, when the case *In re Pennsylvania* had already laid down a rule of construction of this clause which would deprive the circuit court of jurisdiction of the suit itself. The court, in closing its opinion, say:

“Many other questions of interest and importance arise upon this record, and have been argued by counsel, but the conclusion at which we have arrived renders their determination unnecessary.”

We think that it may be fairly assumed that the court not only did not decide this question, but that it was intended to remain open until it became absolutely necessary to decide it. This view is strengthened by the language of the chief justice, who delivered the opinion in *Fisk v. Henarie*, in the subsequent case of *Wilder v. Iron Co.*, 46 Fed. 682. He says:

“Assuming that a single defendant, being a citizen of a state other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same state as the plaintiff, may remove the suit to the circuit court upon making it appear to the court that, on account of local prejudice or local influence, he cannot obtain justice in the state court or courts, still the question remains whether this can be done where the plaintiffs are not all citizens of the state in which suit is brought, being all concerned adversely to the nonresident defendant, who seeks to remove the case.”

The court decides that all of the plaintiffs must be citizens of the state in which the suit is brought, and, this not being the fact, remanded the case to the state court. The evident intention of the chief justice was to leave the present question undecided, although the conclusion of the court as to the plaintiffs in such cases may tend to sustain the contention of the counsel of Pearson as to the defendants.

The fourth clause in express terms changed the previous law in regard to who might have a removal from the state courts. The previous law allowed a plaintiff, as well as a defendant, to remove the case. Now, only a defendant can have a removal. Formerly, all the defendants had to unite in the petition for removal. Now, any defendant, being a citizen of another state than the one in which the suit is brought, can have a removal upon making out the proper grounds. We construe this fourth clause of the second section of this act as allowing any defendant who is a citizen of another state than that in which a suit is brought, where there is a controversy between a plaintiff or plaintiffs and such defendant, although there may be codefendants who are citizens of the same state as the plaintiff or plaintiffs. It is a settled canon of construction to give effect, if it can be done, to all of the words of an enactment. If the contention of the able counsel be correct,—that all of the defendants in such a suit must be citizens of states other than that of the plaintiffs,—the words in this clause, “being such citizen of another state,” are unnecessary and meaningless, since only defendants, by the express language of the clause, can remove. If, therefore, all of the defendants must be citizens of another state than that of the plaintiff, why describe the defendant as “any defendant being such citizen of another state?” Is there not a clear and distinct implication that there might be other defendants who were not citizens of another state? Again, if the diverse citizenship must exist as between all of the plaintiffs and all of the defendants, why the proviso, in this clause, that if it appear the suit thus removed can be fully and justly determined, as to the other defendants, in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, the circuit court may direct the suit to be remanded, so far as it relates to such other defendants, to the state court? Is it to be assumed that the circuit court, having, by order of removal, obtained jurisdiction over a suit in which the diverse citizenship exists, as between all of the plaintiffs and all of the defendants, is to determine whether the suit might not be fully and justly tried in the state court, as to the other defendants, who are citizens of another state to the one in which it was originally brought, and, if the court determine it may be thus tried, as to the other defendants, citizens of another state, remand the suit, as to them? This, too, whether the other defendants, citizens of another state, asked or desired a return to the state court? Such a construction would indicate that, as between the federal and state courts, the preference was to be given the state court, even where the constitution and laws had clearly conferred jurisdiction upon the federal courts. But if we assume that this fourth clause means that suits might be removed from a state court to a federal court, in which some of the defendants were not citizens of another state, but citizens of the same state as that of the plaintiff, we readily see the reason for the proviso. The constitution provides for the jurisdiction of the United States courts in controversies between citizens of different states; and congress has, in the third clause

of this section, provided that if there be in a suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, the entire suit may be removed into a circuit court of the United States. Hence, the fourth clause is construed by us in perfect harmony with the third clause. The difference being, in respect to diverse citizenship, that in the third clause the controversy must be wholly between citizens of different states, and one that can be fully determined, as between them; and in the fourth clause the controversy must be between a citizen of the state in which the suit is brought, and a citizen of another state, but need not be wholly between them. Hence, the purpose of this proviso to the fourth clause. The general result of the act of 1887-88 has been to greatly diminish the jurisdiction of the circuit court, and it may be assumed that such was the general purpose of congress, in its enactment; but we cannot assume such a purpose, and then, in the endeavor to carry it out, ignore the obvious meaning of the language of the act itself. Although there have been dissents by one or more of the circuit courts from the conclusion arrived at by Judge Jackson in his able opinion in *Whelan v. Railroad Co.*, 35 Fed. 849, we think that opinion remains unanswered, and his conclusion upon the question under consideration has not been either overruled or modified by the supreme court. See *Id.*, 35 Fed. 849; *Hall v. Agricultural Works*, 48 Fed. 600; *Railroad Co. v. Orton*, 32 Fed. 470; *Roraback v. Pennsylvania Co.*, 42 Fed. 420; *Anderson v. Bowers*, 43 Fed. 321. The motion to remand must be overruled, and it is so ordered.

PEAKE v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1893.)

No. 161.

1. MUNICIPAL CORPORATIONS—DRAINAGE—CONSTRUCTION OF STATUTE.

In the Louisiana statute transferring all drainage property in New Orleans from the drainage commissioners to the city itself, the provision of section 9 that "all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage," means that the property is to be held for drainage purposes as long as it is required therefor; and in the mean time it cannot be subjected to the canal company's debts. 56 Fed. 376, affirmed.

2. SAME.

The concluding words, "work of drainage," as used in section 9, are not restricted to the property required for the work of drainage under the system of drainage contemplated by that act, so as to leave all property not in accordance with that system to be held in trust for payment of the debts of the canal company.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a bill in equity filed by the city of New Orleans against J. W. Gurley, receiver of the drainage fund of the city, to compel

a reconveyance to it of square No. 467, and the drainage machine situated thereon. The receiver had been appointed by the circuit court of the United States for the eastern district of Louisiana in the suit of James W. Peake, a creditor of the drainage fund, against the city of New Orleans. There was a decree requiring the receiver to make the conveyance prayed, (56 Fed. 376;) and he having refused to take an appeal, although requested by said Peake to do so, the latter himself took an appeal to this court.

Charles Louque and Richard De Gray, for appellant.

E. A. O'Sullivan and Henry Renshaw, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. By the act of March 18, 1858, of the state of Louisiana, enacted for the purposes of draining and reclaiming swamp lands in the parishes of Orleans and Jefferson, there were organized three boards of commissioners,—one for each drainage district,—who were invested with all the rights and powers necessary to drain their several districts, by entering upon lands, and erecting engines and machinery, and digging canals and drains, and making embankments and levees; and by making plans and advertisements, and making proof before one of the district courts, they were authorized to levy assessments upon the land so drained. In 1859 a supplementary act authorized the board of commissioners to issue 30-year bonds, and use the proceeds for carrying on the work of drainage, and provided for their payment; and on March 1, 1861, another act provided for the collection of the assessments for the payment of the interest on such bonds and the principal as they matured. While these acts were in force, and constituted the entire law regarding the drainage of New Orleans and the surrounding country, the president of the board of commissioners for the second drainage district purchased, with money collected as drainage taxes and held as drainage funds, a certain lot of land, known as "Square No. 467," and erected thereon, at the cost of \$57,671.38, paid out of money of such fund, a drainage machine, since known as the "Dublin Draining Machine," which has since that time been continuously operated for the drainage of a large part of the property situated in that part of New Orleans. Subsequent to the purchase of this land and the erection of this draining machine, the drainage of New Orleans was provided for by an act of the legislature of February 14, 1871, authorizing and empowering the Mississippi & Mexican Gulf Ship Canal Company to enter upon the construction of such a system of drainage by canals, embankments, levees, pumps, and drainage machines, as was specified in the act, and should be further designated by the board of administrators of the city of New Orleans. This city was also made the successor of the boards of drainage commissioners provided for by the acts of 1858, and it was provided that said boards should transfer to its board of administration all money, assessments, claims of drainage, real estate, books, plans,

and other property, that they held as such, and it was further provided:

"That all money or moneys received by the said board of administrators from the said commissioners of the drainage districts, either from the sale of property received from said commissions, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage."

Subsequently, by Act No. 16 of February 24, 1876, the city of New Orleans assumed exclusive control of all drainage works in the drainage districts. There being outstanding at that time a large number of drainage warrants, a portion of which were owned by the appellant herein, he brought suit against that city as trustee holding the property of the drainage funds for the payments of such debts. A judgment being obtained in his favor, a receiver was appointed, to whom was conveyed, by the mayor of New Orleans, a large number of lots of land, the property of that fund, among which was the square in question,—No. 467,—upon which had been erected the Dublin draining machine, (see 2 C. C. A. 626, 52 Fed. 74; 38 Fed. 779,) whereupon the city of New Orleans filed its bill of complaint, alleging that said square of land was public property, and had been dedicated to the public use, and was inalienable, and praying that the deed therefor be erased and canceled, and declared null and void. Upon a hearing in the court below the prayer of the bill was granted, and it was ordered that the receiver reconvey to the city of New Orleans, as public property, said square of land. From that judgment an appeal has been taken.

This square of land came to the city through the effect of Act No. 30 of 1871. It was purchased with public money collected for a public purpose, and if it could in any way be treated as held in trust, or liable to be disposed of for any other purpose, it must be by the provisions of that act. Appellant claims that a portion of the ninth section of said act, wherein it provides "that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage," devotes all such property to such trust, and that the final clause, "should the same not be required for the work of drainage," only modifies that immediately preceding, "and ultimately for the benefit of New Orleans." We cannot accept this view of the case. Not only does the form of the expression, but the history, object, and intent of the legislation, appear to prohibit such construction. The entire drainage scheme was for the benefit of New Orleans, through the use of money and property that was applied to it, and the suggestion or declaration that the payments for the labor and services of the canal company would ultimately

produce such result and such benefit would seem reasonable; but to place such a construction upon the language as would declare that that which was not required for the work of drainage should ultimately be for the benefit of New Orleans more than that which was so required produces an absurdity. This final clause is a limiting and restrictive one, and must limit either the property which is to be held in trust, or that which shall ultimately be for the benefit of New Orleans. There is every reason why such restriction should be placed upon the class of property so held in trust, but no reason why all of such payments might not result ultimately to the benefit of New Orleans. Such construction as is claimed by the appellant would undo all the benefits which had resulted from the system. If the property which was required for the work of drainage was to be held in trust for the payment of the debts of the corporation, it would be placing the city at the mercy of the creditors of the company, in a manner which we cannot consider the legislature intended. This is a limitation,—a negative and modifying clause used finally,—and we can but believe it was intended to limit the property which was to be held in trust, and the paragraph was to be construed as a parenthesis inclosed by commas, which might be replaced by curved lines, and read, "All property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company (and ultimately for the benefit of New Orleans) should the same not be required for the work of drainage."

It is also contended by appellant that the "work of drainage" mentioned in said ninth section should be held only to apply to those works and appliances which were contemplated by the act of 1871, and that all the property and appliances not in accordance with that system of drainage should be held in trust for the payment of such debts of the Mississippi & Mexican Gulf Ship Canal Company as might be incurred. It is true that large amounts of warrants were issued and debts incurred, but we cannot appreciate the force of the argument that while the works erected by the said company after its entering upon its contract were protected from any lien or the effect of any trust, if they were required for drainage purposes, yet the property which had been purchased and rendered valuable, and was used for the work of drainage, prior to its connection with the drainage system, and was still so required, was subject to such lien, nor can we accept such construction of the act. The evidence shows conclusively that this square is especially required for the work of drainage; that for nearly 25 years the value of a large portion of the city has depended upon it; that "without it considerable of the property back of St. Charles Avenue would not be habitable." Several witnesses testify in most positive language of the disastrous results which would follow the suspension of its work. We consider that this was no portion of the property which was declared to be held in trust for the payment of the canal company, and hence is, as claimed, dedicated to public uses, and inalienable; and the judgment below is affirmed, with costs, and it is so ordered.

TOWLE v. AMERICAN BLDG., LOAN & INV. SOC.

(Circuit Court, N. D. Illinois. February 6, 1894.)

1. EQUITY JURISDICTION—RECEIVERS—CORPORATIONS.

Courts of equity have jurisdiction to appoint receivers to administer the assets of insolvent corporations.

2. BUILDING AND LOAN ASSOCIATION—RECEIVER—RIGHTS OF SHAREHOLDER.

A shareholder in a building and loan association, whose officers have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, is entitled to have the corporate assets placed in the hands of a receiver.

3. JURISDICTION—AMOUNT IN CONTROVERSY—CORPORATIONS.

In a suit by a shareholder for the appointment of a receiver of a corporation the amount in controversy is the value of the entire corporate assets.

4. SAME—DIVERSE CITIZENSHIP—COLLUSION—CORPORATIONS.

A suit by a stockholder for the appointment of a receiver for the corporation will not be dismissed on the ground that the parties to the suit have been collusively arranged for the purpose of creating a case cognizable in the federal courts, where it appears that the assets of the corporation are in different states, and that its shareholders reside in different states, since in such case it is desirable to have all the corporate affairs wound up under a homogeneous management.

In Equity. Suit by Marcus M. Towle against the American Building, Loan & Investment Society. A receiver having been appointed by the court, a petition has been filed by a receiver afterwards appointed by a state court, asking that this court's receiver be required to surrender to him the assets of the corporation. Denied.

Jesse A. Baldwin, for complainant.

Collins, Goodrich, Darrow & Vincent, for defendant.

Moran, Kraus, Mayer & Stein, for former receiver.

C. H. Aldrich, for present receiver.

GROSSCUP, District Judge. The original bill in this case discloses that the American Building, Loan & Investment Society was a corporation organized under the building and homestead acts of Illinois, with a capital stock of \$50,000,000, divided into 500,000 shares of \$100 each, of which 70,000 shares had already been issued to upwards of 7,000 shareholders; that upwards of \$800,000 had been paid into the treasury of the society by the shareholders, of which \$54,000 was deposited with the state officials of Massachusetts, and the balance has been loaned out on real-estate securities throughout the United States, about \$300,000 of these loans being made on real estate in Illinois, and the remainder in Minnesota, Indiana, Ohio, Massachusetts, and other states; that for some reason the value of its assets is not to exceed \$600,000, and its liabilities to the stockholders amount to about \$900,000; that more than 1,700 stockholders have already demanded the withdrawal value of their shares, amounting to nearly \$200,000; and that attachment suits against the assets of the company have been begun in Indiana, and others are threatened in New Hampshire, Ohio, Kentucky, and Indiana. The bill is brought by a share-

holder of the company, residing in Indiana, on behalf of himself and all other shareholders joining him, and its object is to surrender to the court the administration of the remaining assets of the corporation. The answer of the society, filed with the bill, admits all the allegations therein set forth, and consents to a surrender of the assets to the administration of the court. On the presentation of this bill and answer, a receiver was, on the 1st of January, 1894, appointed by this court, who has since taken the assets of the corporation into his keeping.

On the 15th day of January following, the circuit court of Cook county, on the motion of the attorney general of Illinois, appointed another receiver for the assets of the same company, under section 17 of the act of June 19, 1893, amending sections 3, 15, 16, and 17 of the building and loan society act. The information under which this receiver was appointed is directed to the winding up of the affairs of the society, and charges that the insolvency of the society is due to the intentional and dishonest mismanagement of its officers; that the officers of the society have substantially abstracted large amounts of its assets, through pretended loans to nominal borrowers upon pretended real-estate securities. Many specific instances of these transactions are set up in the information, and, if true, reveal a conspiracy upon the part of the officers to loot the treasury of the society. The receiver of the state court now asks leave to file his petition in this court, asking that the receiver appointed here should be ordered to surrender to him the assets of the corporation, and bases his motion upon the facts disclosed by the pleadings in this cause and in the state court.

It is urged that this court had no jurisdiction to appoint the receiver—First, because the case made out by the bill and answer does not, within the rules of equitable jurisprudence as recognized and enforced in the federal courts, justify the appointment of a receiver; second, because the requisite elements to confer jurisdiction upon the federal courts are not disclosed. I have no doubt that courts of equity have the ultimate power of administering the assets of insolvent corporations. Whether a case is made out for the exercise of that power, or the parties before the court are in a position to invoke it, is altogether another question. The supreme court has, in a number of cases, recognized the existence of such a power while pointing out the care with which it should be put into exercise. *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Hollins v. Brierfield Coal & Iron Co.*, 14 Sup. Ct. 127. The last case above cited was that of an unsecured creditor against the corporation, suing on behalf of himself and all other creditors, and asking, in effect, that the assets of the insolvent corporation be brought into court, to be distributed among the creditors, as their interest might appear. Speaking for the court, Mr. Justice Brewer says:

"It cannot be doubted that the final decree, providing for a settlement of the affairs of the corporation and distribution among creditors, could not have been challenged on the ground of a want of jurisdiction in this court, and that notwithstanding it appeared upon the face of the bill that plaintiffs

were simple contract creditors, because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and, the parties being before the court, it has power to proceed with such administration."

The relief was denied to the complainants in that case, not because of the want of power in the court, but because the creditor, not having reduced his claim to judgment, was in no position to invoke that power, or set it in motion.

Should the power be exercised in favor of the complainant herein? The case is a peculiar one. The complainant is, substantially, both depositor and shareholder. Under the constitution of the society, each member passed into the treasury, periodically, certain stipulated sums. The fund thus collected is loaned out upon real-estate security. The interest of the member is not that simply of a depositor in a bank, or a creditor of a corporation. He holds no promise of the corporation for a return of his fund. He is a part owner of the fund,—has an interest directly in the fund,—and is entitled to a proportionate share, as owner, upon its distribution. The whole scheme of building associations is that of a corporate copartnership, whereby are gathered into a common fund, and loaned as such, the money of many individuals. The interest of each shareholder in the sums thus collected and loaned is as direct as if no corporation intervened. The corporation has no function or power, except to loan out these gathered sums, and return the avails thereof into the hands of the contributors. If the stockholder of a corporation or a partner in copartnership can rightfully invoke the aid of equity to administer the assets of the corporation or copartnership, when such power seems essential to the conservation of the assets, I can see no reason why the complainant is not entitled to a like aid.

That the relief will be afforded to stockholders and copartners upon a proper showing is not seriously denied. The need of such relief in this case seems to me to be imperative. The information of the attorney general in another court of equity is one of its most striking evidences. The society, I think, largely through the mismanagement of its officers, has so impaired the assets that there appears to be on hand less than 66 per cent. upon a dollar contributed. There is no claim that this loss is merely temporary, or that the continuance of the society in its present management will repair the evil. A continuance of the organization would simply be a hardship upon already injured shareholders, and nothing in their interest can be suggested except a speedy and intelligent collection of the assets for redistribution among the members. This, manifestly, ought not to be done by the management that has brought about the injury, and there is no way pointed out for the substitution of a new management that will promise a better administration. Here, then, is \$900,000 collected from innumerable sources. Most of the contributors are among the poor, people not accustomed to the management of business affairs. This large fund is scattered through five or six states, and already promises a return of less than 66 per cent. of the original

advance. There is no management in power except the discredited and distrusted officers. Upon what pretext can a court of equity close its ears against the call to take hold?

It is urged, however, that the federal court has no jurisdiction, because there is no controversy between the complainant and the defendant, and, if there were, it is not shown that it exceeds \$2,000 in amount. It is sufficient to say that whenever any property or claim of parties capable of a pecuniary estimation is the subject of litigation, a controversy, within the meaning of the judiciary act, is disclosed. In this case the entire assets of the society are brought into court for administration, and are, therefore, the matters in dispute or controversy.

A much more serious objection, however, is the one that the parties to the suit have been collusively arranged for the purpose of creating a case cognizable in the federal courts. It cannot be seriously disputed that, in the absence of collusion, a stockholder has a right to bring his action against the corporation in the federal courts, provided diverse citizenship exists, and the case is one in which the stockholder is entitled to an action at all. There are abundance of cases upholding, and none opposed to, this proposition. *Hawes v. Oakland*, 104 U. S. 450, urged with some emphasis by counsel for the petitioner, turned upon the finding of the court that the stockholder, on the facts there disclosed, had no right of action in any court against the corporation. The care with which the court points this out, and enforces it with a collection of authorities, shows that there was no intention of foreclosing a stockholder from the federal courts in cases where he had a right to complain of the corporation, and the requisite diverse citizenship existed.

It is apparent, however, that this interpretation opens a wide door to abuse. It is a matter of no difficulty to place stock in the hands of a citizen of some state other than that of the corporation, and thus create the element of diverse citizenship. Under this arrangement, every controversy in which a stockholder has a right to complain of the conduct of the corporation could be brought within the jurisdiction of the federal courts. So apparent already had the abuse become that congress inserted in the act of March 3, 1875, the provision that if, at any time in the progress of the case, either originally commenced in the circuit court or removed there from the state court, it should appear that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court, or that the parties to the suit had been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable to the federal court, the court should proceed no further, but dismiss the suit peremptorily, or remand it to the state court.

I conceive it to be the duty of the federal courts to examine each case carefully to ascertain if it falls within the terms of this provision. The jurisdiction of the state courts, and the application of state polity, ought not to be taken away, except in those cases which fall within the spirit of the judiciary act. The system of

federal courts is not intended to supersede the state courts, but only to furnish a tribunal where the substantial rights of citizens of different states may be determined. To extend this jurisdiction further, so as to take in the controversies which are practically between the citizens of the same state, is to erect tribunals not contemplated, either by the constitution of the United States or of the state, and contrary to the spirit of both. The fact of diverse citizenship of complainant and defendant, in such a case as this, is not, therefore, in my opinion, standing alone, a sufficient warranty to hold jurisdiction. In the absence of any good reason for bringing the action into the federal courts, I would be disposed to hold that the arrangement of the parties was collusive for jurisdictional purposes. The question, then, arises, is there any substantial reason why the shareholder, seeking an administration of these assets, should select the federal courts? And, if so, was it the reason that dominated the bringing of this action therein? The pleadings disclose that the entire assets of this company, except \$300,000, are represented by mortgages on real estate situated in states other than Illinois, and that many shareholders of the company reside in these sister states. What effect will these facts have upon a closing up of the affairs of the corporation at once equitable, economic, and speedy? Under the federal procedure, the receiver appointed in this court is, by a system of ancillary proceedings, likewise appointed receiver in the several circuits in which this property is situated. The administration of the assets is thus centralized,—the ancillary is but a part of the home receivership. There is but one administration, one distribution. Each shareholder, whether he live in Illinois or Massachusetts, will receive his exact proportionate amount, as if he were a citizen of the same state. For the purposes of the suit, there is but one jurisdiction, one administration, one distribution, and one incidental expenditure. It is obvious that no quicker, cheaper, or more equitable administration could be had.

Will the same results attend an administration of these assets through the state courts? The laws of all the states to which my attention has been called require that receivers shall be residents thereof. There will therefore be as many receivers as there are states. Each receivership will be the result and concomitant of an independent suit. There will therefore be as many suits, with their attendant expenses, as there are states. Each suit is entirely independent of the other, and will be determined according to interpretation of the law adopted by that particular court. Will all these courts hold that the shareholder is not a creditor entitled to a prior lien by attachment upon the property within their several jurisdictions? Will they discriminate against the home claimant, and send the fund realized to a common center, to be distributed? Which court will be regarded as the home receivership, and entitled to the right of distribution? Might it not turn out that in states where the number of members were few and the assets large each member would be reimbursed in full for his advance, while in states where the membership was large, and the

assets proportionally smaller, each member would receive much less than his proper ratio of the assets? Or, if it be assumed that the several state courts would disregard the apparent interests of the home claimants, and turn in the funds to a common officer, to be distributed, would there not probably rise, in the foreclosure proceedings, numerous lines of litigation going to many different tribunals of last resort, and thereby subjecting the fund to larger expenses and greater uncertainty? The advantages of a homogeneous administration of these assets, scattered, as they are, throughout so many states, are at once so obvious and imperative that it seems to me that no inference that the federal court was selected by collusion can be raised.

For the foregoing reasons I deem it my duty to hold jurisdiction of this case and of the receivership to which it has given rise. But none of the reasons impelling me to this conclusion favor the retention of the present receiver. The building associations of Illinois have become institutions of great magnitude and consequence. They are, practically, savings institutions, and invite the deposit of large numbers of people whose frugality enables, and whose forethought impels, them to lay by a store for the future. These are, at once, among the most deserving of our citizens, and the least skilled in ascertaining a safe depository for their savings. Seventy million dollars have thus already been gathered into the hands of these societies. I know of no institutions, except perhaps savings banks, that have a greater title to be regarded as quasi public institutions. I know of no institutions that ought to be regulated and inspected with greater care, and subjected to more rigid scrutiny, than these treasuries of the poor. The officers of these institutions carry a great trust, and ought, when derelict,—especially when intentionally derelict,—to be subjected to instant and severe punishment. The state ought to watch them with a vigilant eye, to see that cupidity or treachery do not succeed, or, if they do succeed, are speedily corrected. I regard the recent legislation in this state as a beneficent step in that direction. The auditor of public accounts and the attorney general are thereby created public agents to see that no harm or wrong creeps into these institutions of the people, and to seize and close them up the moment that any malfeasance appears. It would be intolerable to throw any obstacle in the way of these officers of the public, or to deprive them of a potent voice in the selection of the agents intended to carry out these purposes. There is not one, but many, of these societies whose affairs have become honeycombed with maladministration. I can conceive that a systematic and harmonious execution of the whole trust, which all of these societies, taken together, throw upon the officers of the state, might require identity of receiverships. If the attorney general will intervene in this suit, and suggest a name for the receivership whose qualifications meet with the approval of the court, I will substitute him for the present receiver.

APPLETON et al. v. SMELSER et al.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1894.)

No. 198.

APPEAL—DECISION—MODIFICATION OF DECREE.

A demurrer for want of equity and for multifariousness, which, in the opinion of the appellate court, should have been sustained, and the bill dismissed without prejudice, was overruled by the court below, and thereafter a hearing was had, in which complainants produced evidence, indicating equities which entitled them to the relief prayed. The court, however, instead of permitting an amendment, then entered a decree sustaining the demurrer, and finally dismissing the bill. *Held*, that the only relief to be afforded on appeal was to cause the decree to be amended so as to dismiss without prejudice.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Bill brought by Minnie M. Appleton, T. J. Appleton, and James M. Strong against J. H. Smelser, B. T. Estes, and the Bowie Lumber Company to recover the value of timber alleged to have been wrongfully cut from lands in which complainants have an interest, and for partition of such lands. The demurrer was at first overruled, but after evidence was taken, and a hearing had, the demurrer was sustained, and the bill finally dismissed, from which decree the complainants appeal.

F. M. Henry and E. B. Kruttschnitt, for appellants.

Charles S. Todd and H. C. Hynson, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. The appellants, complainants in the court below, brought their bill against the defendants, J. H. Smelser, B. T. Estes, and the Bowie Lumber Company, wherein they allege that the complainants were the legal and equitable owners of one undivided two-thirds of a large tract of land; that the defendant B. T. Estes was the legal owner of the remaining undivided third; that the defendant J. H. Smelser unlawfully entered upon the said tract of land, and sold to the defendant the Bowie Lumber Company all the timber standing and growing upon the same, and unlawfully entered into a conspiracy with the said lumber company for the purpose of wrongfully cutting down, and carrying away from and off the said tract of land, all the said timber; and that, in pursuance thereof, the said defendants Smelser and the Bowie Lumber Company had cut down and carried away from said tract of land an aggregate amount of 21,000,000 feet of timber, which they had converted to their own use. In said bill, complainants further allege that they have a right to recover judgment against the said Smelser and the Bowie Lumber Company for two-thirds of the value of said 21,000,000 feet of timber; that the said Smelser and the Bowie Lumber Company are now in possession of said tract of land, and are continuing to commit waste by cutting down and carrying away timber, etc.; and, finally, that the said defendants Smelser and the Bowie Lumber Company are setting up some pretended claim of own-

ership to said tract of land, and a right to cut and carry away the timber. The prayer of the bill is for a partition and division of all the said tract of land between the complainants and the defendant B. T. Estes, in accordance with their respective rights and title; that commissioners be appointed to make such division and partition; and, further, that an account be taken and stated of the value of the trees and timber cut and carried away from off said tract of land by the defendants Smelser and the Bowie Lumber Company, and for a judgment and decree against the said Smelser and the Bowie Lumber Company for two-thirds of the value of the timber cut and carried away from said tract of land.

The defendants Smelser and the Bowie Lumber Company filed a demurrer to the bill for want of equity and multifariousness. This demurrer, on argument, was overruled, and thereupon the defendant B. T. Estes answered, admitting himself to be the legal owner of one undivided one-third of the tract of land in question, and further admitting that he had been paid for his share of the timber removed. The defendants Smelser and the Bowie Lumber Company answered, setting up title to the one undivided two-thirds of the tract of land claimed by complainants, and putting at issue all the material averments of the bill. Replication was duly filed, an examiner appointed, and evidence taken. The evidence taken shows that any title which the complainants may have to the land in controversy is equitable, and develops a case in which, if the complainants maintain their equitable title, they are, in equity, entitled to relief as against all the defendants to the bill. On final hearing, the court entered the following decree:

"This cause coming on to be heard upon the defendants' demurrer to plaintiffs' bill, and after hearing arguments of counsel and duly considering said demurrer, the court is of the opinion that the demurrer should be sustained. It is therefore ordered, adjudged, and decreed by the court that the defendants' demurrer to plaintiffs' bill be in all things sustained, that plaintiffs' bill filed in this cause be dismissed, that the defendants recover their costs, and that the plaintiffs be adjudged to pay all costs incurred in this cause, for which let this execution issue."

From this decree the appellants prosecute this appeal, assigning numerous errors attacking the decree on the evidence, not necessary to recite.

In our opinion, the demurrer, when first heard, should have been sustained on the ground assigned, and the bill, unless amended under leave of the court so as to present a case entitling the complainants to equitable relief, should have been dismissed without prejudice. As this was not done, but, on the contrary, the demurrer was overruled, and evidence was taken which, as we have noticed, developed equities in the complainants, the court, on the hearing, might still have permitted the complainants to amend on such terms as to the court seemed just, or have dismissed the complainants' bill, with costs, but without prejudice. As the case is presented in this court, the only relief which, in our opinion, can be granted to the appellants, is to cause the decree appealed from to be so amended as not to prejudice the complainants in the future prosecution of any rights

they may have in the premises. See *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249.

The decree appealed from is reversed, and the cause remanded to the court below, with instructions to enter a decree dismissing the complainants' bill for want of jurisdiction, and without prejudice.

WOOD et al. v. COLLINS et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 186.

1. APPEAL—SUFFICIENCY OF EVIDENCE—FINDINGS OF COURT.

On a bill to restrain an action of trespass to try title it is immaterial whether complainant did actually admit that respondent was the owner of a certain patent title to the land, as it stated in the findings that he did, when there is sufficient evidence in the case to show that respondent was the owner of such title.

2. PUBLIC LANDS—PRE-EMPTION—PROOF OF OCCUPANCY.

Under the Texas land laws, the pre-emptor of land loses his right thereto, as against a subsequent patentee, where he fails to file the required proof of his occupancy in the land office before such patentee locates his certificate.

3. EQUITY—DECREE—CROSS BILL.

On a bill to restrain an action at law to try title to land, where the court dismisses the bill and dissolves the preliminary injunction granted in the cause, it is error to decree further that respondent should recover the land in question from the complainant, and should have a writ of possession for the same, in the absence of a cross bill praying such affirmative relief.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

In Equity. Bill filed by J. F. Wood and others against John S. Collins and others. There was a decree for respondents, and complainants appeal.

This suit was brought by appellants by bill in equity to restrain prosecution of a suit at law instituted by appellees on the law side of the docket against appellants to recover 320 acres of land in McLennan county, Tex., patented to the heirs of W. P. Johnson, December 12, 1872, upon a location and survey made in 1871. Appellants allege in their bill that they have the equitable title to the same land, derived by regular chain of transfer from J. D. Bivens, who settled the same as a pre-emptor in January, 1853, under the pre-emption laws of Texas, at the time when it was vacant, and subject to pre-emption; that Bivens, and those succeeding him by transfer from him, occupied, improved, and cultivated the land the time required by law to entitle him to a patent: that they had the land surveyed, field notes recorded and returned to and filed in the land office at Austin, made proof of occupancy, etc., February 14, 1857, which was filed in the land office January 25, 1875, and did every act required by law to entitle him to patent, but that patent did not issue because of the said Johnson patent. They prayed for cancellation of said Johnson patent, and that complainants' title be decreed to be a good, equitable title to said land, and that it be perfected into a legal title, and for a writ of injunction in the form prescribed by law enjoining and restraining the defendants herein and plaintiffs in said suit at law, and each of them, from further prosecuting said suit at law against complainants, and from offering, using, or introducing in evidence in said suit at law the said patent, until the rights of complainants in the premises can be fully inquired into. Appellees herein answered said bill, denying all the allegations therein;

claimed title under said Johnson patent; prayed that the injunction be dissolved; and, if the court retains the cause, respondents pray for a judgment and decree in their favor, and for special and general relief.

On the trial of the case judgment was rendered in favor of respondents, the injunction before granted dissolved, and writ of possession awarded respondents for two-thirds of the land. The court reduced its findings of law and fact to writing, and they appear in the record, from which it will be seen that the findings of fact are as alleged in complainants' bill, except as to the time Bivens settled on the land in controversy; the court finding that the settlement was made in the year 1853, prior to December 21st, and after February 7th. The court's conclusions of law are all in line with appellants' claim in their bill, except that the court, in effect, holds that the Bivens pre-emption right was lost by the failure to file in the land office at Austin the proof of occupancy prior to the location of the Johnson certificate; and upon these conclusions is based the judgment in favor of respondents.

From the judgment complainants appealed, and, among others, assign the following errors: "(2) The court erred in rendering judgment in favor of defendants for the land in controversy, and awarding a writ of possession for the same, because complainants are thereby cut off from their legal defenses against the action of respondents on the law docket of this court, or limitations or claims for improvements made in good faith, which they intended to and could interpose in said suit at law; and because respondents did not prove title in themselves to the land in controversy. (3) The court erred in finding in favor of respondents, because the court did not find as a fact that the land in controversy was in the Mississippi and Pacific Railroad reserve, and respondents' claim of paramount title over complainants' equitable title was put upon the ground that said land was in said reservation. (4) The court erred in holding and deciding that the holders under the Bivens pre-emption claim lost their right because the proof of occupancy was not filed in the land office until after the W. P. Johnson certificate was located, and on that account deciding the whole case in favor of respondents. (5) The court erred in holding and deciding that the law does now, or ever did, fix any time within which a pre-emptor must file his proof of occupancy in the land office. (6) The court erred in rendering judgment other than that the injunction be dissolved and the complainants' bill be dismissed, and for costs, because all other questions than those presented by complainants' bill ought to be decided and determined in the suit at law now pending between the parties, wherein complainants herein ought to be permitted to make every legal defense available to them, and which the decree in this cause prevents them from making."

Harris & Saunders and E. H. Graham, for appellants.

Robertson & Davis and W. S. Kincheloe, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The appellants do not complain of the correctness of the facts as found by the trial court, except in two respects: First, the finding that J. D. Bivens, under whom appellants claim title, settled upon the land in controversy with the intention of claiming it as a pre-emption some time in the year 1853, some time after February 7th and before December 21st of that year; and, second, the finding that it was admitted on the trial that the defendants below, appellees here, are the owners of the W. P. Johnson title to the land in controversy. Our examination of the evidence in the case leads us to the same conclusion as that reached by the trial judge, i. e. that J. D. Bivens did not settle upon the land in controversy with the intention of claiming it as a pre-emption until the fall of 1853. The parol evidence offered as to the date of Bivens' settlement and of the

survey made by Bigham for him is not sufficient to overcome the documentary evidence in the case. Bigham's evidence does not go far enough to warrant us in concluding that the dates of the survey and field notes coming from the records of the Milam land district were changed from January, 1853, to January, 1854, particularly as the said Bigham does not explain the dates of the survey found in the general land office, nor the date of the affidavit of Bivens, purporting to come from the land office of Milam district, wherein said Bivens swears that he settled on the land before the 21st day of December, 1853. The record does not show that the appellants expressly admitted on the trial in the court below that the defendants in the court below (appellees here) are the owners of the W. P. Johnson title to the land in controversy, and we have no way of ascertaining whether such admission was made or not, except to take the finding of such fact by the trial judge. Whether it was expressly admitted or not seems to be immaterial, because the appellants' bill of complaint impliedly admits that the appellees were the owners of the Johnson title; and, in addition to this, the evidence taken in the case proves it.

As a conclusion of law based on the facts of the case, the appellants complain that the court below erred in holding and deciding that the holders under the Bivens pre-emption claim lost their right, because the proof of occupancy was not filed in the land office until after the W. P. Johnson certificate was located, and, on that account, deciding the whole case against the appellants. On this matter, the learned judge of the court below held:

"There runs through all of the pre-emption laws of Texas a requirement that the pre-emptor shall do the following things to perfect his title: First, he must designate his land; second, he must have it surveyed; third, he must return his designation and field notes to the land office; fourth, he must prove his three-years occupancy, and lodge that proof in the land office at Austin. See 1 Pasch. Dig. arts. 4335-4370; 2 Pasch. Dig. art. 7046; Rev. St. Tex. arts. 3937-3946. The occupancy as a homestead for three years was the substance of the whole matter, and while that continued the pre-emptor was again and again allowed by the state further time to have his survey made, and take the succeeding steps to perfect his title. The time within which he might do this was not construed as an absolute limitation of time, but, where there was no file or intervening right he still might have his survey made or take the succeeding steps. *Kohlhass v. Linney*, 26 Tex. 333. A sound public policy as well as the law demanded that the evidence of the three-years occupation of the land required of the pre-emptor should be placed in the general land office, as well to preserve harmony in the land laws of the state as to protect innocent locators. This requirement is found in nearly all the pre-emption laws of the state. See 1 Pasch. Dig. arts. 4336, 4343, 4344, 4359, and 4363. See, also, 2 Pasch. Dig. arts. 7045 and 7046. See, also, Rev. St. Tex. arts. 3944 and 3945."

We are not prepared to say that this was erroneous, but, on the contrary, we are inclined to the opinion that the reasoning and conclusions are sound, and that the adjudged cases are not in conflict. Where there is a failure to return to the land office proof of occupancy, and to pay the office fees, and there is also an abandonment of the land, we think that an entirely different case is presented from that of *O'Neal v. Manning*, 48 Tex. 403, which was a case where the pre-emption claim had been actually perfected by designa-

tion and survey, actual residence for the time prescribed by the statutes, return of field notes, with affidavits as to residence, and payment of the purchase money, and where it was held that abandoning the place after the claim had attached by a substantial compliance with the law was not an abandonment of the claim, nor any evidence of it. Nor do we find anything in *Miller v. Moss*, 65 Tex. 179, relied upon by appellants, which conflicts with the ruling of the circuit court. In that case the defendants settled on the land in controversy and made improvements with the knowledge of the plaintiffs, and an alleged intended abandonment was urged without success by defendants as an estoppel. A somewhat extended examination of adjudged cases in the Texas Reports fails to give any case where any pre-emptor who had failed to make a substantial compliance with the requisites of the Statutes, and who had abandoned the land, has been held to retain any equity against a subsequent locator in good faith. In addition to cases cited, see *Lewis v. Mixon*, 11 Tex. 568; *Cravens v. Brooke*, 17 Tex. 269; *Jennings v. De Cordova*, 20 Tex. 508; *Kohlhass v. Linney*, supra; *Teel v. Huffman*, 21 Tex. 781; *Fowler v. Allred*, 24 Tex. 185; *Spier v. Laman*, 27 Tex. 205.

The appellants complain of the decree rendered in the court below, which not only dismissed complainants' bill with costs, but was also in favor of the defendants (appellees here) for the land in controversy, and awarding a writ of possession for the same, because, they say, the appellants in the action originally brought on the law docket of the court are thereby cut off from their legal defenses of limitations and claim for improvements made in good faith, which they intended to and could interpose in said suit at law. The record shows that after bill, answer, and replication both the complainants and the defendants amended their pleadings, in form and substance, in total disregard of the equity rules, but did not thereby enlarge their respective prayers for relief, nor at any time did the defendants file any cross bill asking affirmative relief. The rule appears to be well established that, in order to entitle a defendant in equity to affirmative relief, he should file a cross bill, which should be regularly served, put at issue, and heard as any original bill. *Ford v. Douglas*, 5 How. 143-167; *Railroad Co. v. Bradleys*, 10 Wall. 299; *White v. Bower*, 48 Fed. 186. *Railroad Co. v. Bradleys*, supra, is a very interesting case in connection with the irregularities in pleading that appear in the instant case. Mr. Justice Swayne, delivering the opinion of the court, says:

"Parties defendants are as necessary to cross bills as to original bills, and their appearance in both cases is enforced by process in the same manner. Without the aid of a cross bill the court could not have decreed the sale of the property covered by the trust deed. It could only have dismissed the bills of the complainants, and have denied the relief sought. But the cross bill was a nullity. It was not before the court, and should have been stricken from the files. The complainants prayed for an injunction forbidding the trustees to sell. The court, upon the cross bill, and according to its prayer, decreed a sale. This error is inevitably fatal to the judgment given. It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs with-

out averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly, without the aid of a cross bill, the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration."

The decree of the court below, in going further than dismissing complainants' bill with costs and dissolving the injunction previously issued, and in so far as it adjudged that the defendants should have and recover from the complainants the land in controversy, and have a writ of possession for the same, was clearly erroneous, and should be reversed; but we do not think that we need reverse the whole decree, as we can fully protect the rights of all parties by amending and affirming the same decree. Therefore the following decree will be entered: It is ordered, adjudged, and decreed that the decree of the circuit court appealed from in this case be, and the same is hereby, amended by striking therefrom and annulling all that portion which adjudges that the defendants, John S. Collins, E. A. Collins, Nettie Collins, Mary Franklin, joined by her husband, James Franklin, and Annie Cleveland, and her guardian, W. T. Cleveland, do have and recover of and from the complainants, to wit, J. F. Wood, J. T. Wood, Charles Howard, and P. M. Kuydendall, the land in controversy, and awarding writ of possession for the same. It is further ordered, adjudged, and decreed that the decree appealed from, as above amended, be, and the same is hereby, affirmed, the appellees, however, to pay the costs of appeal, for which let execution issue in the circuit court in due course.

DESVERGERS v. PARSONS.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1894.)

No. 92.

1. APPEAL—FINAL DECREE—EIGHTH EQUITY RULE.

A decree will be considered as final where the issues raised by the pleadings were all submitted for final adjudication, and, as entered, it shows that the court passed upon and adjudicated all the merits of the case, leaving nothing to be further disposed of except to carry it into effect, though by inadvertence no time was prescribed (Equity Rule 8) within which certain conveyances therein directed were to be executed.

2. REVIEW—DECREE ON BILL OF REVIEW.

A final decree, from which no appeal is taken within six months from the time of its rendition, can be reviewed in the circuit court of appeals only as to matters of law apparent on its face, on appeal from a decree rendered on issues raised by a bill of review brought to correct errors of law on the face of the decree.

Appeal from the Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

On October 10, 1883, George Parsons filed his bill in equity against Maxime J. Desvergers, Thomas H. Harden, and Francis J. Ruckert, wherein he stated: That early in the year 1881—about January 1, 1881—he employed Desvergers as his agent, and that Desvergers acted as his agent during the whole of that year, and a portion of the following year. That for the purposes of such agency, and for other purposes, he supplied Desvergers with city bonds and money of the value of \$34,133, for which Desvergers was to account to him, and that Desvergers had not accounted fully for

the same. That the object of Desvergers' agency was to acquire for him the capital stock and past-due second mortgage bonds and coupons, and claims against the Coast Line Railroad of Chatham county, Ga., and particularly the stock, bonds, and claims of said Ruckert, including a one-third interest held by Ruckert in the depot grounds of said railroad, and a claim of Ruckert's, amounting to \$1,000, against said railroad for right of way, and another one-third interest in said depot grounds held by said Harden, and a promissory note for \$3,500 and interest, of said railroad, held by said Harden, upon which said Ruckert and one Haywood were coindorsers with Harden, Harden, as indorser, having paid the note to the original holder; also, \$5,250 of said second mortgage bonds belonging to said Harden, and two-thirds of a claim of said railroad against its treasurer, Dillon, and his surety, which two-thirds had been assigned by said railroad company to said Harden and Ruckert; and also \$532 of second mortgage, past-due coupons owned by said Ruckert. That he (Parsons) had verbally requested said Desvergers, early in January, at the inception of said agency, to purchase said stock of said Ruckert and others, including all of said bonds and coupons held by said Ruckert and others, for him, (Parsons,) "at and for such price or prices as said Maxime J. Desvergers should think fit;" and later on during said agency he verbally requested and authorized his said agent to agree with said Harden, "at and for such price or prices as said Maxime J. Desvergers should think fit," for the purchase for him (Parsons) of said properties of said Harden. That later on in the year 1881 he requested and authorized his said agent (his said agent having previously advised him to do so) to agree with said Ruckert for the purchase of said Ruckert's third in said depot grounds and right of way claim; and interest in said claim against Treasurer Dillon and surety, and all other interest of Ruckert's in said railroad company, and in return, and as the consideration for such purchase from Ruckert, to release Ruckert, on behalf of him, (Parsons,) from all liability as indorser upon said \$3,500, and as indorser upon another promissory note of said company for \$1,800. That, in pursuance of the request and authority so conferred upon him, his said agent, in January, February, and March, 1881, purchased from Ruckert seven shares of said railroad stock held by Ruckert, and also other shares of said stock, and delivered to him (Parsons) all of said shares, except seven; and said Desvergers bought from Ruckert and others thirty of said second mortgage bonds, of the face value of \$7,200, and \$532 of past-due coupons of the same serial numbers as said bonds, and delivered over the bonds, but not said coupons, and on or about August 25, 1881, his said agent agreed in writing to release said Ruckert as indorser upon said two notes, and, in return, the said Ruckert agreed in writing to transfer and convey to said Parsons the said right of way claim, claim against Treasurer Dillon and surety, and interest in said depot grounds, and all other interest Ruckert had in said railroad; and on August 25, 1881, his said agent also purchased from said Harden (by agreement in writing of that date) all of said properties which were to have been so acquired from said Harden. That his (Parsons') money was paid to said Ruckert, Harden, and others, as follows:

To Ruckert and others for said stock and bonds and coupons.....	\$4,411 00
To said Harden in the value of city bonds and money.....	6,561 61

Total	\$10,972 61
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That said Harden has assigned and delivered to Desvergers, and Desvergers has turned over to him, (Parsons,) all that was bought from Harden, except the one-third interest in said depot lots, and that Harden is willing to convey the same to Parsons, but is prevented from so doing by Desvergers' false and fraudulent representations. That Ruckert has not transferred the right of way claim, nor seven shares of stock, nor third interest in said depot lots; and that said Ruckert should be made to do so, because, while he has never been formally released as indorser on said two promissory notes, Parsons, as owner of said \$3,500 note obtained from Harden, was in a position to release him therefrom, and relying upon

Ruckert's said written agreement of August 25, 1881, and upon letters written in September, 1881, by Desvergers to him, he (Parsons) had made satisfactory arrangements with Haywood, the only other indorser upon said \$3,500 note, and thereby released Haywood as indorser, which in effect released Ruckert. That Desvergers claims that Ruckert assigned and delivered over all but the third interest in the depot lots. That Desvergers has refused to come to a settlement with him, and account for the disposition of said agency money, i. e. \$34,133, although he has long ceased to be agent. That he retains from Parsons the \$532 of coupons, and has brought suit on them against said railroad. That he retains from Parsons the \$1,000 right of way claim, and claim against Dillon and surety, worth \$833.33; and that Harden and Ruckert each has not yet conveyed to Parsons or Desvergers his respective third of said depot grounds. The bill goes on to charge that Desvergers, in refusing to come to a settlement and turn over said retained property, claims that he made said purchases from Harden and Ruckert on his own account, including said release from said indorsements, and that Parsons guarantied him a claim of his for \$1,500 against said railroad company for salary as director; and that Parsons and himself were partners in business; and he only retains his share of the profits, and that Parsons withholds from him a deed to an undivided half interest in a lot of land at Thunderbolt Point, in Chatham county, Ga.; and Ruckert pretends ignorance of the fact that Desvergers did not act for himself, but for Parsons, in releasing him from said indorsements, whereas Parsons contends the contrary, while admitting that he withholds from Desvergers the deed to the Thunderbolt Point property, but only as a partial protection to himself against Desvergers' attempts to defraud him out of said retained property of Parsons. Further: That the Coast Line Railroad Company resumed payment of its past-due second mortgage bond coupons on December 14, 1881, and that Desvergers ought not to be allowed to collect interest on said \$532 of coupons, because the same were not then presented for payment. That Desvergers became superintendent of said railroad in 1882, Parsons then owning a large majority of the stock of said railroad, and, being principal owner, was principal loser in all losses of said company; yet he (Desvergers) in 1882 notified Parsons and the directors of said company that he intended to resign as superintendent, and thereby induced the company to employ another person as superintendent, then fraudulently refused to resign, thus making the company pay for two superintendents, and entailing a loss of several hundred dollars on Parsons. That Desvergers undertook to act as said Parsons' agent in the said purchase of capital stock and bonds and coupons of said company, in order to secure for himself employment as superintendent of said company, and to enhance the market value of certain property of Desvergers, then wholly unproductive, near the extra suburban terminus of said road, and produce an income therefrom, by bringing about the occupation of said property as a pleasure resort by the patrons of said company; and Parsons was caused fully to understand that Desvergers expected nothing for his said services as agent beyond his salary as superintendent and general manager of the affairs of said railroad, and the income from an increased value of said property. That Parsons, however, ventured some money in a cotton speculation, expecting to pay Desvergers the profits, but there was a loss and no profits. Then Parsons offered to pay Desvergers for his services what any three brokers in good standing in Savannah, Ga., would say Desvergers was entitled to for his services in said purchases and other business transacted for Parsons, but Desvergers would not agree to this. The bill prayed for account with Desvergers, discovery from Desvergers, Harden, and Ruckert as to all the matters contained in the bill, specific performance, injunction to restrain suit upon said coupons, and for relief appropriate to the matters alleged, and propounded sixteen interrogatories for Desvergers to answer, one for Harden, and eight for Ruckert, covering substantially every point in the bill.

To this bill, Desvergers made answer, admitting many of the statements of the bill, explaining others, and denying that the complainant was entitled to any relief under the circumstances of the case, a full history of

which, as Desvergers claimed it to be, being set forth in the answer, amended answer, and answers to interrogatories. Defendant Harden answered, setting forth the dealings between him and Desvergers, and showing that he dealt with Desvergers individually, and not as agent for Parsons, and that the contract entered into between him and Desvergers was an entire contract, with one entire consideration. Defendant Ruckert filed an answer, and subsequently an amended answer, showing that he dealt with Desvergers only, and not as agent of Parsons, and that he transferred his one-third interest in the depot lots in question to Desvergers before the filing of the complainant's bill. Thereafter defendant Desvergers, by leave of the court, filed a cross bill against the complainant, in which he sets forth the whole matter of the business relations which existed between him and Parsons, in which he claims \$5,000 for his services to Parsons in regard to route No. 4, and \$9,763.16 as per account annexed, and as an equivalent for the value of bonds, stock, claims, and interest acquired upon consideration moving directly from himself under the agreement between Parsons and himself. In this cross bill, Desvergers waives discovery from Parsons, and professes a willingness to assign to Parsons the two-thirds interest in depot lots and right of way claim upon being paid a just and fair value, to be ascertained by the court. The original complainant, Parsons, defendant in the cross bill, after demurrer overruled, answered the same by admissions, denials, and explanations, and giving another lengthy account of the agreements and transactions between Desvergers and himself. Thereafter, by leave of the court, the complainant filed an amended bill, asking relief with regard to certain choses in action alleged to have been purchased from Harden by Desvergers as his agent, and also by amended bill changed the prayer of the original bill so as to ask relief from Desvergers, in lieu of Harden and Ruckert, as to the transfer of certain depot lots of ground.

After considerable legal skirmishing with exceptions to answers of Desvergers for impertinence and insufficiency, and with references and demurrers, replications were filed on all sides and by all parties, and by order of court the whole matter at issue under the original and amended bills of Parsons and the cross bill of Desvergers, and the answers thereto, was referred to a standing master of the court, with directions to take the evidence, and report to the court conclusions both of law and fact, to which either party might take exceptions, as is usual in such cases.

The master reported, after reciting the pleadings and the answers of the parties to interrogatories, as follows:

"I find that the statement of Desvergers in regard to compensation for his services and his understanding of the contracts is, in the main, the correct one, namely: That he was to have the option of sharing in the bonds purchased to an extent not exceeding one-half of them, or was to be paid a fair compensation for his services, as he chose to elect. That he had this option on the bonds, see Parsons' letter of March 24, 1881, Desvergers' Exhibit A 1; also, Parsons' answer to cross interrogatory 18, folio 7. That he was not to be paid for these purchases by the difference between Parsons' limit and the price at which they were bought is shown by Parsons' letter of February 9, 1881, (Desvergers' Exhibit B 9); also, Parsons' testimony, p. 20. I am equally clear that everything which Desvergers obtained in the trade with Harden and Ruckert while acting under his agreements with Parsons, and that he did not obtain anything as his own individual property; that the consideration of these purchases was Parsons' money, and the promise to hold the vendors harmless from their indorsements on the notes obtained in the trade, which promise has been ratified by Parsons. See Desvergers' answer to cross interrogatory 2, page 188; also, cross interrogatory 16, p. 234. His Exhibit 16, Letter Book, folio 168. It was admitted that the Mather's Point property and adjoining lot was the property conveyed to Parsons, and that the reconveyance should have been of a one-half undivided interest in both pieces, and not of Mather's Point alone. The Ruckert and Ott coupons, amounting to \$536.00, were purchased after the cessation of his relation with Parsons. Desvergers has elected to be paid a fair compensation for his services, and not to share the bonds. T. H. Harden had completed

his part of his contract with Desvergers before this suit was filed. F. J. Ruckert had only to assign his right of way claim against the Coast Line Railroad. Desvergers has delivered to Parsons all the stock, bonds, and coupons acquired while acting under his contracts with Parsons, but retains the Harden and Ruckert interest in the depot lots, the Ruckert right of way claim, the Byck judgment, and the Thomas duebill. Parsons has failed to reconvey the undivided half interest in the back lot at Thunderbolt, known as the 'Springer Lot,' but since the filing of this suit has delivered the deed for the interest in the Mather's Point property. As against T. H. Harden, the complainant is entitled to no relief, and Harden should be discharged with his costs. F. J. Ruckert should be required to assign to the complainant his claim for right of way against the Coast Line Railroad, and then be discharged with his costs, as he was a mesne stakeholder between the parties. M. J. Desvergers should be required to transfer to Geo. Parsons the two-thirds undivided interest in the six depot lots obtained from Harden and Ruckert, to assign the Ruckert right of way claim if it has been assigned to him by Ruckert, the Byck judgment, and the Thomas duebill. As he has already assigned to Parsons the Anderson note of \$3,500, to whom it of right belonged, there is no necessity for further steps in that behalf. Geo. Parsons should transfer to Desvergers an undivided one-half interest in the Springer lot at Thunderbolt.

"The final question of compensation to be paid to Desvergers is the one which presents the most difficulty. He claims that his services in purchasing bonds and in reference to the memorials for route No. 4 are worth \$5,000.00. At the time when he entered into his contracts with Parsons he was earning a salary of \$1,200.00 from the city of Savannah, and was receiving from outside sources from \$1,500 to \$1,700 more,—a total of nearly \$3,000.00 per annum. He left this position, and undertook work with Parsons, for which he was to be paid, and was placed in the position of superintendent of the Coast Line Railroad, from which he obtained a salary of \$1,200, with the promise from Parsons to increase the emoluments of that position from his own pockets to an amount not less than \$1,800.00 nor more than \$2,000.00. It is thus seen that Desvergers gave up a position in which he was earning nearly \$3,000.00 to enter into business relations with Parsons where a salary of from \$1,800 to \$2,000.00 was assured to him, with compensation for services in purchasing bonds, etc., and in interesting himself and others in route No. 4. He was thus employed nearly two years. I think five thousand dollars would be full compensation for all services rendered during that time. He has received his salary as superintendent during this time, amounting to \$1,400.00, which should be deducted from the above amount, and would leave a balance of \$3,600.00, for which he should have a decree against the complainant, Geo. Parsons.

"The Ruckert and Ott coupons, amounting to \$536.00, should remain the property of Desvergers. They were purchased after he had ceased purchasing for Parsons, were bought by him individually, and no consideration moving from Parsons entered into the purchase. Whatever may be the custom among brokers in reference to past-due coupons matters little in this case. The evidence is that the Ruckert bonds were purchased with these coupons attached. See Desvergers' test. 10th point, page 146, and Ruckert's answer. These bonds were the first ones purchased for Parsons. See his testimony, cross interrogatory 12. They were delivered to him without objection, in the condition in which they were bought, and he knew bonds were being bought with past-due coupons detached. See his testimony, page 9, ans. to 5th interrogatory. There is no evidence that the Ott bonds were ever purchased by Parsons, and naturally he cannot claim the coupons. Desvergers having omitted from his cross bill the allegation in regard to his claim for salary, as set out in his answer, this question is not passed on."

Parsons and Desvergers respectively filed elaborate exceptions to the adverse findings of the master, each attaching to his exceptions all the evidence relied upon to sustain his side of the case. The exceptions to the master's report, and the whole merits of the litigation, came on to be heard at the April term, 1888, when the cause was duly submitted to the court for decision. Two years later, at the April term, 1890, the court rendered a decree as follows:

"George Parsons, Complainant, v. Maxime J. Desvergers, Thomas H. Harden, Francis J. Ruckert, Defendants. Bill.

And

"Maxime J. Desvergers, Complainant, v. George Parsons, Defendant. Cross Bill.

"Final Decree, July 12, 1890.

"This cause came on to be heard at the April term, 1888, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

"That the defendant Maxime J. Desvergers was the agent of George Parsons, as alleged by George Parsons in his original bill in this cause, and as such he is bound fully to account to said George Parsons, and to pay over to him whatever balance there is still in his hands held as such agent.

"That said Maxime J. Desvergers shall execute in due form, and shall deliver to said George Parsons, deeds of conveyance conveying to said George Parsons the legal title to two undivided third interests in fee simple absolute, which interest he acquired, as the agent of George Parsons, from Thomas H. Harden and Francis J. Ruckert, his codefendants in the original bill in this cause, in six lots of land situated in the city of Savannah, county of Chatham, state of Georgia, which are designated and known on the map or plan of the land of the estate of the late James M. Schley, made by John R. Tebeau, county surveyor of Chatham county, and dated August 15, 1872, as lots No. 45, No. 46, No. 47, No. 48, No. 49, No. 50, and which together constitute and form the rectangular tract or parcel of land on which are located the office, the car shed, and the stables of the Coast Line Railroad, and which is used by said railroad for depot purposes; and said tract or parcel of land is bounded on the north by Bolton street, on the east by the right of way of the Savannah, Florida and Western Railroad Company, on the south by a lane, and on the west by lot No. 51, as designated and known on said map or plat.

"That said Maxime J. Desvergers shall transfer, or cause to be transferred, to said George Parsons, upon the books of the Coast Line Railroad, seven shares of the capital stock of said Coast Line Railroad, which shares he acquired, as the agent of said George Parsons, from Francis J. Ruckert, one of the defendants in the original bill in this cause, yet never transferred to said Parsons.

"That Francis J. Ruckert, one of the defendants in the original bill in this cause, shall in due and proper form execute and deliver to said George Parsons a transfer and conveyance of the claim he holds against the Coast Line Railroad on account of said railroad's right of way through land owned or controlled by him, the right to which claim said Desvergers, as the agent of George Parsons, acquired from said Ruckert, who, however, has never transferred the same out of himself.

"That said Maxime J. Desvergers acquired the detached coupons in dispute in this cause after he had ceased to be the agent of George Parsons, and not as the agent of said Parsons, and he is consequently entitled to have and to hold the same to his own and exclusive use as his own property, free from the claim of the said George Parsons. That George Parsons, upon his receipt from Maxime J. Desvergers, and from Francis J. Ruckert, the conveyances and transfers herein required to be executed, made, and delivered to him, shall pay into this court, for Maxime J. Desvergers, the sum of one thousand dollars, in full for all the services claimed in the cross bill in this cause to have been rendered by said Desvergers for said Parsons in respect to any and all the matters and things, of whatsoever kind or sort, mentioned in said cross bill; and that George Parsons shall pay the unpaid balance of the fee and compensation of Geo. W. Owens, Esq., the standing master of the court, to whom this cause was referred, and that Maxime J. Desvergers shall pay the remainder of the costs incurred in this suit."

October 3, 1890, Parsons' solicitor filed a petition for amendment of the decree, so as to comply with the eighth equity rule, and prescribe the time within which Desvergers should execute and deliver to Parsons the deeds of

conveyance referred to in the decree, and also the time within which Desvergers should transfer to Parsons the railroad stock referred to, and the time within which Francis J. Ruckert should execute and deliver to Parsons the transfer and conveyance of the right of way claims referred to in said decree, which petition does not appear to have been acted upon. November 13, 1890, Parsons filed a bill of review against Desvergers and Ruckert, wherein he set forth the history of the case, recited the decree rendered at the April term, 1890, pointed out the failure to comply with the eighth equity rule, and prayed the court to review said decree, and to correct or supplement the same so as to make it conform to the eighth equity rule, and for general relief.

To this bill of review both defendants entered an appearance, but Desvergers alone answered, filing what he called an "answer and cross bill," wherein he admitted that the decree sought to be reformed does not conform to the eighth equity rule, suggests that it was the fault of complainant's solicitor, and informs the court that he does not contest the justice of reforming said decree, but submits that the costs of such reformation should be borne by complainant, and not by the defendant. The defendant, further in answer, requests the court to review that part of said decree (paragraph 3) which directs that he shall transfer, or cause to be transferred, seven shares of the capital stock of the Coast Line Railroad, in which connection defendant averred that it must have been an inadvertence that this matter was injected into said decree, and that such transfer is made by said decree a condition precedent to a recovery by the defendant of the compensation allowed him; and that he is thereby required to perform an impossibility, inasmuch as the said complainant, though requested by the defendant, has failed or refused to indicate the serial numbers of the shares referred to, or to produce the script for the same,—and much more to the same purport; concluding with a prayer that said portion of said decree may be eliminated therefrom, and further praying the court to review said decree, and to correct or supplement the same, to give the needed aid to the defendant, and for all other relief that may be necessary in the premises. Desvergers' answer was filed February 2, 1891. Without further proceedings apparent of record, on February 11, 1892, the court rendered what is denominated an "amended final decree," wherein the original final decree was amended so as to comply with the eighth equity rule, as prayed for by complainant, Parsons; and, in respect to the transfer of the seven shares of capital stock of the Coast Line Railroad directed to be transferred by Desvergers to Parsons, the original decree was amended so as to operate said transfer by the force and effect of the decree itself, practically as prayed for by the defendant, Desvergers.

On the 29th of February, 1892, Desvergers notified Parsons of the execution by him (Desvergers) of the deed of conveyance of the land mentioned in said decree, without prejudice to his right of appeal from said decree. August 6, 1892, Ruckert waived his right of appeal, stating that he was only a nominal party to the proceedings, and thereupon Desvergers appealed to this court from the amended final decree, assigning as errors to be reviewed all the findings in the said decree favorable to Parsons and adverse to himself, without reference to whether the same were adjudicated in the decree of July 12, 1890, or in the decree rendered on the bill in review February 11, 1892.

W. R. Leaken, for appellant.

George A. Mercer, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge, (after stating the facts as above.) The master's report shows that all the matters in controversy between Parsons, the original complainant, and Desvergers, the main defendant and cross complainant, (and between them and all other parties,) raised by the original bill, amended bill, answers, cross bills, and replications, were submitted to and reported on by him; the

exceptions to the master's report show that all the said issues were submitted to the court at the April term, 1888, for final adjudication; and the decree of July 12, 1890, shows that the court at that time passed upon and adjudicated all the rights and matters in controversy,—all the merits of the case,—leaving nothing to be further disposed of, or in any wise open, except to carry the said decree into execution. The decree itself was intended to be final, and was complete and formal in every respect, except that by inadvertence the eighth equity rule in respect to the execution of the decree was not complied with, no time being therein prescribed within which certain conveyances and transfers ordered to be made by Desvergers and Ruckert should be executed. The decree meets all the requirements of a final decree, as it terminates the litigation on the merits of the case, and settles the rights of all parties. Many cases can be cited in support of this conclusion, from *Ray v. Law*, 3 Cranch, 179, down to *McGourkey v. Railroad Co.*, 146 U. S. 536-569, 13 Sup. Ct. 170, where the cases respecting final and interlocutory judgments are reviewed, and the distinctions between them pointed out. We content ourselves with citing *Grant v. Insurance Co.*, 106 U. S. 430, 1 Sup. Ct. 414, where it is declared that "the rule is well settled that a decree, to be 'final,' within the meaning of that term as used in the act of congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but execute the decree it had already rendered."

Section 11 of the act of congress to establish circuit courts of appeals, by which this court is created and its jurisdiction determined, provides "that no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit courts of appeals under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed." In this case the decree appealed from was rendered on February 11, 1892; it was rendered on the issues raised by a bill of review brought to review and correct errors of law on the face of the decree rendered July 12, 1890. Under such a bill of review, no inquiry can be made into the evidence of the case in order to show the decree to be erroneous in its statement and finding of facts. See *Freeman v. Clay*, 2 U. S. App. 254-267, 2 C. C. A. 587, 52 Fed. 1, where the rule is recognized and authorities collated. The issues made by the bill of review in this case and the answers thereto are solely in regard to matters of law apparent upon the face of the decree. The decree deals only with such matters of law, and in no respect deals, or attempts to deal, with matters based upon the evidence in the case. The appellant assumes that the decree of July 12, 1890, was not a final decree, and that, no final decree being rendered in the case until February 11, 1892, his present appeal brings before us for review the entire case, and permits us to inquire into the evidence, and determine whether the findings of the master and of the court upon the merits of the case were correct or not. As we have shown,

the decree of July 12, 1890, was a final decree, and, as no appeal was taken therefrom within six months from the time of its rendition, it can only be reviewed in this court, as in the court below, upon the bill of review which was filed in the case, which bill of review, as we have seen, opens up only matters of law apparent on the face of the decree. As to such matters there are no errors which need serious consideration. The decree appealed from is affirmed.

GUNN v. BLACK et al.

BLACK et al. v. GUNN.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

Nos. 277 and 278.

1. ACCOUNTING—OBJECTIONS TO MASTER'S REPORT—WAIVER.

Where an order directing an accounting states the principle to be followed, and no objection is made thereto until after final decree, four years later,—the opposite party having died in the mean time,—it is then too late to contend, for the first time, that certain matters plainly excluded by the order ought to have been taken into consideration.

2. APPEAL—REVIEW—ACCOUNTING.

A reviewing court will not, on an accounting between partners, reverse the action of the court below in disallowing, on conflicting evidence, certain claims which were first presented on exceptions to the master's report, when the consideration of such claims was necessarily excluded by the order under which the accounting was conducted, and when the opposite party and one of the bookkeepers having knowledge of the matters had died in the mean time.

3. PARTNERSHIP—DISSOLUTION — SALE OF PROPERTY BY RESIDENT PARTNER—TRUSTS.

A resident managing partner, who is charged with the duty of winding up the partnership affairs and selling its property, is the agent and trustee of his nonresident copartner; and it is a breach of trust for him to become interested as a purchaser of such property, either alone or with others, without his partner's knowledge, or to make profits out of the property at his partner's expense, and by so doing he renders himself liable to account for the full value of the property at the time of the sale.

4. SAME—CONVEYANCE OF PARTNERSHIP INTEREST—EFFECT.

A deed whereby a partner owning a two-thirds interest in the partnership conveys to his copartner an "equal interest" in all the property of the firm will not, in the absence of a special provision to that effect, operate as a release of the accounts of the firm, against the partners, respectively; but these, like other accounts, remain part of the firm property.

Appeals from the Circuit Court of the United States for the Eastern District of Arkansas.

These are cross appeals from a decree settling an account between partners. March 1, 1870, John Gunn, William Black, and Thomas Moffet formed a partnership under the name of John Gunn & Co., for the purpose of carrying on the sawmill business in Monroe county, Ark. August 3, 1872, Gunn purchased the interest of Moffet in the property of the partnership, and the two remaining partners continued the business of the firm. January 28, 1882, by a deed of that date, Gunn made Black an equal partner with himself in the property of the firm. The principal place of business of this partnership was at Brinkley, in Monroe county, Ark., where its mill was located. The account books of the partnership were kept there. Black

resided there, and took a more active part in the management of the business than did Gunn, who lived in Memphis, Tenn. The original articles of copartnership provided that Gunn should give no more attention to the business than he should deem proper, but that Black should give his personal attention to the management of the workmen, and to the mill, and to whatever business should be transacted thereat. These provisions appear to have been kept in mind, and complied with, through the entire existence of the firm. The partnership was engaged in active business as such until 1882, when it had accumulated property worth at least \$150,000. Subsequent to that year, the partners were engaged in selling the property of the firm, and in winding up the affairs of the partnership; but as most of the property was in Monroe county, Ark., where Black resided, he conducted the business of selling it, and of winding up the partnership affairs, as he had before conducted the active business of the firm in that county. October 3, 1888, Gunn commenced this suit against Black to dissolve the partnership, and to settle the accounts between the partners. September 16, 1889, the special master who had been appointed by the court to state the accounts of the partners filed his report. A few days later, Black died intestate, and this suit was revived against his administratrix, widow, and heirs at law, who, for convenience, will hereafter be called the defendants. The complainant filed many exceptions to the master's report, and October 27, 1890, filed an amended complaint. December 14, 1892, the final decree was rendered, from which both parties have appealed.

George Gillham, for complainant, Gunn.

John J. Hornor and M. L. Stephenson, (Jacob Trieber, on the brief,) for defendants.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first supposed error assigned by the complainant cannot be sustained. It is that the master did not charge Black, as managing partner of the firm, with all of the money and property that went into his possession, and credit him only with his proper disbursements, but stated an account between the firm and each of the partners, in the usual form. While Black was the active manager of the business of this partnership at Brinkley, where the mill was situated, the record in this case clearly discloses the fact that during several years of its existence the complainant collected at Memphis, where he lived, large amounts of moneys of the firm, conducted its business with banks in that city, and generally received and disbursed as much, if not more, of the funds of the firm, than did his partner, Black. Moreover, the account books of the partnership were kept in the same manner in which the master has stated these accounts, and the order appointing him directed him "to state the separate account of the plaintiff and defendant as the same appears from the books, and report the same to the court."

Nor was it error for the court to direct the master to state these accounts from the books alone, and to report this statement to the court. This order was made October 26, 1888, shortly after the commencement of the suit; and no objection to it, no motion to recommit the case to the master for a further accounting, no complaint concerning it, was made, until it was assigned as error after the final decree in 1892. It was then too late for the complainant

to object, if there had been error, and there certainly was not. A master in chancery is an officer appointed by the court to assist it in obtaining information requisite to its decision. He is usually appointed to take and report testimony, to state accounts, to compute interest, to ascertain the value of annuities, to report the amount of damages in particular cases, or to perform like duties. His report, when made, is merely advisory. The court may confirm, modify, or reject it, and must itself decide the issues presented in the case. It cannot refuse to perform its duty to determine by its own judgment the controversy before it, nor can it delegate the performance of that duty to any of its officers, without the consent of the parties. It follows that it is entirely in the discretion of the court to determine, subject to the rules of evidence, the extent and character of the information the master it appoints shall obtain and report for its guidance. *Kimberly v. Arms*, 129 U. S. 512, 523, 9 Sup. Ct. 355.

Three hundred and eighty-nine vouchers for amounts aggregating about \$100,000 were produced by complainant, from which, and the evidence accompanying them, it appeared that he had paid about this amount on account of the debts of the partnership, and that he had never received credit for any of it on the account books of his firm, or on the master's report. The court below refused to allow him any part of this amount, and this ruling is repeatedly assigned as error, and is the principal ground of complaint. Most of these vouchers appear to have been made, and the amounts they represent appear to have been paid, in the years 1872, 1873, 1874, and 1875. During those years, Black was running the sawmill at Brinkley, and selling and shipping lumber to various parties, on account of the firm. Many of these customers resided in Memphis, and the bills of the firm against them were collected in that city. Some of these bills were collected by the complainant, and in that way he received moneys of the firm which should be charged against him, if he is to be credited with the amount of these vouchers. He admits in his own testimony that he should be charged with \$19,531.82 that does not appear against him on the books or in the master's report. On these books are still found accounts against customers of the firm, who were solvent, aggregating many thousands of dollars, which were, in all probability, paid to some one; but no payment has ever been credited on the books, nor has the amount paid been charged to any one. Who collected these accounts? The cash received by this firm, according to its books, for the 29 months ending August 1, 1872, averaged \$2,223.31 per month. The cash received by the firm, according to these books, for the 36 months commencing August 1, 1875, averaged \$4,321.08 per month. But the cash received by this firm, according to these books, for the 36 months intervening between August 1, 1872, and August 1, 1875, averaged only \$575.09 per month. This was the period during which the complainant paid most of the amounts he presents these vouchers for; and if the firm business was increasing during these years, as its subsequent record strongly indicates, this cash account is very persua-

sive evidence that some one must have collected for the firm a very large portion, if not all, of the money expended for these vouchers. If the business yielded a monthly income in amount halfway between the average of the 29 months before and that of the 36 months after this period, it would have produced \$96,893.60 more in these three years than it is credited with on the books of the firm. Joseph Tomlinson was bookkeeper of the firm at Brinkley from January, 1873, until January 1, 1880. R. B. Davis, the special master who stated the account in the court below, was the bookkeeper of the firm from January 1, 1880, until May 1, 1886. J. M. Folkes was the bookkeeper of the firm from April 1, 1887, until this suit was commenced. About the year 1885 the complainant learned that the amounts he had paid upon some of these vouchers had not been credited to him on the books; and thereupon, in that year, at the suggestion of himself and Black, the two bookkeepers, Tomlinson and Davis, who had some, if not all, of these vouchers, prepared lists of the debits and credits which each of the partners was entitled to as against the firm, for the purpose of enabling them to settle their accounts with each other. In the list of credits to the complainant thus prepared, the amounts evidenced by most of these vouchers appeared, and yet the difference between the balances due the firm from the two partners was less than \$5,000, according to these lists. No settlement was effected, and in 1887 the bookkeepers Davis and Folkes, who had some if not all of these vouchers, prepared lists of the debits and credits of each of these partners as against the firm, in like manner. The list of credits to the complainant which these bookkeepers made contains many of the amounts evidenced by these vouchers, and yet the difference between the balances due the firm by these partners in 1887 was less than \$1,000, according to these lists. The master's report makes the difference between these balances in 1889 \$3,953.21. If the amounts of these vouchers should now be credited to the complainant, after debiting him with the amount he admits he received, it would make it appear that the difference in the balances of the two partners was more than \$75,000 during all the time after 1884. If this was the true state of the accounts, it is strange that none of these bookkeepers discovered it. Moreover, the bookkeeper Folkes testifies that a copy of the account he and Davis made in 1887 was sent to complainant; that the complainant discussed it with him, and objected to a few items, which did not amount to \$5,000 in the aggregate. In the original complaint no special mention is made of the failure of the firm or of Black to credit the complainant with this large amount which does not appear on the books, although the complainant knew as early as 1885 that the amounts of these vouchers were not credited to him on the books. The order appointing the master on October 26, 1888, directed him to state the accounts according to the books, and no objection was made to this order until long after the death of Black, although it clearly excluded the vouchers from the consideration of the master. The master's report was filed September 16, 1889, and in that month Black died.

Joseph Tomlinson, the bookkeeper from 1872 to 1880, is also dead; and it was not until January 28, 1890, when he filed his exceptions to the master's report, that the complainant first asked for an allowance of the amounts evidenced by these vouchers. In view of these facts,—that the complainant received \$19,531.82 of the moneys of the firm that were not charged to him on its account books; that he collected moneys of the firm in Memphis, deposited them in bank accounts which he used, and generally managed the financial affairs of the firm in that city during the years when most of these vouchers were made; that the cash which appears by the books to have been received by the firm at Brinkley during this period is nearly \$100,000 less than the members of the firm must have collected if the business increased as the receipts before and after this period indicate that it did; that the bookkeepers of the firm (men who were most likely to have knowledge concerning these accounts) made two independent statements of them in different years, in which the complainant was given credit for most of these vouchers, and yet the state of the account between the partners shown by these statements is substantially the same as that found by the master; and the further fact that Black and the bookkeeper of the firm during this period were both dead before this claim was presented in this suit, and we are thus deprived of the explanations and countercharges they might have presented,—we are of the opinion that it would be extremely dangerous to now allow this large claim, and that this ruling of the circuit court ought not to be disturbed. Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, they must be permitted to stand. *Warren v. Burt*, 58 Fed. 101; ¹*Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. 885; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821.

The thirteenth error assigned is that the complainant was charged \$500, December 17, 1881, as paid him by James Reilly; and it is sustained, because Mr. Reilly testifies, and the account books of the Brinkley Oil Company, of which he was president, show, that this amount was not paid to the complainant by Mr. Reilly, or the company of which he was president.

The sixteenth error assigned is that the complainant is not credited with several items, aggregating \$1,280.84; and it is sustained, to the extent of \$1,155.84, because it appears from the testimony of the bookkeeper Linsted that items aggregating that amount appear to the credit of the complainant on the partnership's books of original entry, which were not posted to the ledger, and hence were omitted from his credits in the master's report and in the decree.

¹ 7 C. C. A. 105.

The eighteenth error assigned is that Black should be charged with \$2,223.30 more than he is charged with in the decree; and it is sustained, to the extent of \$100, because the record discloses that an item of \$131.95 charged to him on the books of original entry was posted as \$31.95, and thus this \$100 was not debited to him in the master's report or in the decree.

From 1882 until the commencement of this suit, the firm of Gunn & Black was selling its property and winding up its business. Gunn still lived in Memphis, and Black negotiated the sales of the property of the firm, and managed the business at Brinkley, where he lived. In the management of this business, he was the agent and trustee of his partner. It was his duty to sell the partnership property at the best price he could obtain for it, and to look solely to the interest of the firm while he was selling its property. The law guards the fiduciary relations with jealous care. It exacts good faith and fair dealing between partners, to the exclusion of all arrangements which could possibly affect injuriously the profits of the firm. It aims to prohibit the possibility of a conflict between the duty of a trustee and his personal interest. The interests of vendor and purchaser are diametrically opposed. To the vendor the highest price, to the purchaser the lowest price, is the greatest good. For the agent of a vendor to permit himself to become interested in a purchase from his principal is to inaugurate so dangerous a conflict between duty and self-interest that this has long been wisely and strictly forbidden. No man, whether he be principal or agent, can be a vendor and a purchaser at the same time; and the agent of a vendor, who intentionally sells his principal's property at less than he can readily obtain for it, or who intentionally becomes interested, as a purchaser, in the subject-matter of his agency, violates his contract, betrays his trust, and makes himself liable for the full value of the property at the time of the sale, or for the profits he derives as a purchaser, at the option of his principal. *Warren v. Burt*, 7 C. C. A. 105, 58 Fed. 101; *Kimberly v. Arms*, 129 U. S. 512, 527, 9 Sup. Ct. 355; *Michoud v. Girod*, 4 How. 503, 554, 555; *Bigelow v. Walker*, 24 Vt. 149; *Dunlap's Paley*, Ag. (4th Am. Ed.) 25.

This record clearly shows that Black violated his trust; that he sold partnership property to himself at less than its value; that he sold property of the firm at less than its value to other parties, with whom he was at the same time clandestinely interested as a purchaser; and that in one instance, without his partner's knowledge, he gave away a thousand dollars of the property of the firm, in the hope that this might benefit himself and his friends. In all these cases, equity demands that he be charged with the amounts lost to the firm by this course of action.

Accordingly, \$300 will be charged to the defendants, under the twenty-ninth error assigned, because Black sold lot 5, block 35, in the town of Brinkley,—which was partnership property, and was worth \$1,000,—to himself, for \$700, and caused the lot to be conveyed by the members of the firm to Salinger for that price, who afterwards conveyed it to him (Black) for the same price; thus

deceiving Gunn, at the time he signed the deed, as to the real purchaser, and inducing him to join in the conveyance in reliance upon the good faith of his partner.

\$2,520 will be charged to the defendants, under the thirtieth error assigned, because Black sold 280 acres of the lands of the firm, which were worth \$4,480, to himself and one McKeown, for \$1,960, but concealed from his partner the fact that he was a joint purchaser with McKeown, and caused the title bonds to be made in the name of McKeown only.

Interest at 6 per cent. per annum from January 1, 1874, until December 14, 1892, on the \$821 allowed by the court below for the moneys expended by the firm in purchasing, and building improvements in and prior to 1873 upon, the lot owned by Black, and kept by him as a homestead from that time until he died, which amounts to \$886.68, will be charged to the defendants, under the thirty-second error assigned, because, during all these years, Black had the sole use and benefit of this expenditure.

Under the thirty-fourth error assigned, \$1,000 will be charged against the defendants, because, without his partner's knowledge, Black subscribed and paid that amount from the funds of the firm towards the construction of a bridge at Brinkley in 1887, and the money thus paid was used to purchase lumber and merchandise of a corporation and a partnership doing business at Brinkley, in which Black was heavily interested, so that he derived a profit at the expense of the firm, which had long retired from active business.

Turning now to the cross appeal of the defendants, the principal error they assign is that the court below did not hold that the effect of the deed of January 28, 1882, from the complainant to Black, was to satisfy and release the accounts owing to the firm by the partners respectively, and to settle the accounts between them to that date. According to the books of the partnership, Black was then owing it \$18,145.14, and Gunn was owing it \$10,188.76. Prior to August 3, 1872, Gunn, Black, and Moffet each owned an interest of one-third in the partnership property. On that day, Gunn bought the interest of Moffet for \$10,000, and from that time until he made the deed of January 28, 1882, he owned an interest of two-thirds, and Black an interest of one-third, in the property of the firm. The accounts owing to the partnership were property of the firm, as much as its other personal property or its real estate, and the accounts owing the firm by the partners were no less the property of the firm than the accounts owing to it by strangers. No intention to satisfy or release either of these accounts against the partners, or to diminish the property of the firm in any way, is expressed in the deed. The record contains much parol evidence offered to explain or modify this instrument, or to show the intention with which it was made; but this testimony is contradictory, confused, and unsatisfactory. Moreover, the deed is clearly complete in itself; its subject-matter is clearly and definitely described; its terms are plain and unambiguous; and it is not subject to addition, modification, or variance by parol evidence. It must stand as it reads. By its terms, it con-

veys to Black "an equal interest in any and all of the property of the firm of John Gunn & Company and in the property of the firm of Gunn & Black. Said property includes all of the property, real, personal, and mixed, accumulated by the firms of John Gunn & Company and Gunn & Black, respectively, since the 12th day of March, 1870. To have and to hold, an equal one-half interest in said granted and bargained property, real, personal, and mixed, of every kind and description, owned or partly owned by me, as a partner of the aforementioned firm."

There are no better rules for the construction of such a deed than (1) that the court may put itself in the place of the grantor, for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him at the time of the execution of the instrument, consider how the terms of the deed may affect the subject-matter; and (2) that, when the intention is manifest, it will control in the construction of the deed, without regard to technical rules. *Prentice v. Storage & Forwarding Co.*, 58 Fed. 437;¹ *Witt v. Railway Co.*, 38 Minn. 122, 127, 35 N. W. 862; *Driscoll v. Green*, 59 N. H. 101; *Johnson v. Simpson*, 36 N. H. 91; *Walsh v. Hill*, 38 Cal. 481, 486, 487. The application of these rules to this deed leaves no room for doubt that the intention of the grantor was to convey to his partner one-sixth of all the partnership property, and thus to vest in him an equal interest in all its assets, including its accounts against the partners themselves. That intention the deed clearly expresses, but it expresses no more; and the court below rightly gave it this effect, and this only.

Another supposed error assigned by the defendants is that the court, after giving this effect to the deed, did not credit Black, in the accounting, with the \$11,000 he paid Gunn for this sixth interest in the partnership. But this was not error. The \$11,000 was paid by Black to discharge his individual liability to his partner, and not in payment of any firm debt, and it was properly excluded from the partnership accounts.

In these appeals the complainant assigned 42 errors, and the defendants assigned 6. We have carefully examined all of the evidence relating to each one of them. We have discussed those which question the fundamental rules by which the court was guided in this accounting. We have indicated those which we think should be sustained, and given our reasons for our opinion. Many of the rulings complained of, that we have not specifically mentioned, are governed by the rules we have already announced; and in none of them has any such error intervened in the application of the law, or any such mistake in the consideration of the evidence, as would warrant us in disturbing them.

The decree below is reversed, and the cause remanded, with instructions to the circuit court to vacate all proceedings taken to execute the decree, and to enter a decree in conformity to the views expressed in this opinion, to the effect that the complainant shall recover of and from the defendant Bena Black, administratrix of

¹ 7 C. O. A. 293.

the estate of William Black, deceased, \$13,302.40, and interest at 6 per cent. per annum from December 14, 1892, (instead of the \$10,070.88 named in the former decree,) to be paid out of the lands allotted to the defendants by the commissioner, Parker C. Ewan, substantially as provided in the former decree. The complainant, John Gunn, will recover of the defendants three-fourths of his costs in this court in each of these appeals.

GUNN v. BLACK et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 347.

CIRCUIT COURT OF APPEALS—APPELLATE JURISDICTION.

An order made for the purpose of executing a decree, after an appeal from such decree has been perfected, but reserving final action until a commissioner should report his proceedings to the court at a subsequent term, is not subject to review on appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George Gillham, for appellant.

John J. Hornor and M. L. Stephenson, (Jacob Trieber, on the brief,) for appellees.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

SANBORN, Circuit Judge. For convenience, the appellant is termed the complainant, and the appellees the defendants, here, as in the preceding opinion in cases No. 277 and No. 278, between the same parties. 60 Fed. 151.

After both the complainant and the defendants had appealed to this court from the decree made December 14, 1892, (the appeals from which decree have just been decided,) and after the complainant had given an appeal bond, which had been approved by the court, and which operated as a supersedeas per se, the circuit court, on the motion of the defendants, made an order for the purpose of executing the decree below, to the effect that unless the complainant should select by May 1, 1893, from certain lands allotted to the defendants, those which he would accept, at their appraised value, in satisfaction of the amount of money decreed to be due to him from the defendants, a commissioner appointed by the court should make the selection, should execute deeds of the lands selected to the parties in accordance with the order, and report his proceedings to the court at its next succeeding term. The appeal now before us is from this order.

The order was undoubtedly erroneous. Both parties had appealed from the decree. That decree was in the complainant's favor, so that it is difficult to see how the defendants could suffer any damages through the complainant's appeal. Moreover, his appeal bond, which was approved by the judge, was conditioned that he should prosecute his appeal to effect, and answer all damages and

costs if he failed to make good his plea; and a bond so conditioned, when the appeal is perfected in time, as this was, operates as a supersedeas per se, and suspends the power of the court below to proceed further in the case by executing its decree. Rev. St. §§ 1000, 1007, 1012; Supp. Rev. St. p. 904, § 11; *Gay v. Parpart*, 101 U. S. 391. Upon a proper application presenting these facts, a writ of supersedeas might have been issued by this court, staying the proceedings of the court below until the decision of the appeals from the decree. Supp. Rev. St. p. 904, § 11; *Hardeman v. Anderson*, 4 How. 640; *Adams v. Law*, 16 How. 144; *Ex parte Milwaukee R. Co.* 5 Wall. 189.

But the act establishing this court gives it no jurisdiction to review such an order as that now before us upon an appeal. That act provides "that the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act." 26 Stat. c. 517, § 6; Supp. Rev. St. p. 903, § 6.

Under this statute, a final judgment or decree which determines all the matters in controversy in the suit, or a judgment or decree that finally determines the rights of some of the parties to the litigation who are claimed to be separately, not jointly, liable with others against whom the litigation continues, (*Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690,) or a decree which determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, (*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 224, 10 Sup. Ct. 736,) is subject to review in this court by writ of error or appeal, (*Forgay v. Conrad*, 6 How. 201, 204; *Bronson v. Railroad Co.*, 2 Black. 524, 529; *Thomson v. Dear*, 7 Wall. 342, 345; *Trustees v. Greenough*, 105 U. S. 527; *Williams v. Morgan*, 111 U. S. 684, 689, 4 Sup. Ct. 638; *Central Trust Co. v. Hiawasse Co.*, 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850; *Grant v. Railroad Co.*, 2 U. S. App. 182, 1 C. C. A. 681, 50 Fed. 795; *Potter v. Beal*, 5 U. S. App. 49, 2 C. C. A. 60, 50 Fed. 860.)

But with the exception of orders granting or continuing injunctions, this statute gives no jurisdiction to this court to review any order made in the progress of the case, before or after judgment or decree, which does not embody in itself a final decision of the substantial rights of some of the parties to the suit, or to the controversy it affects. *McLish v. Roff*, 141 U. S. 661, 665, 666, 12 Sup. Ct. 118; *Railway Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123; *Hohorst v. Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590.

The order here in question was certainly not a final decree. It was not based upon, and did not embody, any final decision of any of the rights of the parties to this suit. It expressly provided that the commissioner, after selecting the lands, and executing the deeds of them to the parties, should report his proceedings to the court at the succeeding term. This was an express reservation of final action until the report should be received. The order was a mere direction of the court concerning the method of executing its decree, —an order that would have been entirely within its discretion,

if the decree had not been superseded by the appeal. It was not subject to review by appeal in this court. *Smith v. Trabue*, 9 Pet. 4, 7; *Callan v. May*, 2 Black, 541; *Barton v. Forsyth*, 5 Wall. 191.

For want of jurisdiction in this court, this appeal is dismissed, with costs.

CITY OF DETROIT v. DETROIT CITY RY. CO. et al.

(Circuit Court, E. D. Michigan. January 31, 1894.)

No. 3,320.

1. HORSE AND STREET RAILROADS—VOID ORDINANCE—ESTOPPEL.

A grant, by ordinance, to a street-railway company, was extended, by subsequent ordinances imposing new obligations, to a period beyond the limit of the corporate life of the company. The franchises of the company were thereafter transferred in turn to two different corporations, whose charters did not expire within the term of the extended grant. *Held*, that the extended grant was void upon the ground that it could not exceed the normal life of the original company, and that the enforcement of new obligations, discharged at great expense by the new companies, would not estop the city, in view of statutory restrictions, from denying a grant in the streets by any other act than an ordinance "duly enacted for the purpose." *How. Ann. St. Mich.* § 3548.

2. SAME.

An ordinance, imposing new obligations, extended a grant beyond the limit of the corporate life of a street-railway company. *Held*, that such ordinance constituted a valid, subsisting contract during the term of the corporate life of such railway company, and that the city was not thereby estopped from asserting the right to oust the grantee of such railway company (whose charter did not expire within the term of the extended grant) from the occupation of the streets after the expiration of such term.

In Equity. Suit in the circuit court of Wayne county, Mich., by the city of Detroit against the Detroit City Railway Company, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company of the City of New York, for an injunction to compel the removal of tracks from the streets, and to restrain respondents from operating a street railway therein. The Washington Trust Company of the City of New York removed the cause to this court, and a motion to remand was thereafter denied. 54 Fed. 1. A motion by complainant to postpone the hearing on bill and answer, or to dismiss the complaint, was also denied. 55 Fed. 569. The cause was afterwards heard on bill and answer, and the injunction was refused as to certain lines of rails, and a further hearing ordered in respect to the remaining lines (56 Fed. 867), which hearing is now accordingly had.

C. A. Kent and Benton Hanchett, for complainant.

Russell & Campbell, Brennan, Donnelly & Van de Mark, Henry M. Duffield, Otto Kirchner, F. A. Baker, Ashley Pond, and Sidney T. Miller, for defendants.

Before TAFT, Circuit Judge, and SWAN, District Judge.

Taft, Circuit Judge. This is a suit in equity, brought by the city of Detroit for an injunction to compel the Detroit Citizens' Street-Railway Company to cease the running of its cars, and to remove its railway tracks from the streets of the city. The cause was heard on bill and answer in the spring of 1893, and every question was then decided save one. This the court reserved for further argument, and gave leave to the parties to amend their pleadings, and to introduce evidence in respect to it. The case is fully stated in the opinion of the court at the former hearing, reported in the fifty-sixth volume of the Federal Reporter, page 867. For the better understanding of the question now to be decided, however, it is necessary to state again the main facts of the case, and to give a brief synopsis of the previous decision.

On November 24, 1862, the common council of Detroit granted to certain persons about to secure incorporation under the laws of Michigan as the Detroit City Railway a right to construct and operate a street railway in the streets of the city, on certain conditions, for the term of 30 years from the date of the ordinance. The Detroit City Railway was accordingly organized on May 9, 1863, with a corporate life, limited, as required by the incorporating statute, to 30 years. It accepted the terms of the ordinance, and built and operated the railway as authorized. On November 14, 1879, the common council passed another ordinance, which imposed new and different obligations on the railway company with respect to taxes, new liens, and other matters, and extended the grant of 1862 for 30 years from November 14, 1879. By ordinances of 1887 and 1889, the obligations of the railway company in respect to taxes, rates of fare, and the extension of lines were again varied, and the new grant of 1879 was confirmed. The railway company accepted in writing the ordinances of 1879, 1887, and 1889, on the faith of the grant of 1879. In December, 1890, the Detroit City Railway conveyed all its property and franchises to the Detroit Street-Railway Company, a corporation newly organized for 30 years from that date. After operating the railway until October, 1891, this company in turn conveyed all its property and franchises to the Detroit Citizens' Railway Company, another new corporation, organized for 30 years from September, 1891. The last-named company has operated the street railways received by it from its predecessors until the present time, and is the principal defendant against whom relief is sought. On March 29, 1892, the common council passed an ordinance in which, after reciting that the ordinance of 1879 was beyond the power of the common council passing it, in so far as it purported to extend the grant beyond the corporate life of the grantee, the ordinance was amended by limiting the operation of the grant to May 9, 1893, the day when the corporate life of the grantee the Detroit City Railway must end.

At the hearing upon the bill and answers four questions were presented, argued, and decided.

The first and most important was whether the grant until 1909 was valid. The holding of the court was that the city had no power to grant a vested right in its streets except as it was conferred in

the statutes of Michigan providing for the incorporation of street-railway companies, and limiting their corporate lives, in accordance with the Michigan constitution, to 30 years; that the function of the city, as defined by those statutes, was nothing but a consent, with such conditions as the city might impose, to the exercise by the duly-incorporated railway company of its state-given franchise to construct and operate a street railway in the streets of the consenting city; that by the rule of strict construction in favor of the public, enjoined upon courts in interpreting the meaning of grants of power to municipal corporations, the consent of the city could not be of longer duration than the franchise, the exercise of which was to be consented to; and that, inasmuch as such a franchise was limited in duration to the normal life of the railway company upon which it had been conferred by the state, the city's power of consent to its exercise was similarly limited. It was therefore decided that the ordinance of 1879, in so far as it purported to give the right to the railway company to occupy the streets after May 9, 1893, was beyond the city's power as a grant, and was not binding.

The second question was on a plea of *res judicata*, which needs no notice here except to say that the plea was not sustained.

The third question was presented on defendant's objection that, if the ordinance of 1879 was *ultra vires*, then the city was seeking relief from its own wrong, and, as the parties were in *pari delicto*, a court of equity would leave them where it found them, and dismiss the bill; and the case of *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, was cited to sustain the point. It was held that the rule relied on did not apply; that the common council, in the valid exercise of legislative power, had revoked the license of the railway company to remain in the streets after May 9, 1893; that thereafter the use of the street by the street-railway company, being unauthorized, became a nuisance; and that the public, for whom the city, in its control of the streets, acted merely as trustee, could not be denied the ordinary equitable remedy for abating a nuisance, because a common council, years before, had assumed to bind the public by a longer grant than it had power to make. It might well have been added that the principle invoked by defendants has application only where a court of equity is asked to aid a wrongdoer, as, for example, one who has entered into, and partially or wholly executed, a contract which is *ultra vires* because its execution is an offense against the law, or a plain contravention of public policy (*Thomas v. Richmond*, 12 Wall. 349; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 395, 12 Sup. Ct. 953), or one who has made and entered upon the execution of an *ultra vires* contract with the deliberate intention of evading the known limitations of the law. *Common Council v. Schlich*, 81 Mich. 405, 45 N. W. 994. It does not apply to a case like the present, where parties in entire good faith, with no intent to violate law or public policy, but by reason of a common mistake of law, make a contract, a stipulation of which is not binding to its full extent,—not because it is immoral or unlawful or against public policy, but simply for want of statutory power in the stipulating

party. In such a case, to use the language of Mr. Justice Mathews, "the policy of the law extends no further than merely to defeat what it does not permit, and imposes on the parties no penalty." *Chapman v. County of Douglas*, 107 U. S. 348, 356, 2 Sup. Ct. 62.

The fourth question was one of estoppel. It was contended by the defendants that the city was estopped to assert the invalidity of the grant until 1909, because, on the faith of it, the defendants have invested very large sums of money in repaving the streets between the tracks, in relaying tracks, and in extending new lines on the demand of the city authorities, and also in equipping its lines with electric motive power. It was held that, as the railway company was charged with a knowledge of the city's powers, no estoppel could supply a want of power, and that the defense was bad.

In discussing this question it was suggested by the court that the averments of the answers somewhat obscurely raised another and a different question of estoppel, growing out of the transfer of the property and franchises of the old company to the new companies. The new companies had corporate lives extending beyond 1909, and there was no want of power in the city to confer a grant of that duration upon them. The question was this: If the city enforced against the new companies obligations created by the ordinances of 1879, 1887, and 1889, and not contained in the ordinance of 1862, and these obligations were discharged at great expense by the new companies on the faith of the extension of the grant until 1909, would this constitute a confirmation by the city in pais directly to the new companies of the invalid grant of 1879? As the question had not been argued, a further argument was ordered, with leave to amend the pleadings and take evidence upon the point reserved. The pleadings were accordingly amended, the question has been argued, and is now to be decided.

The first objection made to the claim of estoppel is that under the laws of Michigan a municipal corporation cannot be estopped to deny a street-railway grant. It is contended that the only way of securing such a grant from the public is by ordinance, duly enacted for the purpose as prescribed by statute, and that this prevents an estoppel by matter in pais. Counsel for defendants suggest that the question made by the objection does not arise here, because the ordinance of 1879 was enacted for the purpose of making the grant until 1909, and all that now has to be shown is a ratification or recognition on the part of the city by matter in pais of that ordinance. It is said that when the new companies took possession the city was under a duty to elect whether it would go on under the ordinance of 1879, or that of 1862, and that a failure to elect, and acquiescence in the ordinance of 1879, bound the city to all its terms. I cannot concur in this view. The grant from May 9, 1893, to 1909, has been held to be not voidable, but void. There can be no ratification of a void act by mere acquiescence. The defendants, in order to sustain this defense, must show conduct of the city equivalent to a new grant, or rather conduct estopping the city to deny a new grant. The void grant may be used as evidence to characterize and show the meaning of the city's conduct towards the new compa-

nies, relied on as constituting the estoppel, but it cannot be used to supply to such conduct any lack of formality which the statute may make indispensable in a new grant.

Another suggestion with the same purpose is that the grant, though void as such, may be considered a standing offer to make a grant, good until withdrawn, to any assignee of the original grantee, whose corporate life should be long enough to give the city power to make the grant. This is said to be justified by the form of the grant, which is "to the Detroit City Railway and assigns." As the offer was not withdrawn, and the new companies who have entered into possession and discharged their obligations under the ordinance of 1879 have thus accepted it, it is now said to be binding as a contract in the form of an ordinance of the city duly enacted for the purpose. I do not think this ingenious argument can be supported. The grant until 1909 purported to be a binding grant, and was intended to be; but beyond May 9, 1893, it was void. How can it be changed into a standing offer to grant when it is not so framed? It is true that succeeding councils were charged with a knowledge of its void character, but how could they recognize it as a continuing offer to grant, binding on them unless withdrawn by them? Where is there any authority in one council to make a standing offer of a street-railway grant running for 15 years? The use of the words "and assigns" in the grant was simply a recognition by the council making it of the statutory right of the grantee to assign the grant, and of the fact that if the grant was to be enjoyed after May 9, 1893, it must be by an assignee. It is manifest, therefore, that the question whether an estoppel can be asserted against the city to deny a grant when there is no grant by ordinance duly enacted for the purpose cannot be avoided in the ways suggested, and must be now considered.

Section 3548, c. 95, How. Ann. St., a part of the law under which the new companies are incorporated, is as follows:

"Any street railway corporation organized under the provisions of this act may with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets."

In this section are defined the conditions precedent to the enjoyment of a street-railway franchise in the streets of a city. Having regard to the rule of strict construction in favor of the public, for whose benefit manifestly these conditions were imposed, it is reasonable to believe that the provision of the section as to how the consent shall be granted was intended to be mandatory. Grant by ordinance was doubtless required because it was thought that the time and formality necessary in passing an ordinance would be more apt to secure that care and deliberation of the council and

the mayor so essential to the public interest in framing this important contract. The words "duly enacted for the purpose" have much significance, for they indicate the legislative intent that the municipal authorities shall know what they are doing when they make a street-railway grant, and were used for the very purpose of preventing such a grant by an ordinance which has not the grant for its expressed object. The words have an effect like that of the frequent requirement in state constitutions that the purpose of a bill shall be expressed in its title, and should be construed, as that requirement generally is, to be mandatory. The question next arises whether such a mandatory restriction as to an express grant prevents a court from holding a city to be estopped by matter in pais to deny a grant.

Where a city has received money or appropriated property under a contract which is beyond its power, courts have frequently required the city to restore the money, or to reconvey the property, or even the reasonable value of the latter, on the ground that it cannot retain that which it received under a contract, and at the same time repudiate the contract. Under *ultra vires* contracts, however, it is only where there is the receipt of money, or the taking of property, that courts can afford such relief against municipal corporations. The general rule is that, where an express mode of creating a liability against such a corporation is prescribed by statutes, no liability can be enforced, and no estoppel can be raised against it, on the ground of the acceptance of benefits or other conduct which would render an individual liable. *Petz v. City of Detroit*, 95 Mich. 169, 180, 54 N. W. 644; *Dill Mun. Corp.* § 459, and cases cited. The reason is that the mode of contracting prescribed limits the power of contracting, and no implication or estoppel from circumstances can supply a want of power. If this rule applies, as it does, to all contracts made by a city acting as an individual in its proprietary capacity, how much stronger must its application be where the city, as a trustee for the public, and in a quasi governmental capacity, is exercising a limited and restricted right to make a private grant in the streets. It is much more difficult to imply a liability or to raise an estoppel against the city in respect to the highways intrusted to its care than in matters where the city acts as full and complete owner. *Dill Mun. Corp.* § 675. And while Judge Dillon is of the opinion (in which he is supported by many authorities) that an estoppel may be asserted against a municipal corporation to defeat its attempt to oust persons asserting private rights in a public street, he says that such cases are exceptional, and must depend on their own peculiar circumstances. But nowhere in this valuable work does he intimate, and no authority has been cited which holds, that a municipal corporation can be estopped in pais to deny a grant in the street to a railway corporation or other person when the statute prescribed for the corporation a particular mode of making the grant.

Let us examine the cases cited for the defendants upon this point. In the case of *Spokane St. Ry. Co. v. City of Spokane Falls*,

decided by the supreme court of Washington, and reported in 33 Pac. 1072, a street-railway company, with authority under an ordinance to lay its track on certain streets, laid part of it on a street not included in the ordinance, with the knowledge of all the city officials, and without objection on their part, and under the direction of the superintendent of streets. The line upon this ungranted street was operated for more than two years without objection, and taxes were levied and collected on the property. It was held that the city was estopped to claim that the right to maintain the track on the street was not authorized by it. In that case the city charter provided that contracts should be made only by ordinance, and it was objected to the claim of estoppel that, as the grant to the city railroad was in the nature of a contract, the right to maintain a street-railway track in the streets could arise in no other way than by the provisions of an ordinance. After referring to this clause of the charter, the court said:

"But it is evident from the reading of that entire section that the contracts therein intended are those which would bind the city to the payment of money. The general rule would, of course, be that franchises of this kind could not be acquired except by the action of the corporation, which must be taken by ordinance. But the statute in question does not prohibit the court from declaring an estoppel against the city in other matters in the same manner as they would in the case of private persons."

It is clear from this language that the court held that a street-railway grant was not within the section requiring contracts of the city to be made by ordinance, and therefore that there was no restriction on the mode of making the grant.

Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25, was a bill in chancery to restrain the operation of a steam railroad over certain streets in the city of Joliet to the public square. It appeared that the steam-railroad company, for upwards of 22 years, had occupied the streets from which, by this bill, it was now sought to exclude it. The city was held estopped in pais to prosecute the action. The occupation had begun before there was an incorporated village, with the express permission of the county commissioners, and under an implication of authority from an act of the legislature; and it did not appear that the mode by which the city of Joliet could confer such an easement in the streets was restricted by its charter. In Chicago & N. W. R. Co. v. People, 91 Ill. 251, the authorities of the city acquiesced for 19 years in the use of a public street by the railroad company in maintaining an arch over the street, and had made an agreement in writing with the company, whereby the right to so use the street had been recognized as continuing until it should be necessary to rebuild the arch. It was held that the city, by these acts of recognition and acquiescence, was estopped from compelling the company to remove the arch and obstruction until it should become necessary to rebuild the same. It did not appear by what arrangement the company had originally built the arch, but the court presumed that some arrangement had been made which was satisfactory to the parties. The report of the case does not show that the exercise of the power of making a grant in the streets was limited by the

city's charter to any particular mode. In each of the Illinois cases it will be seen that there was something very like an express grant from public authorities at a time when they were competent to make it.

In *New Orleans v. N. Y. Mail S. S. Co.*, 20 Wall. 387, the authorities of New Orleans appointed by the military government established during the late Civil War had made a lease for 10 years of one of the city wharves to a steamship company, which had spent much money in improving the leased premises. Some time after the occupancy began, and before the term ended, the general commanding turned the city over to a regular civil government, and a suit was brought by the city to oust the company. The decision of the court against the city, concurred in by four judges, was put upon the ground that it was within the power of the military authorities to make a lease for 10 years. There was also an intimation that perhaps the lease could be sustained on the ground that by receiving one installment of rent the civil government of the city had ratified the lease. Justice Hunt concurred in the judgment of the court only on the ground of ratification. Judge Field dissented. It is doubtful whether this can be considered a relevant authority, for it would seem that the city acts with respect to wharf property more as a private landlord. In view of the division of the court, it is hardly authoritative on the subject of ratification by estoppel. But, even if it is, there is nothing in the case to show that there were any restrictions different from those applicable to private individuals upon the mode in which the city government could make a lease of its wharf property.

For the reasons given, I am of the opinion that the statutory restriction upon the mode by which the city can make a street-railway grant precludes me from holding the city estopped to deny a grant in the streets by any other act than an ordinance duly enacted for the purpose.

Concede that I am wrong in this view, however, and let us consider the acts which in this case are said to estop the city to deny that it has made a grant to the new companies until 1909. The first is that the city required the Detroit Street-Railway Company, in the spring of 1891, to relay its tracks, and repave between the tracks, on Jefferson avenue between Woodward avenue and Second street, when that part of Jefferson avenue was being regraded and repaved by the city. This entailed upon the railway company an expense of \$12,000. Under the ordinance of 1862, the Detroit City Railway agreed, whenever the city should repave, to relay its tracks and repave between them and 2½ feet on each side thereof, the city to furnish the material. By the ordinance of 1879 this provision was changed, so that the railway company agreed to pave between the tracks, and to pay for the material. The requirement that the company should furnish paving material, it is said, could only be based on the ordinance of 1879, and was, therefore, a complete recognition of that ordinance as defining the mutual obligations existing between the city and the new companies, giving life to all its parts, including the extension of the grant until 1909. It appears, how-

ever, by an examination of an ordinance approved July 8, 1873, that the Detroit City Railway was given authority to construct and maintain a double track on Jefferson avenue, on the express condition that whenever the city should pave or repave that avenue the company would pay all the expenses, including that of material, for repaving between the tracks and two feet and nine inches outside of the outer rail of each track. It would therefore seem that the company, in repaving Jefferson avenue, and relaying its tracks thereon, was complying with an obligation in force under the grant of 1862, the burden of which had been reduced, rather than increased, by the ordinance of 1879.

Another act of the city, relied upon by the defendants, is the reception of taxes by the city from both the new companies. The ordinance of 1862 imposed an annual license fee upon the railway company of \$15 per car, and, in addition, there was a provision in the street-railway act imposing an annual state tax of one-half of 1 per cent. upon the paid-in capital of every street-railway company. In the ordinance of 1879 the city license was changed from \$15 per car to 1 per cent. of the annual gross receipts of the company. In 1882 the legislature of Michigan repealed the clause of the tram-railway act imposing a tax of one-half of 1 per cent. on the paid-in capital, and this brought the railway companies under the general tax laws of the state. Thereupon the city attempted to impose general taxes upon the personal and real property of the railway company. This was resisted, and the litigation resulted in a compromise ordinance of 1887, which provided that the railway company, in lieu of all taxes to be collected by the city, should pay the same tax as that assessed upon individuals on its real estate, and should also pay $1\frac{1}{2}$ per cent. upon its gross receipts until 1897, and 2 per cent. thereafter until 1909. Subsequently the city attempted to collect taxes upon the personal property of the company, and the supreme court of the state held that the city had precluded itself from doing this by the stipulation of the ordinance of 1887. From this history of the litigation it would seem that the provision with respect to taxes in the act of 1887 was a shield for the company, rather than an imposition of a new burden. There was no provision in the ordinance of 1862 that the license of \$15 per car should be in lieu of all taxes to be assessed by the city. Payments of taxes under the ordinance of 1887, when without that ordinance the city might have assessed higher taxes, could hardly be made the basis for an estoppel to support a grant.

Another act of the city, relied on, is a resolution of the common council in August, 1891, directing the Detroit Street-Railway Company to proceed immediately to lay a double track on Gratiot avenue from its then terminus to the easterly city limits. By the ordinance of 1879 the old company was required to extend its track on Gratiot avenue from Chene street to the city limits within such time as the council might by resolution declare to be necessary. Under the ordinance of 1889 it was required to lay a double track whenever the city should repave that part of Gratiot avenue. It thus appears that in directing the construction of this double track

the common council was enforcing an obligation imposed upon the Detroit City Railway by the ordinances of 1879 and 1889, and was recognizing those ordinances, and that the railway company made a substantial investment because of the action of the council. It does not appear that the mayor signed this resolution, but, as he was required by law to approve all resolutions and ordinances involving the city in future pecuniary liability, we may infer that he signed the resolution or ordinances approving the contracts for the improvement of Gratiot avenue which made this resolution necessary. It would seem, therefore, that the city authorities who were authorized to pass express grants to railway companies took part in the proceedings by which the railway company was required to lay the double track on Gratiot avenue.

Another act of the city which is said to have been a recognition of the ordinance of 1879 was the resolution of the council of April 26, 1892, directing the railway company to repave Woodward avenue between its tracks while the city was repaving the rest of the street. At an expense of \$133,000, the company did this repaving, and put in new rails. Again, on June 7, 1892, the common council by resolution approved a contract of the board of public works for the repaving of Gratiot avenue, and the board of public works notified the street-railway company of the city's intention in this regard. The company accordingly relaid its entire track, and paved between the tracks, and furnished the material therefor. The total cost of the work was \$60,000. As already stated, under the ordinance of 1862 the railway company was obliged to pay all the expense of relaying the tracks, repaving the streets between the rails, and two feet four inches outside thereof, except the cost of the paving material. Therefore the additional burden put on the company by the ordinance of 1879 was the difference between the cost of the paving material used between the rails and the cost of paving four feet eight inches of the street, exclusive of the material. To the extent of this difference the acts of the city in compelling the Citizens' Company to do the work done in repaving Woodward avenue and Gratiot avenue was a binding recognition by the city of the ordinance of 1879. What the difference was is nowhere definitely stated, but we may assume, for the purpose of this decision, that it was a substantial sum.

Another transaction relied upon by the defendants as the basis for an estoppel is the expenditure by the company, which the city permitted and supervised, of \$250,000, to equip the Jefferson and Woodward avenue lines with electric motive power. The authority to do this was conferred upon the company by the ordinance of 1889, which in terms reaffirmed the extension of the grant by the ordinance of 1879. The expenditure by the company was voluntary. There was no affirmative action on the part of the city, except that it provided the inspectors to secure compliance with the ordinances of the city in regard to the manner of placing the electric plant upon the streets. This action of the city was an acquiescence in the validity of the ordinance of 1889 in conferring authority upon the railway company to use electricity in the opera-

tion of its railways, but the act of the city could hardly be said to be an enforcement of the obligations of the ordinance of 1879, or any amending ordinance. It ought to be mentioned here that the expenditure of \$133,000 on Woodward avenue, of \$60,000 on Gratiot avenue, and of \$250,000 in equipping the Woodward and Jefferson avenue lines with electricity, was all subsequent to the ordinance of the city declaring that the rights of the company in the streets would end May 9, 1893, and was in the face of that declaration.

Another, and the last, act of the city which I shall notice, was the passage by the common council of the ordinance February 4, 1893, requiring the Detroit Citizens' Street-Railway Company to sell what were known as "workingmen's tickets" on their cars, and imposing a penalty for the failure to do so. By section 8 of the ordinance of 1862 it was provided "the rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance." By the ordinance of 1889, which reaffirmed the extension of the grant contained in the ordinance of 1879, it was provided that between the hours of 5:30 and 7 in the morning, and between the hours of 5:15 and 6:15 in the evening, passage should be furnished upon tickets to be sold at the rate of 8 tickets for 25 cents. These were known as "workingmen's tickets." The tickets were voluntarily sold by the new companies at stations along the lines. The ordinance of February 4, 1893, was passed to compel the sale of these tickets upon the cars. The company refused to obey, and was prosecuted criminally at the instance of the city, and was fined \$300. After the validity of a similar ordinance against another company had been sustained by the supreme court of the state, the company acquiesced, and sold the tickets on the cars.

I was at first inclined to the opinion that the provision in the ordinance of 1862 as to fare was a limitation upon the company only, and would not prevent a reasonable regulation of the fare by the common council, under section 19 of the same ordinance. The argument of counsel for the company, however, has convinced me that I was wrong, and that in the provision of section 8 in the ordinance of 1862 there is a necessary implication, binding as a contract on the city, that the company may, if it chooses to do so, charge five cents for each fare. It therefore follows that the obligation upon the company to sell tickets at the rate of 8 for 25 cents for passage during any hours of the day was a change in the stipulations of the ordinance of 1862, and an additional obligation and burden upon the company, imposed by the ordinance of 1889, which expressly reaffirmed the grant until 1909. It is clear, therefore, that the ordinance of February 4, 1893, compelling the sale of workingmen's tickets, was a recognition by the city of the ordinance of 1889, and the strongest affirmation that it had the right to enforce against the new companies the obligations of that ordinance. It may also be mentioned that under the ordinance of 1889 the old company was required to furnish transfer tickets entitling a passenger on one fare to ride on two routes, whereas, under the

ordinance of 1862, a single fare paid for a ride on a single route, and no more. The new companies continued the system of transfers without question, and have issued an average of 10,000 a day while operating the railways. But it would be difficult to make out any affirmative action on the city's part towards the new companies in regard to transfers as a basis for recognition by estoppel of the ordinance of 1889.

I have now at tedious length examined all the acts of the city which are said to constitute the estoppel asserted in this case. Do they do so? There is no doubt that acts have been shown in which the city has affirmatively recognized clearly and in the most emphatic manner that the ordinance of 1879 and succeeding ordinances were binding on the new companies. Was this a recognition and affirmance of an existing and binding grant until 1909, in all respects like that purporting to be made in the ordinance of 1879? It certainly was if the ordinance of 1879 was rendered void in all its parts by the invalid extension, for in such case the new companies would have acquired from the old company rights and liabilities in the streets fixed under the ordinance of 1862, and the recognition of obligations under another ordinance, wholly void; and the enforcement of them could only be consistent with and referable to a new grant in all respects like that of the void ordinances.

The act of the city in compelling compliance with the conditions of such a grant would confirm it in all its length and breadth. A substantial expenditure by the new street-railway companies in yielding to such compulsion would be a sufficient basis to create an estoppel against the city to deny its existence. It becomes of controlling importance in this discussion, therefore, to determine the effect of the invalidity of the extension until 1909 upon the ordinance of 1879. After much consideration, I have reached the conclusion that, while the extension beyond May 9, 1893, was void as a binding stipulation upon the city, the ordinance, as a contract, was only voidable. It may be true that the extension was the chief consideration for many of the obligations assumed by the railway company, but the ordinance, as a contract, was workable as such until May 9, 1893, and it had, in effect, been carried out as long as the Detroit City Railway remained in possession. As already stated, there was no offense against the law or contravention of public policy in carrying out the ordinance. Its provisions were not void because of any unlawful or immoral consideration. The disability of the city to bind itself beyond May 9, 1893, entitled the railway company to rescind the contract contained in the ordinance, and to be restored to its former position, so far as might be, under the contract of 1862; but, until rescinded by the company, the contract in the ordinance of 1879 must be regarded as an existing contract, enforceable as far as the law would permit. It seems to me that the case in this respect is very like the case of *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62. In that case the complainant had in good faith, under an honest mistake as to the county's powers, sold and conveyed 160 acres of land to a county

in Nebraska in consideration of \$8,000,—\$2,000 in county warrants, and the balance in four equal annual notes of the county commissioners, at 10 per cent. interest, secured by mortgage. It was beyond the power of the county to buy the land except for cash in hand, or upon an agreement to pay as the state of the county treasury would permit, and the notes and mortgage were void, and of no effect. It was held that the vendor might waive the invalid terms of the contract, and receive his money at such times as the county should be able to pay it from ordinary assessment of taxes; or that, after waiting a reasonable time, he might rescind the contract because of the disability of the county to comply with all its terms, and compel the county to reconvey the land.

In the case at bar, the City Railway, or either of its successors, might have rescinded the contract embodied in the ordinance of 1879, and the company's acceptance thereof on the ground of the city's disability to make the grant until 1909; but until such rescission the contract was binding on both parties. The effect of the rescission would have been to restore the parties to the ordinance of 1862, and to relieve the companies of the heavier obligations of 1879. It is true that the case cited differs from the one at bar in that the court there was able to restore to the complainant his property, title to which had passed to the county, whereas here the benefit conferred upon the city by the investments of the railway company was of an indirect character, upon which it would have been impossible for a court to place a pecuniary estimate. *Hedges v. Dixon Co.*, 14 Sup. Ct. 71, 72. But this difference does not affect the bearing of *Chapman v. County of Douglas* upon our present inquiry, which is whether all of the ordinance of 1879, except only the extension beyond May 9, 1893, was existing and in force as a contract when the new companies took possession of the street railway. For the reasons given, this inquiry must be answered in the affirmative.

The case of *State v. Town of Harrison*, 46 N. J. Law, 79, is apt to mislead, and needs explanation upon this point. It there appeared that the city council of the town of Harrison had made by ordinance a contract for 20 years with a water company for a water supply, when, under the statute, there was power in the council to make only a 10-years contract; and it was held that the excess vitiated the whole proceeding, and that the void part could not be severed from the good. At first blush, the case might seem to be on all fours with the one at bar, but an examination of the exact question which was before the supreme court of New Jersey shows it to have no application here. The proceeding was supervisory. It was a writ of certiorari, brought to directly review the action of the common council in making the contract. The contract was wholly executory, and the question presented to the court was whether at that stage it should say that what purported to be the contract of the city for 20 years was a lawful contract for 10 years, when, if the council really wished to make a contract for 10 years, it could do so then, when everything was still in the future, and no one had been led to change his position by the first ordinance. The

question which arises at the bar is in reference to a contract which has been carried out by both parties for more than one-half of its term. Where contracts which contain a void stipulation have been entered into in good faith through a mutual mistake of law as to the power of the stipulating party, and have been partially or wholly executed, they are recognized as existing, and as binding the parties, as far as the same are enforceable, until rescission. *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62; *City of East St. Louis v. East St. L. Gaslight & Coke Co.*, 98 Ill. 415; *City Council of Montgomery v. Montgomery Water Works Co.*, 79 Ala. 233; *City Council of Montgomery v. Montgomery & W. Plank-Road Co.*, 31 Ala. 76; *Water, Light & Power Co. v. Carlyle*, 31 Ill. App. 325; *Decatur Gaslight & Coke Co. v. City of Decatur*, 24 Ill. App. 544; *Nebraska City v. Gas Co.*, 9 Neb. 339, 2 N. W. 870.

It is not claimed that there was a rescission of the contract of 1879 by either of the railway companies; on the contrary, each company insisted that it was in full force in all its parts. Assuming that I am right in regard to the invalidity of the extension of the grant beyond May 9, 1893, it must follow that there was a contract in force, securing to the company rights in the streets until May 9, 1893, and no longer, which imposed on the new companies all the obligations of the ordinances of 1879, 1887, and 1889. None of the acts which we have examined went further than to affirm the binding character of the obligations upon the company under the ordinances of 1879, 1887, and 1889. They were not inconsistent, therefore, with a grant expiring May 9, 1893, and could not estop the city from asserting its right to oust the Citizens' Street-Railway Company from its occupation of the streets after that date. The question which was reserved for further argument must be answered, as all the others have been, against the claims of the company. It was my first impression, as it was my hope, because of the great hardship of the case, that the point reserved would enable the defendant company to escape the effect of my former rulings; but further consideration has brought me to a different conclusion.

As I have said, this is a hard case for the railway company, but the particular hardship should not blind us to the very great importance of a strict construction of all municipal grants in favor of the public, and the great danger of departing from sound rules of law to meet a special case. Of the \$500,000 expended by the new company, all but \$20,000 was spent after the city, in the solemn form of an ordinance, had declared its intention to insist on the invalidity of the grant beyond May 9, 1893. In this expenditure, therefore, the railway company acted in the confident belief that the grant of 1879 was valid in spite of the claim of the city. It has seemed to me that the company was in error. My Brother SWAN vigorously dissents from my view. It is quite likely that he is right, and that I am wrong, but, meeting the responsibility which the law imposes on me, I must hold that the complainant in this bill is entitled to the relief prayed for, except with reference to the grants now owned and used by the Detroit Citizens' Street-Railway Company, which were conveyed to the Detroit City Railway Com-

pany by the Congress & Baker Street Railway Company and the Cass Avenue Street-Railway Company, and which will not expire until 1907 and 1909, respectively. As to these, the prayer for relief is denied. The prayer of the cross bill that the ordinance of March 29, 1892, be declared null and void, and that the city be enjoined from taking any action thereunder is denied, except as to the two grants above excepted, and in respect to them the relief is granted.

Let a decree be entered making findings as above, and enjoining the Detroit Citizens' Street-Railway Company from occupying the streets of Detroit with its railway tracks except on the lines of the Congress & Baker Street Railway Company and the Cass Avenue Street-Railway Company, and from running their cars thereon after three months from the entry thereof, and enjoining the city of Detroit from taking any action under the ordinance of March 29, 1892, to interfere with the operation of the Congress & Baker Street Railway Company line or the Cass Avenue Street-Railway Company line by the Detroit Citizens' Street-Railway Company. The costs will be taxed to the defendants. I have given three months to the defendant railway company for a compliance with the decree, because, if the tracks are to be removed, that is not an unreasonable time for the purpose. Moreover, it will afford some opportunity for an adjustment of this controversy, which it is to be hoped will result either in a new grant to the defendant company, reasonable in its terms, or the sale of the plant on an appraised value to any new company who may operate the old lines. In expressing such a hope, I assume that the municipal authorities will be influenced by considerations of municipal honor, and will not, for the immediate pecuniary benefit accruing to the city or the public, take unconscionable advantage of the position in which this decree puts the street-railway company; and that it will be seen to be, as it certainly is, for the ultimate benefit and reputation for integrity and fair dealing of the city of Detroit that a compromise be made with the company, enabling it to secure an adequate return for the large cash investments which it has made, in entire good faith.

In view of the division of the court, and the magnitude of the interests involved, this case will, of course, be taken, as it ought to be, to a reviewing court. It can be heard in the court of appeals in May next, and an early decision had. Upon the company's giving bond in the sum of \$10,000, conditioned in the usual form, the decree may be superseded, and the operation of the injunction will be stayed pending the appeal.

SWAN, District Judge. For reasons given in my former dissenting opinion in this case, filed June 1, 1893, I dissent from the reasoning and conclusions of the circuit judge in the foregoing opinion.

ALLEN v. DILLINGHAM.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 138.

NEGLIGENT KILLING—ACTION AGAINST RECEIVERS.

A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. Tex. art 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents. *Turner v. Cross*, 18 S. W. 578, 83 Tex. 218, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Intervening petition of Evelyn Allen, individually, and as next friend of Ella Allen, a minor, against Charles Dillingham, as receiver of the Houston & Texas Central Railway Company. Respondent demurred, and upon demurrer the petition was dismissed. The petitioner thereupon appealed.

This is an intervening petition in equity against Charles Dillingham, as receiver of the Houston & Texas Central Railway Company, filed in the receivership cause February 24, 1890, and was brought by the widow and children of a deceased employee of the receiver, for compensation out of the fund in the court's custody, to be received in the way of damages that had accrued to them from injuries resulting in the death of the deceased. The petition, as amended, in its stating part, in addition to appropriate averments that the death of the deceased was caused by negligence of the receiver or his agents, without contributive negligence on the part of the deceased, contains these allegations: "In 1885 the Houston and Texas Central Railroad was placed in the hands of a receiver on a bill brought in the United States circuit court for the eastern district of Texas by the Southern Development Company against the Houston and Texas Central Railway Company et als., asserting a lien upon the corpus of the property by reason of the diversion of current earnings from the payment of current expenses, and indebtedness of \$300,000 or \$400,000, and insolvency of the company, all of which was admitted by answer filed in the case. The name of Benjamin C. Clark was presented by the parties as a proper person to appoint as one receiver, and the court was asked to designate another, and thereupon designated Charles Dillingham, both of whom, Clark and Dillingham, were appointed receivers. Thereafter Nelson S. Easton and James Rintoul, trustees under the first mortgage, and the Farmers' Loan and Trust Company, trustees on other mortgages bearing on said railroad company's property, filed independent bills for foreclosure in the same court, and a general demurrer to the bill of the Southern Development Company. In June, 1886, the demurrer was heard before Mr. Circuit Justice Woods and Circuit Judge Pardee, and was sustained, and thereupon an order was entered dismissing the bill of the Southern Development Company, and appointing Charles Dillingham and the trustees under the first mortgage, Rintoul and Easton, receivers, in accordance with the prayer contained in the bill for foreclosure above referred to. The foreclosure suits were put at issue, came on for hearing in 1887, and decrees were rendered foreclosing all the mortgages bearing upon the Houston and Texas Central Railway property, except the first mortgage upon the Waco Branch, and a sale was ordered. At the sale in the following year, Mr. Frederick Olcott, representing a reorganization committee, purchased the main line and property attached, which sales were thereafter duly confirmed. In April, 1889, *ex propria*, the court entered orders directing a turning over of the property that had been sold, and looking to the termination of the receivership. Immediate execution of these orders was opposed in the interest of large floating debt creditors, whose interventions had not been disposed of, and

was complicated by the represented fact that the purchasers of the property, desiring to form a new company, had been delayed by the necessity of obtaining some legislative action. The turning over of the property was further complicated by the institution of a suit by Carey et al., old stockholders of the Houston and Texas Central Railway Company, who filed an apparently independent bill to annul the former decrees of foreclosure and the sale thereunder, on the ground of want of jurisdiction of the court, and fraud of parties in obtaining the original decree of foreclosure. And petitioners further show the court that said order of the court directing the property to be turned over to the purchaser was made in or prior to the month of April, 1889; that, by proceedings duly had in the said court about that time, the said Rintoul and Easton were discontinued as receivers in the above consolidated cause, and the said Charles Dillingham continued as receiver, with the same rights, powers, and privileges, and subject to the same duties and liabilities, as theretofore pertained to said joint receivers; and ever since then the said Charles Dillingham, as receiver, under authority of the order of appointment, has had the custody, control, and management of the properties of said railway company, and run and operated the railroad thereof as a common carrier of passengers and freight for hire; that on, to wit, the 1st day of August, 1889, the purchasers of the property of the Houston and Texas Central Railway Co., as aforesaid, organized themselves into a railroad corporation under the general laws of the state of Texas, by the name of the Houston and Texas Central Railroad Company, and on the said day and date aforesaid articles of incorporation were duly filed in the office of the secretary of state of Texas, and afterwards, on, to wit, September 12, 1889, the said railroad corporation so created was organized, and elected said Charles Dillingham the president thereof, and so he has ever since been; that while said receivership has been continued, through necessity, beyond control of this court, yet, ever since the aforesaid purchase, confirmation, and incorporation of said new railroad company, the property thereof has practically been in its hands, through the said Charles Dillingham as its president and agent, and run and operated, controlled and managed, largely by its directions, and for the benefit of the owner thereof, although held by said Charles Dillingham, from necessity, in his official capacity, as receiver of this court; and since said confirmation of sale the original purposes of the receivership have been entirely accomplished, and the official custody, control, and management of the property by said Charles Dillingham, as receiver, have been real, but formal only, and permitted by the court only through circumstances beyond its prevention, as hereinbefore shown."

The appellee (respondent below) demurred generally, and upon the hearing of the demurrer the intervening petition was dismissed absolutely. The petitioners prayed, in open court, at the same term, that an appeal be allowed, which prayer was granted, and they duly filed the required appeal bond, and have brought the case here upon the following assignment of error, namely: "Afterwards, on the 15th day of March, A. D. 1893, come the above interveners and appellants, and say that in the records and proceedings aforesaid there is manifest error, in this, to wit: that the petition in intervention, as amended by said interveners, and the matters therein contained, are sufficient in law for the said interveners to have and maintain their aforesaid action thereof against the said Charles Dillingham, as receiver. There is also error in this, to wit: that by the records aforesaid the owners of the property in the hands of said Charles Dillingham, as receiver, would have been liable for the death of the deceased; and, under the circumstances appearing in the petition, the court is bound in equity and good conscience to charge the fund in the receiver's hands with liability for his negligences, just as would be were the said property in the hands of the owner; wherefore, by the law of the land, the said petition in intervention ought not have been dismissed, and the said interveners (appellants herein) pray that the decree aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things that they have lost by occasion of said decree," etc.

H. F. Ring and Pressley K. Ewing, for appellant.

The question to be determined upon the foregoing assignment is whether the receiver, as such, is liable to respond, through the fund in his hands, in damages, by way of compensation, for injuries resulting in death.

I. Where a federal court has obtained jurisdiction of a proceeding in equity, seeking relief upon a state statute, which, as construed by state decisions, entitles the petitioner to the relief, subsequent inconsistent state decisions cannot affect the right of the federal court to its independent judgment on the question involved; and, as a question to be determined by the independent judgment of this court, we submit it is too clear to doubt that the statutes of Texas did give a cause of action for death injuries against a receiver of a railroad.

The later Texas decisions are not binding upon this court. *Rev. St. U. S. § 721; 1 Stat. 92; Judiciary Act, § 34; Burgess v. Seligman, 2 Sup. Ct. 10, 107 U. S. 20-38; Bucher v. Railroad Co., 8 Sup. Ct. 974, 125 U. S. 555-585; Post. Fed. Pr. § 375; Douglass v. Pike Co., 101 U. S. 677-688; Sharon v. Terry, 36 Fed. 337; Trust Co. v. Debolt, 16 How. 416; Pease v. Peck, 18 How. 595, 601; Town of Thompson v. Perrine, 103 U. S. 806-820; Fairfield v. County of Gallatin, 100 U. S. 47-55; Elmendorf v. Taylor, 10 Wheat. 160; Groves v. Slaughter, 15 Pet. 498; Ober v. Gallagher, 93 U. S. 199-208; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22, (compare with Yoakum v. Selph, 19 S. W. 145, 83 Tex. 607, and Turner v. Cross, 18 S. W. 578, 83 Tex. 231); Clark v. Dyer, 16 S. W. 1061, 81 Tex. 348.*

The statutes of Texas did give an action against a receiver for death injuries. *Rev. St. Tex. arts. 2899, 3138, and General Provisions, § 2; Merkle v. Bennington Tp., 24 N. W. 776, 58 Mich. 156; Haggerty v. Railroad Co., 31 N. J. Law, 349; Bolinger v. Railroad Co., 31 N. W. 856, 36 Minn. 418; Railway Co. v. Shacklett, 10 Ill. App. 404; Hayes v. Williams, (Colo. Sup.) 30 Pac. 352; Beach v. Bay State Co., 6 Abb. Pr. 415, 16 How. Pr. 1, 27 Barb. 248; Soule v. Railroad Co., 24 Conn. 577; Lamphear v. Buckingham, 33 Conn. 237; also, Pierce v. Railway Co., 51 N. H. 591; Hall v. Brown, 54 N. H. 497; Meara v. Railroad Co., 20 Ohio St. 137; Schott v. Harvey, 105 Pa. St. 229; Little v. Dusenberry, 46 N. J. Law, 614; Lyman v. Railway Co., 10 Atl. 346, 59 Vt. 167; Erwin v. Davenport, 9 Heisk. 45; McNulta v. Lockridge, (Ill. Sup.) 27 N. E. 452; Railway Co. v. Cox, 12 Sup. Ct. 905, 145 U. S. 593; Sloan v. Railway Co., 16 N. W. 331, 62 Iowa, 728; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 12; Potter's Dwar. St.; Willis v. Owen, 43 Tex. 48.*

II. By the Texas statutes giving action for death injuries, a valid state law imposed a duty upon the owner, the railway company, in the management and operation of the railroad; and by the second section of the act of congress passed March 3, 1887, a federal receiver was placed upon the same plane of duty, and substituted to the same liability in this respect, as pertained to the owner, the railway company.

Rev. St. Tex. art. 2899; Act Cong. March 3, 1887, (24 Stat. 554; Eddy v. La Fayette, 4 U. S. App. 247, 1 C. C. A. 441, and 49 Fed. 807; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 40 Fed. 427; Railway Co. v. Cox, 12 Sup. Ct. 905, 145 U. S. 593; Clark v. Dyer, 16 S. W. 1061, 81 Tex. 339; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22.

III. If it be true that no independent right of recovery is given by the statutes of Texas against a receiver for death injuries, yet where, as in this case, the petition for compensation is addressed to the court of equity, having jurisdiction of the receivership fund, and the proceeding is one in rem, seeking relief only from the fund itself, the court of equity will treat the receiver, for the purposes of relief, as standing in the relation of owner, and will hold the fund liable to respond for all negligences, whether grounded upon statutes or the general law, which would have imposed personal liability upon the owner if in charge; and especially will this relief be granted where, as appears from the petition in this case, the receiver, without exclusive custody as such, controlled and operated the property, in effect, as agent of the owner, but merely from necessity accounted as receiver.

20 Am. & Eng. Enc. Law, p. 378; McNulta v. Lochridge, 12 Sup. Ct. 11, 141 U. S. 327, 331; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22; Klein v. Jewett, 26 N. J. Eq. 474; and authorities elsewhere cited.

E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, for appellee.

The question to be determined in this cause is whether the appellant had a right of action against the appellee, Charles Dillingham, as receiver of the Houston & Texas Central Railway Company, for injuries resulting in death while he was operating and managing said road as receiver.

Appellee contends, where a federal court has jurisdiction of a proceeding where a party seeks relief upon a state statute, that the construction placed upon such statute by the courts of last resort of said state is binding, and will be followed by the federal courts, without considering whether the statute was originally construed correctly or soundly.

The latest Texas decisions on the construction and interpretation of the state statutes are binding, and will be followed by the federal court. Rev. St. U. S. § 721; Lavin v. Bank, 1 Fed. 650; State v. Grand Trunk Ry., 3 Fed. 889; Bank of Sherman v. E. M. Apperson & Co., 4 Fed. 25; McCall v. Town of Hancock, 10 Fed. 9; Schreiber v. Sharpless, 17 Fed. 589; Investment Co. v. Parrish, 24 Fed. 200; Buford v. Holley, 28 Fed. 685; Myrick v. Heard, 31 Fed. 243; New Orleans Waterworks Co. v. Southern Brewing Co., 36 Fed. 833; Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co., 42 Fed. 376; Gray v. Havemeyer, 3 C. C. A. 497, 53 Fed. 174; Percy v. Cockrill, 4 C. C. A. 73, 53 Fed. 872; Society v. Watts, 1 Wheat. 289; Jackson v. Chew, 12 Wheat. 153; Fullerton v. Bank, 1 Pet. 604; Green v. Neal, 6 Pet. 291; Livingston v. Story, 11 Pet. 398; Harpending v. Dutch Church, 16 Pet. 493; Porterfield v. Clark, 2 How. 125; Rowan v. Rannels, 5 How. 134; Luther v. Borden, 7 How. 1; Nesmith v. Sheldon, Id. 812; Williamson v. Berry, 8 How. 559; Van Rensselaer v. Kearney, 11 How. 318; Moore v. Brown, Id. 435, 436; Webster v. Cooper, 14 How. 504; Beauregard v. City of New Orleans, 18 How. 497; League v. Egery, 24 How. 266; Amey v. Mayor, Id. 364; Bank v. Skelly, 1 Black, 436; Conway v. Taylor, Id. 621; Leffingwell v. Warren, 2 Black, 603; Gelpcke v. City of Dubuque, 1 Wall. 175, 212, 219; Supervisors of Carroll Co. v. U. S., 18 Wall. 82; Town of South Ottawa v. Perkins, 94 U. S. 260; Davie v. Briggs, 97 U. S. 637; Andreae v. Redfield, 98 U. S. 235; Amy v. Dubuque, Id. 471; Fairfield v. County of Gallatin, 100 U. S. 52; Taylor v. Ypsilanti, 105 U. S. 71; Burgess v. Seligman, 2 Sup. Ct. 10, 107 U. S. 34; Bendey v. Townsend, 3 Sup. Ct. 482, 109 U. S. 668; Bauserman v. Blunt, 13 Sup. Ct. 466, 147 U. S. 647; Turner v. Cross, 18 S. W. 578, 83 Tex. 231. The statute of Texas did not give an action against a receiver for death injuries. Rev. St. Tex. art. 2899; Turner v. Cross, 18 S. W. 578, 83 Tex. 231.

Before PARDEE, Circuit Judge, and BOARMAN and TOULMIN, District Judges.

TOULMIN, District Judge. The judgment of the circuit court in this case must be affirmed, on the authority of Turner v. Cross, 83 Tex. 218, 18 S. W. 578; and it is so ordered. Affirmed.

NOTE.

The case of Turner v. Cross, 83 Tex. 218, referred to above, is reported as follows in 18 S. W. 578:

TURNER v. CROSS et al.

(Supreme Court of Texas. Feb. 5, 1892.)

NEGLIGENT KILLING—ACTION AGAINST RECEIVERS.

A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. art. 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents.

Appeal from district court, Williamson county.

Action by S. S. Turner against H. C. Cross and George A. Eddy, as receivers, for damages on account of injuries resulting in the death of her son. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Parker, for appellant. Fisher & Townes, for appellees.

STAYTON, C. J. Appellant brought this action to recover damages for an injury received by her son, which she alleges was caused by the negligence of the receivers, and resulted in his death, and it is agreed that the only question to be decided is: As the law (article 2899, Rev. Civ. St.) stood on the 22d day of December, 1889, is the receiver of a railroad liable as such for injury negligently inflicted upon and resulting in the death of an employe, when the injury is sustained while the railroad is being operated by the receiver? In other words, is the receiver of a railroad operating the road, within the enumeration of the statute, either as proprietor, owner, charterer, or hirer? The court below held not, and therefore sustained a demurrer to a petition, the sufficiency of which is not otherwise questioned. It must be conceded that the action cannot be sustained unless it is given by the statute, and, as it is not claimed that the receivers are liable personally, the only statute which has application to the case is the following: "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steam-boat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents." Rev. St. art. 2899. The action is not against the railway company whose property was in the hands of the receivers, and no inquiry arises whether in a case brought against the company the receivers, under any circumstances, might be deemed its servants or agents. To maintain the action it is necessary to hold that a receiver operating a railway under the appointment and control of a court is, within the meaning of the statute, "the proprietor, owner, charterer, or hirer of any railroad." By "hirer" we understand to be meant one who by contract acquires the right to use a thing belonging to another, and by "charterer" we understand to be meant one who by contract acquires the right to use a vessel belonging to another; and, as the statute embraces subjects to which these terms may be applied, we are of opinion that they were used in their ordinary sense, and we do not understand appellant to contend for any other meaning for them. But it is contended that the receivers were, within the meaning of the statute, "proprietors" or "owners," while appellees contend that these words cannot be applied to any person not holding property in his own right, although conceding that proprietorship or ownership, within the meaning of the statute, may exist without absolute title. It is insisted by appellees that the statute in question is in derogation of the common law, and must therefore be construed strictly; but the rule here invoked has been abolished by statute, which provides that "the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this state respecting the subjects to which they relate, and the provisions thereof shall be liberally construed, with a view to effect their objects and to promote justice." Rev. St. Gen. Prov. § 3. The statute in reference to the construction of statutes contains the following: "The ordinary signification shall be applied to words, except words of art, or words connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such art or trade, or with reference to such subject-matter." "In all interpretations the court shall look diligently for the intention of the legislature, keeping in view at all times the old law, the evil, and the remedy." Rev. St. art. 3138. These are but statutory declarations of rules of construction which had long been recognized by courts, and the statute but emphasizes their importance.

It is the duty of a court to give to language used in a statute the meaning with which it was used by the legislature if this can be ascertained;

and to do this, if the words used be not such as have a peculiar meaning when applied to a given art or trade with reference to which they are used in the statute, the only safe rule is to apply to them their ordinary meaning, for the legislature must be presumed to have used them in that sense in which they are ordinarily understood; and if, so applying them, the legislation in which they are found seems to be harsh, or not to embrace and give remedies for acts for which remedies ought to be given, the courts, for such reasons, are not authorized to place on them a forced construction for the purpose of mitigating a seeming hardship, imposed by a statute, or conferring a right which the legislature had not thought proper to give. It is the duty of a court to administer the law as it is written, and not to make the law; and however harsh a statute may seem to be, or whatever may seem to be its omission, courts cannot, on such considerations, by construction sustain its operation, or make it apply to cases to which it does not apply, without assuming functions that pertain solely to the legislative department of the government. It may be difficult to perceive a good reason why an action should not exist for an injury resulting in death, caused by the negligence of a receiver or his servants while operating a railway under order of court, as for an injury to a passenger not resulting in death, and subject to the same restrictions as to the manner and fund from which a judgment recovered should be satisfied; but this furnishes no reason why the right of action should exist in the one case and not in the other, where in the one the right does not exist unless given by statute, while in the other the right of action exists without a statute conferring it." If a receiver, within the meaning of the statute, is either a "proprietor" or "owner," then the ruling on the demurrer was wrong. If he is not, it was right. A receiver is an officer of the court that appoints him, when the law takes possession of the property to which the receivership relates, and, in cases of receiverships of railway property under the orders of the court appointing them, receivers often operate railroads, and assume the duties, burdens, and liabilities ordinarily imposed by law upon common carriers, in addition to the ordinary duties attaching to the position; but at all times they are only the agencies of the court, subject to its orders, and having no personal interest in the property in their hands resulting from the existence of the receivership, though responsible officially for the proper management and custody of property confided to their care, and, as other persons, personally responsible for their own unlawful acts working injury to others, but not so responsible for the negligence or unlawful acts of servants they may be compelled to employ in the business confided by the court to their management and control. When lawfully appointed, they are not the representatives of the company or persons when property may be placed in their possession and under their management, though they, in some cases, may be subjected to liability for charges arising under the permission of the courts appointing them, or from the negligence of themselves and their employees.

Examples of such charges upon railway companies' property in the hands of receivers are of almost daily occurrence in these cases in which the receipts of railway business, which are the property of a railway company in the hands of a receiver, are appropriated to the liquidation of claims arising from breach of duty as common carriers; but can such relations as they bear to property placed in their custody and management justify a holding that they are either the "proprietors" or "owners" of a railroad, within the meaning of the statute? One who has the legal right or exclusive title to anything is said to be a "proprietor." Webst. In many instances, if not usually, the word is the synonym of the word "owner." Abb.; Bouv.; Webst. The "owner" is said to be "he who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with as he pleases, even to spoil or destroy it, so far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." Bouv. "One who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not." Webst. Both words convey the idea of property in the thing in right of the person who is said to be the proprietor or owner, and exclude that

or a mere possessor in the right of another, although the possession may be coupled with the duty or obligation to take care of, or even to use, the thing in that other's right. Both words are doubtless often used to express right to property in a thing less than absolute or exclusive right, but when this occurs it will ordinarily appear from the context, and in all such cases the person holds for himself and in his own right; and, as stated in brief of counsel: "The right of such a person to the possession and control springs, not from an act to which the concurrence or consent of the owner is not required, as in the appointment of a receiver, but from the direct act of the owner or proprietor, who thereby clothes the person placed in the possession and control with the right to operate the same for his own benefit." This may be illustrated by reference to cases. In *Pierce v. Railroad Co.*, 51 N. H. 591, it appeared that the Concord & Portsmouth Railroad was operated by the Concord Railroad under a lease for 99 years, and a question arose whether it was liable for property destroyed by fire from one of its locomotives, under a statute which provided that "the proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine of such road;" and, in view of a statute in force in that state which declared that the term "proprietors of a railroad" should "include the corporation to which any railroad was originally granted, or into whose hands it has subsequently passed, the assignees or trustees to whom any railroad has been mortgaged for the security of a debt, and any company or person to whom it may have been conveyed," it was held that within the meaning of the law the defendant was a proprietor, and, as such, liable. In *Hall v. Brown*, 54 N. H. 497, an action was brought to recover damages resulting from the obstruction of a highway by a locomotive under a statute which provided that "no such proprietors shall obstruct by their engine, cars, or train any highway more than ten minutes at any one time, under penalty of twenty dollars for each offense to the party delayed thereby." The defendant was not the absolute owner of the railroad, but at the time of the accident the railway was occupied and used by the defendant for his own benefit, and it was held that he was a proprietor, within the meaning of the statute. Many cases are cited under the word "owner," illustrating the use and meaning of that word under a great variety of facts, which show that absolute and exclusive right is not always necessary to ownership; and, on the other hand, that possession, when held in a fiduciary character, does not constitute ownership, unless the relation under which the possession exists be created by the act of one who held dominion, such as, in the ordinary acceptation of the words, is deemed proprietorship or ownership; and it is not believed that any adjudicated case can be found in which it has been held that a person not having a personal interest in or right to property was its proprietor or owner. Abb. Dict.

In the construction of the statute under consideration it is proper, in order to arrive at the intention of the legislature, to consider the association in which the words "proprietor" and "owner" are found; for it ought to be presumed that in enacting the statute, having, as it does, relation to the use of enumerated kinds of property by persons sustaining given relations to it, the legislature was prompted by the same reason to give actions against the persons or corporations to whom the act applies; that it was the intention to give such actions against those who stood in similar relations to property and its use, though the relations may not be of the same degree, rather than to give such rights of action against persons whose relations to properties enumerated and their uses were wholly dissimilar. The importance and propriety of doing this is emphasized when we take into consideration the fact that right of action for injuries resulting in death is given against the persons enumerated in the statute under consideration, even where the injuries result from the "unfitness, negligence, or carelessness of their servants or agents;" while under the second paragraph of the act the persons against whom right of action is given are not made liable for the acts or omissions of their servants or agents. The words "hirer" and "charterer" apply to persons who, in their own rights, are entitled to possess, use, and have the benefits resulting from the use of

the thing hired or chartered, and those rights must be acquired by contract with persons having such dominion over the thing hired or chartered as enables them to confer on the hirer or charterer the right to use the thing hired or chartered, and to have the benefits resulting therefrom. The ordinary meaning of the words "hirer," "charterer," "owner," and "proprietor," as well as that attached to them by judicial decisions, being such that no person can hold either of these relations to property unless he has a personal interest in or right to it, would it not be contrary to all recognized rules of construction to hold that, when they are found thus associated, it was not the intention of the legislature to give to them the meaning ordinarily attached to them, where there is nothing in the statute tending to show that either of the words was used in some other sense? Looking to the character of the property named in the statute, if it was the intention of the legislature—as seems manifest by the language used—to give right of action against all persons and corporations sustaining to the property the relations which the words indicate in cases of injuries resulting in death caused by the negligence or the unfitness, negligence, or carelessness of their servants and agents, then there was necessity to name all the persons against whom right of action was intended to be given, so that any grade of ownership conferring personal right should be brought within the operation of the statute, and it was doubtless for the purpose of deciding all misconception as to the intent of the legislature that "hirers," "charterers," owners," and "proprietors" were named. The manifest purpose of the statute was to give right of action for injuries such as are complained of in this case against those in possession in their own rights of the classes of property named in the statute, when operated by themselves or by servants or agents of their own selection, for whose acts or omissions they ought to be responsible; and the language of a statute ought to be such as to imperatively require it before a court would be authorized to hold that such owners were intended to be made liable, directly or indirectly, for an injury occurring in the use of their property while under the management and control of an officer of a court having power to do with it as the court may direct, and to select his own servants, without regard to the wish of the owner. In cases in which railways are operated by receivers appointed by courts it is held that the receiver becomes a common carrier, subject officially to the liabilities attaching to that business, as well as to the liabilities of a master to the servant; and that, from the public nature of the business, earnings of the property, while in his hands, may be applied to discharge obligations arising in the course of the business; and it is true that in this way the owner of such property is made, through the appropriation of earnings of its property, to pay debts incurred through the negligence of a receiver or his servants. But those cases stand on exceptional ground, and are justified only by public considerations, not now necessary to consider. Such actions as that before us, however, stand on the statute which gives the right of action; and, while it cannot be denied that the legislature might give such right of action against receivers, and require judgment thereon rendered against them to be satisfied out of such funds as may be used to discharge obligations against them in other classes of cases, or even out of the corpus of the property, so far as only the owner's rights might be affected thereby, yet, unless this be done, no court would be justified in holding, under an act which in terms only gives such an action against the proprietor or owner, hirer, or charterer, that it was the intention of the legislature to subject even the earnings of a railway, which, as against all persons not having a right thereto conferred by contract, are as much the property of the owner of the railway as is the road itself, to the satisfaction of a claim based on the negligence of a receiver or his servants. It is ordinarily true that in the construction of a statute effect should be given to every word found in it, and it is contended that under this rule a meaning so essentially different must be given to the words "owner" and "proprietor" as to make the one or the other mean a person who has such right to possession and control as a receiver has; but this does not follow, and the rule is satisfied if the words be given a similar meaning, the difference being in the degree of right to the thing to which owner-

ship or proprietorship relates; and we are not called upon in this case to determine which of these words indicates absolute dominion, and which some lesser rights. The words "agents" and "servants," found in the statute under consideration, in a general sense both apply to persons in the service of another, but in a legal sense an agent is one who stands in the place of his principal,—his representative,—while a servant is one in the master's employment, but not clothed with any representative character.

The rule of construction which requires effect to be given to all the words of a statute never requires a meaning to be given to any word other than that it ordinarily bears, unless this is required by the context, and cases arise where it becomes proper to hold that words are tautological. We need not go beyond the statute under consideration to find an instance of this. This statute gives an action "where the death of a person is caused by the negligence or carelessness of the proprietor," etc., or where death is caused by the "negligence or carelessness of their servants or agents;" and there can be no doubt that the words "negligence" and "carelessness," as here used, mean identically the same thing, for negligence is but the omission of care, and the same is carelessness. It must be borne in mind that actions for injuries resulting in death can be maintained only against such corporations and persons as the statute gives such actions against, and only in favor of such persons as the statutes name, and the courts have no more power to extend its operation by construction not authorized by the words of the statute. If, perchance, an administrator of the estate of a deceased person, or the guardian of the estate of a minor or lunatic, should be required to operate for a time some of the vehicles for transportation of goods and passengers which might belong to such an estate, would it be claimed that the estate represented by him would be liable for an injury resulting in death, caused by the negligence of such an administrator or his servants, or of such a guardian or his servants? To hold that one having possession of and right to control property, as has an administrator, guardian, or receiver, is either the owner or proprietor of the property, would do violence to the ordinary understanding of the meaning of the words, as well as to the meaning attached to them, in a statute like that under consideration, by all judicial decisions.

It is claimed, however, that contrary rulings have been made, and we will briefly refer to the cases relied upon. In *Murphy v. Holbrook*, 20 Ohio St. 137, an action was brought by an administrator against receivers to recover damages for an injury resulting in the death of his intestate, which it was alleged occurred through the negligence of the agents of the receivers, and they were held officially liable. The action was brought, however, under a statute of the state of Ohio, which gave right of action in such cases against any person or corporation through whose wrongful act, neglect, or fault death resulted, if the injury would have given cause of action to deceased had he lived. Of the correctness of the decision under the statute on which it was based we think there can be no doubt, in so far as the question there decided can have any application to the question involved in this, for the receivers were persons who, under the act, might be made officially to pay damages, for their liability was not made to depend upon their relation to property. Under such a statute as that, they were liable, as receivers are liable, for injuries not resulting in death when caused by negligence in the business confided to their care. *Little v. Dusenberry*, 46 N. J. Law, 614, was an action brought against a receiver of a railway company's property for an injury resulting in death, based on a statute which provided that "in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages," etc. This, it will be seen, is substantially the same as the Ohio statute, and it was held that under it a receiver was liable officially to such an action, and there can be no doubt of the correctness of the decision, even in the absence of another statute, quoted in the opinion, which provided, when the property of a railroad company was placed in the hands of a receiver by order of the chancellor, that "all expenses incident to the operation of said railroad shall be a first lien on the receipts." The case of *Lamphear v. Buckingham*, 33 Conn. 238,

was an action brought against trustees in possession of a railroad, and operating it for the benefit of mortgage bondholders, to recover damages for an injury resulting in death. The statute then in force in that state provided that, in case the life of any passenger on a railroad, who was in the exercise of reasonable care, should be lost by the negligence of the railroad, the company should be liable to pay damages, not exceeding \$5,000; and it was contended that by the express terms of the statute the right of action was limited to injuries received at the hands of railroad companies, but, on account of another statute, the court said: "The original eighth section of the act of 1853 authorized the action against the railroad company only; but we are of opinion that the act of 1858, which authorized and regulated the surrender of the road and franchises to trustees for the benefit of creditors, subjected the property in the hands of such trustees to liability, and them to suit under this statute." The inference is that, but for the statute referred to, the court would have held the trustees not liable. The case of *Lyman v. Railroad Co.*, 59 Vt. 167, 10 Atl. 346, was one in which an action for an injury resulting in death was brought against a railroad company that was acting as receiver of two other railways, which it was operating in connection with a railroad it had leased, and the injury occurred on the leased road. In the opinion the court said: "If the court of chancery consented that its receiver might step outside his proper functions as receiver of the Vermont & Canada and Vermont Central Railroads, and engage as a lessee in business foreign to the administration of the property in the hands of the court, he stands, as to such business, and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as a receiver, in the sense that he is then an officer of the court, but as a party *sui juris*, acting as his own principal, and upon his own responsibility. The order of the court, if any, sanctioning his engagement in such business, is available to him in the settlement of his accounts as receiver of the roads in the hands of the court, but not as the gauge of his responsibility to third persons dealing with him." The court, however, does say that he would have been liable had he been in fact a receiver, and not a lessee; and we see no reason to doubt the correctness of this conclusion under the Vermont statute, which gives the right to action for the "rightful act, neglect, or default of any person, either natural or artificial." *Erwin v. Davenport*, 9 Heisk. 45, was also an action against a receiver to recover damages for an injury resulting in death, and it was held that the receiver, under the averments of the petition, would be personally liable for his own misfeasance; but the case can have no bearing on the question involved in this. We do not find that any other state in the Union has a statute in all respects the same as that in force in this state, and have been unable to find any case in which the question involved in this is considered; but, after holding the case under advisement for some time, in view of the importance of the question involved, as well as its novelty, and after giving to it full consideration, we are constrained to hold that the ruling of the court below was correct. Some judgments have been affirmed by this court that were rendered against receivers officially for damages for injuries resulting in death; but in these cases the question involved in this was neither suggested nor considered, and they cannot be considered as adjudications of the question. If it be desirable to make the property of a railway company liable in actions of this character on account of the negligence of a receiver in whose hands it may be, or on account of the negligence of his servants or agents, the legislature will doubtless so amend the law as to give such liability. The law is peculiar, in that it restricts liability for the negligence of agents and servants to persons and corporations engaged in given lines of business, no more dangerous in many of its branches than are many others in which the liability is made to depend on the wrongful act, unskillfulness, or negligence of the person or corporation to be affected. Whether such discriminations are conducive to the public welfare is a matter for consideration of the legislature. The judgment will be affirmed.

STATE OF LOUISIANA et al. v. LAGARDE et al.

(Circuit Court, E. D. Louisiana. March 2, 1894.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—FERTILIZERS.

Act La. No. 51 of 1886 required all manufacturers of and dealers in commercial fertilizers within the state to file with the board of agriculture a statement of the ingredients of their several fertilizers, to obtain licenses for their sale, and to place on each package sold a tag, to be furnished by the board, showing that such dealers had complied with the law; and penalties were provided for failure to conform to its provisions. Complainants, as soliciting agents, within the state, of an Illinois manufacturer, were in the habit of sending orders to their principal, and the fertilizer was shipped direct to the purchaser in Louisiana by such principal, and was never in complainants' possession or control. *Held*, that complainants were engaged in interstate commerce, and that such act, as applied to them, was an interference with such commerce, and hence the federal courts will restrain proceedings against them for non-compliance with such act.

2. SAME—INJUNCTION—AGAINST STATE.

The fact that such proceedings against complainants were taken in the name of the state will not affect the right of the circuit court to restrain the proceedings; for the injunction will go against the board of agriculture and its officers, at whose instance the proceedings were had, and not against the state.

3. SAME—AGAINST CRIMINAL PROSECUTIONS.

Whether or not the circuit court has jurisdiction to restrain the law officers of the state from instituting the criminal proceeding provided for by the act in the event of failure to comply with it, it can clearly restrain the board of agriculture, its agents and officers, from instigating any such prosecutions.

This suit was commenced by a petition filed in the civil district court for the parish of Orleans by the state of Louisiana, represented by M. J. Cunningham, attorney general, and Henry C. Newsom, commissioner of agriculture, against E. Lagarde & Son, a commercial partnership doing business in the city of New Orleans, and charging, among other things, said E. Lagarde & Son, as dealers in commercial fertilizers, with carrying on their business in violation and disregard of the provisions and requirements of Act No. 51 of the Laws of Louisiana of 1886. That everything has been done on the part of the state, contemplated by said act, as to the rules established by the bureau of agriculture; the issuance and distribution of circulars; the preparation of tags; the establishment of the necessary regulations for the printing and attaching to bags and packages of fertilizers of the analyses of such fertilizers, seeking to obtain samples, and publishing analyses of fertilizers; the establishment of regulations for obtaining such samples and making the analyses; the adoption of rules and regulations for the collection and deposit of money for tags sold and fines imposed, etc. That said E. Lagarde & Son, for the seasons of 1890-91 and 1891-92, submitted to the commissioner of agriculture the statement required by section 2 of the act, and obtained the certificates and licenses for each of those seasons required by section 3. That said E. Lagarde & Son have failed and refused to submit said statement as to the fertilizers they sell, or propose to sell, during the current season of 1892-93, and they therefore are not authorized, and have no right, to deal in commercial fertilizers in this state, but that, notwithstanding their failure to file the statement and receive the certificate aforesaid, they are and have been so dealing, and are therefore liable to a fine of \$1,000 for each violation of the law, which petitioners now sue for. Further, that said E. Lagarde & Son have been guilty of many of said violations, selling without filing said statement and procuring such certificate, exceeding 10 in number, up to the commencement of this suit, etc., and during the past two seasons have sold in this state, as petitioners believe, an average of 3,000 tons of commercial fertilizers, and have sold up to this

time, during the current season (1892-93), 1,000 tons, making 7,000 tons up to this date; that the whole of said amount has been so sold by them in bags, some containing 200 pounds and some 100 pounds, or from 10 to 20 bags to the ton, or, at the lowest, 70,000 bags of fertilizers so sold by them; that they have failed entirely to comply with the positive requirements of section 6 of said act, having failed and refused to attach, or cause to be attached, to each of said bags, one of the tags prepared according to section 5; that the taggage affixed by law is 50 cents a ton, which said E. Lagarde & Son now owe on 7,000 tons heretofore sold by them, or \$3,500, up to this time, which petitioners now sue for. Further, that, in addition to said taggage which said E. Lagarde & Son owe, they are liable, under section 6, to a penalty of \$150 for each omission to affix a tag to each bag of fertilizer sold by them, making \$10,500,000, which petitioners now sue for. And the petition details instances of various and sundry sales alleged to have been made by said E. Lagarde & Son without compliance with the law aforesaid. The petition further charges that said E. Lagarde & Son, and other dealers operating with them, have willfully disregarded the law, and hampered and crippled the bureau of agriculture and the experiment stations; that they have not the right to carry on business or the sale of fertilizers, directly or indirectly, personally or through an agent, or as agents, resident or non-resident, in violation of the law; that unless they are restrained they will continue their unlawful business, and cripple and destroy the efficiency of these important state institutions, and cause petitioners irreparable injury. Wherefore, they pray for order and writ of injunction enjoining said E. Lagarde & Son from further dealing in fertilizers or selling fertilizers in this state until they shall have filed with and submitted to the commissioner of agriculture a written or printed statement as required by section 2 of Act No. 51 of 1886, and procured a certificate required by section 3 of said act, and without placing upon and attaching to each bag or package of fertilizers one of the tags prepared and furnished by the commissioner of agriculture. And they also pray for judgment against E. Lagarde & Son, *in solido*, in the sum of \$10,000 penalties incurred under section 3 of said act, and for the sum of \$3,500 taggage or inspection fees, and for \$10,500,000 penalties prescribed by section 6 of the act, and for costs and for general relief. On the said petition an injunction issued as prayed for. Thereafter, on motion of E. Lagarde & Son, suggesting their desire to bond the said injunction in accordance with the practice in Louisiana, the said injunction was dissolved, on a bond of \$1,000; and thereafter, on petition of defendants, and bond for removal, the cause was transferred to this court, as one arising under the constitution and laws of the United States.

In this court the defendants filed a cross bill, wherein they allege that orators have been, during the years 1890, 1891, 1892, and 1893, engaged in the business or occupation of soliciting agents or drummers in this city and state for the Thompson & Edwards Fertilizer Company, a corporation created and organized under the laws of the state of Illinois, and are citizens of said state, the business of said fertilizer company being the manufacture and sale of commercial fertilizers; that orators' business consists in soliciting orders for said fertilizer company from persons in this state, inducing them to agree to purchase fertilizers from the said fertilizer company, and, when they have so secured an agreeing purchaser for said company, they notify said company by sending to it the name and address of the intending purchaser, and the terms of the sales agreed upon, and said company then ships direct from Chicago, Ill., to the said purchaser in this state, the fertilizers so sold; that "your orators do not manufacture, pack, ship, handle, or even see, said fertilizers, but the same are sold by the said fertilizer company to the purchaser, and shipped direct from the state of Illinois to the purchaser in the state of Louisiana, without your orators ever handling or owning or having any possession or control thereof;" that orators are not, and never have been, the soliciting agents of any other dealer in fertilizers than the said Thompson & Edwards Fertilizer Company; that they do not now have, and never have had, any fertilizer in their possession in this state, or exposed for sale in this state; have never had anything to do with said fertilizers, except as soliciting agents, as above stated; that for their services to said fertilizer

company they receive a commission on sales effected through their efforts. Orators further aver that said Thompson & Edwards Fertilizer Company do not now, and have not during the years 1890, 1891, 1892, and 1893, or during orators' connection with the said firm, kept on hand or exposed for sale any fertilizers in this state. The bill then sets out in full Act No. 51 of the Acts of the General Assembly of the State of Louisiana for the Year 1886, and also the proceedings hereinbefore recited in regard to the institution of the suit. It is further averred that "orators are not manufacturers of or dealers in commercial fertilizers in this state, within the meaning of the provisions of said Act No. 51 of 1886, but that said commissioner of agriculture and the said attorney general claim that your orators' aforesaid business is subject to the provisions of said act. And orators charge that, if said act is applicable to the aforesaid business of orators, then said act is unconstitutional, null, and void, because in violation of the constitution of the United States, and especially of article 1, § 8, cl. 3, thereof; and, in support of this, orators aver that their business is now, and has ever been, that of soliciting agents or drummers of said Thompson & Edwards Fertilizer Company, for the sale and shipment of fertilizers by said company from the state of Illinois to the state of Louisiana, said shipments being made direct from Chicago, Ill., to the purchasers in Louisiana, and received by orators in the original packages; that orators' business or occupation is interstate commerce, and is exempted, by the above referred to provisions of the constitution of the United States, from any such regulations, interference, restriction, burden, or tax as is sought to be imposed by said Act No. 51 of 1886. And orators further say that, if said act be an inspection law, it must be confined to commercial fertilizers manufactured in this state, or prepared for export or actually offered and exposed for sale in this state, and so far as applicable to fertilizers manufactured in other states, and not brought into this state, except after sale, and while in course of direct transportation to the purchaser and consumer, said act is in violation of the commerce clause of the constitution of the United States above referred to. But orators charge that said act is not in any proper or legal sense an inspection law; that said act does not require or provide for any actual inspection or examination of the fertilizers subject to its provisions; that it is purely and simply a revenue act. Orators further charge that said act is in violation of article 29 of the present constitution of the state of Louisiana, in that it embraces more than one object, and of articles 202 to 218 of said constitution, which define and limit the power of the general assembly to impose licenses or any other taxes for purposes of revenue." It is further averred that "notwithstanding the premises, and the patent unconstitutionality and nullity of said Act No. 51, of 1886, the said commissioner of agriculture and the said attorney general threaten to enforce its provisions against your orators, and they threaten to (and, unless restrained by this court, will) bring, not only a number of civil suits against your orators, but will cause to be instituted a number of criminal prosecutions against your orators, and the members thereof, and will cause them to be indicted, arrested, and tried for each sale of fertilizers negotiated by them as the soliciting agents of the said Thompson & Edwards Fertilizer Company as aforesaid, and will so oppress and harass your orators and the individual members by a multiplicity of suits and prosecutions as to break up their aforesaid business, and subject them to irreparable loss and injury, and deprive them of their personal liberty." The prayer is that the defendants may answer, but not under oath, and that a writ of injunction may issue, restraining and enjoining Henry C. Newsom, commissioner of agriculture of this state, and M. J. Cunningham, attorney general of this state, and each of them, their agents, attorneys, and servants, including Charles A. Butler, district attorney, and John J. Finney, assistant district attorney, for the parish of Orleans, state of Louisiana, from instituting or filing, or directing any others to institute, any suit or suits, action or actions, civil or criminal, against your orators, or the individual members thereof, to enforce against them the provisions of Act No. 51 of 1886, to recover the tax or baggage fees therein provided, or the fines or penalties, or any of them, therein imposed, except in this cause and in this court, and from interfering with orators' business by reason of anything contained in said act; and in

the mean time they pray for a restraining order embracing all the relief prayed for.

On notice to show cause why the restraining order prayed for in the cross bill should not issue, the defendants M. J. Cunningham, attorney general, and H. C. Newsom, commissioner of agriculture, appeared by counsel; and thereupon, on their motion, the suit was ordered placed on the law docket of the court, and the application for an injunction and for equitable relief dismissed and abandoned,—consent, however, being given that the cross bill of E. Lagarde & Son should stand as an original bill. Thereupon, the defendants to the bill were ordered to show cause why an injunction pendente lite, as prayed for, should not issue; and, in the mean time an order was entered, restraining the defendants, their agents and servants, and certain prosecuting officers, from instituting further suits, civil or criminal, against the complainants.

On the hearing the complainants presented the affidavits of several dealers in fertilizers, to the effect that the law in question, in its operation, is in no wise an inspection law; that no inspections are made, or ever have been made, under the same; and that there are no officials appointed, or ever have been appointed, or are acting, under said statute, whose duty it is to inspect fertilizers, or to see that said tags required by the act are affixed to the packages of fertilizers offered for sale or sold. Complainants also presented affidavits to the effect that the members and agents of the bureau of agriculture have threatened and are threatening to prosecute complainants, civilly and criminally, in all the parishes of the state, based on every transaction of theirs as the soliciting agents of fertilizers, with the intention declared of involving them in a multiplicity of suits and prosecutions, unless they shall comply with the law, and that such suits and prosecutions are intended to break up complainants' business, which is a growing and profitable one, and thus destroy their property.

M. J. Cunningham, Atty. Gen., Lionel Adams, and Lazarus, Moore & Luce, for the State.

J. P. Blair, for Lagarde and others.

PARDEE, Circuit Judge (after stating the facts as above). Counsel for respondents present no argument—make no assertion, even—that the act in question (No. 51 of the Laws of 1886) is constitutional; nor, on behalf of respondents, is denial made of the matters presented by the evidence read on the hearing, to the effect that the said law, in its operation, is purely a revenue law, and in no sense an inspection law, and that the bureau of agriculture and their agents are threatening and intending to harass and annoy the complainants with civil and criminal prosecutions under the said act until they shall pay the revenue demanded, or be compelled to abandon their business. The whole showing is addressed to the proposition that under the circumstances of the case the court has no power to grant relief. The title of the act under which the respondents have proceeded against the complainants, and threaten to still further proceed by a multiplicity of suits and prosecutions, is as follows:

“An act to protect and advance agriculture by regulating the sale and purity of commercial fertilizers and the guarantee and conditions upon which they are to be sold, and by fixing the penalties incurred by the violation of such conditions: by providing for practical and other experiments in relation thereto; by reorganizing the board of agriculture, increasing its powers and those of the commissioner of agriculture; by creating an official chemist, defining his duties and powers, and by repealing laws in conflict herewith,” etc.

The first section of the act provides for the reorganization of the bureau of agriculture, and defines some of its powers. The second section provides as to the duty of manufacturers and dealers in fertilizers before offering the same for sale; requiring a statement setting forth a description of the brand and package, and the named ingredients which they are willing to guaranty the fertilizer to contain. The third section provides for a certificate of compliance with the second section, to be issued by the bureau of agriculture, and that such certificate shall authorize the manufacture and sale of fertilizers, and further providing, under penalties, that no person who has failed to file the statement shall be authorized to manufacture for sale, or deal in, commercial fertilizers, in the state of Louisiana; the penalty being a fine of \$1,000, recoverable before any court of competent jurisdiction. The fourth section provides for circulars setting forth the brands of fertilizers sold in the state, and their claimed analysis, to be distributed by the board. The fifth section provides that the commissioner of agriculture, under regulations, shall prepare tags, of suitable material, with certain marks, which shall be furnished to any dealer or manufacturer who has complied with the second and third sections upon payment of 50 cents for a sufficient number of tags to tag a ton of fertilizer. The sixth section provides that every person, before offering for sale any commercial fertilizers in the state of Louisiana, shall attach, or cause to be attached, to each package, one of the tags aforesaid, and that any person who sells, or offers for sale, any package which has not been tagged, shall be guilty of a misdemeanor, and, besides, liable to a penalty, and further provides a penalty for counterfeiting the aforesaid tags. The seventh section of the act requires that all fertilizers offered for sale in the state of Louisiana shall have printed upon each package, in such manner as the commissioner of agriculture shall determine, an analysis of such fertilizer or chemical. The eighth section authorizes the commissioner of agriculture to obtain fair samples of all fertilizers sold, or offered for sale, in the state of Louisiana; to cause the same to be analyzed, and the analyses published. The ninth section provides for the drawing of samples from any package of fertilizer whenever required by the purchaser. The tenth section provides that the copy of the official chemist's analysis of any fertilizer certified by him shall be admissible as evidence in any court of the state on the trial of any issue involving the merits of such fertilizer. The eleventh section relates entirely to rules and regulations to be adopted by the board of agriculture for the collection of moneys arising from the sale of tags, and from fines imposed by the act. The twelfth section gives authority to the commissioner of agriculture to employ a competent chemist to carry on and conduct experimental stations, etc. The thirteenth section relates to the compensation of the chemist for the conduct of experiments and experimental stations. The fourteenth section provides that the director of the state experiment station shall be considered as the official chemist of the bureau of agriculture. The fifteenth section relates to accounts of tags received

and sold, and moneys collected. The sixteenth section defines the terms "commercial fertilizer or fertilizers," where used in the act. And the seventeenth and last section provides for the act to go into effect at a certain date, and the repeal of conflicting laws.

It is to be noticed that neither in the title nor in any part of the act is the inspection of fertilizers mentioned, or in any wise provided for; the nearest approach to it being in the eighth section, where the commissioner of agriculture is authorized to obtain samples and cause an analysis to be made, and cause publication of the same. Under the terms of the act, a description of the packages of fertilizers, and the statement amounting to a guaranty of the ingredients, must be filed with the commissioner of agriculture, and a certificate of compliance obtained, before any person is authorized to deliver any commercial fertilizers in the state of Louisiana. There is no provision that this statement shall be made, and such certificate obtained, for each and every year or season, or more than once. The complainants aver in their bill that they have complied with this provision of the act. The tags provided for by the act are to be attached to each package before the same shall be offered for sale, from which it follows that the act contemplates only sales of fertilizers within this state, and by persons having possession or custody of the same. Now, as the business of complainants is admitted to be purely and simply that of soliciting agents for a manufactory, and that the only sales they negotiate or make are of fertilizers not within the state, nor in their custody, and that the complainants do not manufacture, pack, ship, handle, or even see, said fertilizers; that they do not now and never have had any fertilizers in their possession in this state, and have never exposed any for sale in this state,—it would seem that the act in question was not intended to, and does not, in any way affect their business, and that they are in no wise liable for any of the penalties provided for in the said act. The bill shows, however, that the law officers of the state have otherwise construed the law; and for that reason it is not requisite that this court should at this time, and for the purposes of this case, so hold or declare. The business of complainants is interstate commerce, and it is beyond the regulation of the state of Louisiana. Nor can the state of Louisiana levy any tax upon it. *Robbins v. Taxing Dist.*, 120 U. S. 492, 7 Sup. Ct. 592; *Leloup v. Port of Mobile*, 127 U. S. 640-648, 8 Sup. Ct. 1380; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141-148, 9 Sup. Ct. 256. Even if the act in question could be construed as an inspection law, or as an exercise of the police power of the state, the complainants' business cannot be affected thereby, as complainants do not deal with, nor handle, nor bring to the state, fertilizers; and, even if the complainants were to import into the state original packages of fertilizers, and the act in question could be properly construed as an inspection law, within and under the police power of the state, still the interference with complainants' business would be in violation of clause 3, § 8, art. 1, of the constitution of the United States. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *In re Sanders*, 52 Fed. 802.

The case, then, is one within the jurisdiction of this court, and warrants relief according to equity principles and practice. An injunction is the usual relief in such cases, and it is asked for in this case. The respondents say that it cannot be issued, because the suit is one against the state, and the state cannot be enjoined, nor can it be issued against the law officers of the state, to restrain them from instituting criminal proceedings under the said law, nor can it issue against state officers or state boards, because such an injunction would be equivalent to an injunction against the state. The state of Louisiana was a party to the suit under which complainants' bill, as a cross bill, was originally filed; and when, by consent of parties and an order of court, the cross bill was permitted to stand as an original bill, the state of Louisiana was not dismissed, but remained as, practically, a nominal party. The objection that the suit is one against the state, so far as it has merit, can be eliminated from the case by the formal dismissal of the bill as to the state of Louisiana. The board or bureau of agriculture, or any of the individual members thereof, and some other persons who cannot be classed as agents, attorneys, or employes of said board, against whom complainants desire relief, should be made parties. Leave will be given to the complainants to amend their bill in these respects.

The state being out of the case, there is only one serious question as to the scope of the injunction that ought to be issued, and that is whether a court of equity can enjoin the law officers of the state from instituting and prosecuting criminal suits or proceedings under a void or unconstitutional law. Many cases on each side of this question have been cited and examined, but I do not think it necessary to review them at this time, for the purposes of this case, nor to determine the yet unsettled question of how far proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity. In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Lottery Co. v. Fitzpatrick*, 3 Woods, 222; *Bottling Co. v. Welch*, 42 Fed. 561; *Texas Railroad Commission Case*, 51 Fed. 529. There is only one section of the act in question that in any way calls for or requires the district attorneys of the state, as such, to institute criminal proceedings against the complainants, even if complainants' business should be construed as being within the act; and that section relates to cases where complainants shall be charged with selling, or offering to sell, any package of commercial fertilizer which has not been tagged as provided in the act. It is not at all probable that the district attorneys of the state will constitute themselves inspectors of fertilizers, or agents of the board of agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for non-compliance with the act in question, will be instigated, instituted, and prosecuted only through the action of the board of agriculture, its members, officers, agents, and attorneys. There can be no doubt about the power of the court to issue an injunction running to those

persons, restraining their action as prayed for in the bill; and, on complainants amending their bill as herein suggested, such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.

MILLSAPS v. CITY OF TERRELL.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 190.

1. MUNICIPAL CORPORATIONS—BONDS—LIMIT OF INDEBTEDNESS.

Const. Tex. art. 11, §§ 5, 7, provide that no city shall ever incur a debt for any purpose or in any manner, unless at the same time provision is made for levying and collecting a tax sufficient to pay the interest, and a sinking fund of at least 2 per cent. per annum. Article 8, § 9, provides that the tax to be levied for the erection of public buildings and other permanent improvements shall not exceed 25 cents of the \$100 valuation in any one year. *Held*, that the power of a city to create debts for such purposes is limited to a sum upon which the interest, together with 2 per cent. for the sinking fund, will not exceed the revenue derived from a tax of 25 cents on the \$100.

2. SAME.

After a city had issued bonds to such an amount that the interest and sinking fund absorbed the whole of such tax, it issued another series, and provided that the interest and sinking fund should be appropriated out of the general revenue of the city. *Held*, that the first issue of bonds, to the full amount authorized by the constitution, exhausted its power to contract debts, and the additional issue is void, without regard to its authority to apply its general revenue to the payment of interest and sinking fund of a bonded debt.

In Error to the Circuit Court of the United States for the Northern District of Texas.

At Law. This was an action by Reuben W. Millsaps against the city of Terrell. There was judgment for defendant, and plaintiff brings error.

The defendant, the city of Terrell, is a municipal corporation in the state of Texas, existing under and by virtue of chapters 1 to 10 of title 17 of the Revised Statutes. In the month of July, 1884, defendant created a debt for waterworks purposes by issuing bonds to the amount of \$28,000, bearing interest at the rate of 7 per cent. per annum. In the month of October of the same year, for the purpose of erecting a city hall, defendant issued other bonds to the amount of \$25,000, bearing interest at the rate of 8 per cent. per annum; and on the 1st day of January, 1885, for the purpose of completing this building, defendant made yet another issue to the amount of \$2,000, bearing interest at the rate of 8 per cent. per annum. The taxable values of all the real and personal property in the city for the year 1884, as shown by the assessment rolls for that year, were \$908,976. At the time of issuing the waterworks bonds, the city, by ordinance, provided for the levy of an annual tax of one-fourth of 1 per cent. to pay the interest and create a sinking fund for said bonds. Plaintiff's bonds of the first (\$25,000) series were issued under an ordinance passed September 23, 1884, the third section of which is as follows: "Sec. 3. For the purpose of meeting the interest upon said bonds, and providing an annual sinking fund sufficient to discharge the principal at maturity, an annual ad valorem tax of twenty-five cents on the \$100 on all property, real and personal, in said city subject to taxation, is hereby levied, and there shall be, and is hereby set apart out of the general revenue of the city constituted by one-fourth of one per cent. ad v.60f.no.2—13

valorem tax heretofore levied, as well as all occupation taxes levied and collected, an amount sufficient to make up all deficiency that may exist from the appropriation hereinbefore made in paying said interest and sinking fund." Plaintiff's bonds of the second series (\$2,000) were issued under an ordinance passed November 25, 1884, the third section of which is as follows: "Sec. 3. Said bonds shall be known as bonds of the second series, city hall bonds, and the interest and sinking fund shall be paid out of the funds heretofore levied and set apart for the payment of interest and sinking fund of the first series." The present action is upon coupons of the 27 bonds constituting the last two issues above described. The defense is that the city exhausted its power to create debt when it issued the waterworks bonds, and that the present bonds are therefore void. The court found as facts that, from the year 1882 down to the trial, the city had annually levied and collected a tax of one-fourth of 1 per cent. to defray its current expenses, and had also collected occupation taxes to the extent allowed by law. The amount of these latter was shown by the defendant's evidence to be about \$4,000 per annum. The court also found that plaintiff is a holder for value, and before maturity, without actual notice of any objection to the bonds. Upon this state of facts the court found for the defendant, and entered judgment accordingly. Plaintiff thereupon sued out this writ of error, and filed an assignment of errors, complaining that the court erred in holding that prior to the issuance of the bonds sued on herein the defendant had, by the issuance of its waterworks bonds, exhausted its authority to create debts, and the plaintiff's bonds and coupons were therefore void.

T. K. Skinker, for plaintiff in error.

B. F. Word and M. L. Crawford, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The plaintiff in error does not dispute that the tax of one-fourth of 1 per cent., authorized by the ordinance of July, 1884, does not provide a fund sufficient to pay the interest on the waterworks bonds and create a sinking fund of 2 per cent., but he insists that the bonds under the ordinances of September 23 and November 25, 1884, involved in this suit are, nevertheless, valid, because, he says, the city did not by the issue of the waterworks bonds exhaust its power to create debts, and the provisions made by the ordinances of September 23 and November 25, 1884, for the payment of interest and to create a sinking fund are sufficient. The bonds in question bear interest at the rate of 8 per cent. per annum which, with 2 per cent. additional for sinking fund, must be raised annually, requiring an aggregate amount annually of about \$2,700. The provisions made by the ordinances consist of (1) a special tax of 25 cents on the \$100 which, it is conceded, is already fully mortgaged; (2) a general revenue tax of 25 cents on the \$100; (3) the occupation taxes, —the two latter constituting, as we understand it, the alimony of the city. The question presented by the plaintiff in error, and argued by his counsel, is whether the alimony of the city, made up, under the constitution and laws of the state, of the general revenue tax and occupation taxes, can be used as a basis for creating a debt for permanent improvement and issuing therefor time-running bonds; the provision for the payment of the principal and interest thereof being the appropriation or pledge of such general revenue and occupation taxes. In our opinion, however, the first question in the case is whether the municipality had power to create the

debt based on any taxation; if not, the peculiar character of occupation taxes need not be discussed.

Article 11, § 5, of the constitution of the state, provides:

"That no debt shall ever be created by any city, unless at the same time, provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of, at least, two per cent."

Section 7 of the same article is the same, substantially, but with emphasis, to wit:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide, at least, two per cent, as a sinking fund."

These two sections of the constitution unquestionably prohibit municipal corporations from creating debts, unless payment of such debts is provided for by taxes to be assessed and collected annually. Article 8, § 9, of the constitution, as amended in 1883, provides:

"That no county, city or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment; and for the erection of public buildings, streets, sewer and other permanent improvements not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as is in this constitution otherwise provided."

This section expressly restricts the levying of a tax for the erection of public buildings, street, sewer, and other permanent improvements to 25 cents on the \$100 valuation in any one year, and, with sections 5 and 7, *supra*, restricts the creation of debts by municipalities for the purpose of erecting permanent improvements to a sum on which a tax of 25 cents on the \$100 valuation in any one year will pay the interest and create a sinking fund of 2 per cent.; for the municipality must provide, at the time of creating a debt for permanent improvements, for the assessment and collection of a sufficient tax to pay it, and yet under section 9, art. 8, cannot, for such purpose, provide over 25 cents on the \$100 valuation. If a tax is levied for the payment of debts created for permanent improvements of over 25 cents on the \$100 valuation, section 9, art. 8, is violated. If a debt created for the erection of permanent improvements is in excess of such sum as the tax levied will pay the interest on, and provide 2 per cent. sinking fund, then sections 5 and 7, art. 11, are violated. When we consider, in addition, the well-settled proposition that no municipality can create a debt unless the power to do so is either expressly or impliedly conferred upon it by law, it seems clear that in the case in hand the coupons sued on, as well as the bonds to which they were accessories, having been issued by the city of Terrell for permanent improvements after the power to create debts for such purposes was exhausted, were void for want of power in the municipality that issued them. To this effect see the decisions of the supreme court of Texas: *Gould v. City of Paris*, 68 Tex. 517, 4 S. W. 650; *City of Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593; *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003; *Biddle v. City of Terrell*, 82 Tex.

335, 18 S. W. 691; Nolan County v. State, 83 Tex. 182-195, 17 S. W. 823. We quote from Citizens' Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003, as follows:

"While our constitution authorizes the creation of a debt and the issuance of its negotiable bonds by the defendant city to provide for constructing waterworks, its mandate is imperative that no such debt shall be created without making provision at the time of its creation to assess and collect annually a sufficient sum to pay the interest thereon, and create a sinking fund of at least two per cent. on the principal. Until that is done the debt is not created, and none exists. If not forbidden by another provision of the constitution, the levy may provide for the collection of a greater sum than the interest contracted for and two per cent. additional, but it cannot be less than that. The language is plain and unambiguous, and in relation to cities the command is twice given. The provision must be sufficient when made. If, subsequently, it becomes either more or less than sufficient, the validity of the obligation would not be affected. By another provision of the constitution the percentage on the assessed value that may be levied is limited. The constitution, in effect, commands that a city with less than 10,000 inhabitants shall, in order to create a debt, take its latest assessment of property for taxes, and from that ascertain how much money a tax of 25 cents on \$100 of valuation will produce, and it may create a debt that that amount will provide for the payment of the interest on, and 2 per cent. per annum additional. The rule applies with all its force to cities having more than 10,000 inhabitants, except that the limit of the percentage of taxation is greater."

The coupons sued on in the case in hand being void for want of power in the city of Terrell to create a debt represented by such coupons, the plaintiff in error was rightly defeated in the trial court, and it is not necessary to discuss whether the city of Terrell had a right to pledge either its general revenue or its occupation taxes to pay the same; but, even as to that, the adjudged cases are against the plaintiff in error. See Citizens' Bank v. City of Terrell, 78 Tex. 460, 14 S. W. 1003, where it is said:

"The city had no authority to pledge or appropriate any part of the current revenues for the payment of the principal or interest of the debt. That fund is devoted by the constitution to the support of the city government, and is always under the control of the council for that purpose. The net proceeds from the waterworks, if there had been such, would have likewise been under the control of the council, and was not a basis for the creation of debt."

Also, see Texas Water & Gas Co. v. City of Cleburne, 1 Tex. Civ. App. 587, 21 S. W. 393. And, if we were without authority on the subject, we are inclined, on principle, to the opinion that it is against public policy to permit the necessary alimony of any city, however small such city may be, to be bargained away beyond the year for which it is assessed and is applicable. The judgment of the circuit court is affirmed.

WHITING v. EQUITABLE LIFE ASSUR. SOC.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1893.)

No. 145.

1. WRIT OF ERROR—PROCEEDINGS—AMENDING BILL OF EXCEPTIONS.

It is within the authority of the trial court, during the term, to allow an amendment to the record showing that a paper excluded from evidence was afterwards offered again and admitted; and at the hearing above, on writ of error, the bill of exceptions may be amended to show that such action was taken.

2. INSURANCE—ACTION TO RECOVER PREMIUM—EVIDENCE—SUFFICIENCY.

An administrator sued a life insurance company to recover the premium alleged to have been paid by his intestate upon an application for insurance, which was not granted by the company; and he put in evidence the latter's receipt for such premium, which provided for repayment if the application was denied. The testimony of defendant's agent, who conducted the transaction, showed that the intestate had given a sight draft for the premium, but had paid no cash; that the draft was protested, and had never since been paid; and that it was partly on this ground that the application had been refused. There was no conflicting evidence sufficient to raise a doubt. *Held*, that it was proper to direct a verdict for defendant.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action by J. T. Whiting, administrator of H. C. F. Brown, against the Equitable Life Assurance Society. There was a judgment for defendant on a verdict directed by the court, and plaintiff brings error.

This was an action brought by the complainant in error, J. T. Whiting, as administrator of the estate of H. C. F. Brown, in assumpsit against the Equitable Life Assurance Society, a corporation of New York, in the circuit court for Escambia county, state of Florida, whence it was removed to the circuit court of the United States for the northern district of that state. It was alleged that plaintiff's intestate, on the 28th day of June, 1873, made application to the defendant company for a policy of insurance upon his life for the sum of \$30,000, and paid therefor the first premium of \$817.51. The policy was not granted, but the party died the 16th of July that year. In 1892 an administrator was appointed, and suit was commenced by him to recover, first, the amount of premium paid with interest; second, \$30,000 and interest for life insurance on the life of the plaintiff's intestate. This last claim was abandoned by plaintiff at the trial, and the only demand was for the premium alleged to have been paid, with interest. Upon the trial, the plaintiff proved the death of the intestate, the granting of the administration to the plaintiff, and that the widow of the intestate came into possession of her husband's papers, among which she found a receipt as follows, to wit:

"Age 36.

No. ———.

"The Equitable Life Assurance Society of the United States, New York.

"Amount, \$30,000.00.

Premium, \$817.50.

"William C. Alexander, President; Henry B. Hyde, Vice President.

"Received from Mr. H. C. F. Brown eight hundred and seventeen dollars and fifty cents, being for the first annual premium and policy fee on an assurance of thirty thousand dollars on the life of the said H. C. F. Brown, for which an application is this day made by him to the Equitable Life Assurance Society of the United States. The said H. C. F. Brown to be assured from the date of this receipt, in accordance with the rate of premiums and the provisions of the policy of said society: provided always said application shall be approved and accepted by said society; but should the said applica-

tion be declined by said society, then the amount, the receipt whereof is hereby acknowledged, is to be repaid by me to the said H. C. F. Brown. Inasmuch as delays and miscarriages may take place in the mails or otherwise, the applicant for the policy is desired himself to send the annexed coupon by mail to the head office of this society, where it will receive immediate attention. Failure to do this will relieve the society from any liability under this conditional receipt.

"Dated Mobile, June 28th, 1873.

Jos. E. Murrell, G. A.,

"Per J. C. Ruse.

"For further reference, the applicant should note here the date he himself sends the coupon, and the name of postoffice at which mailed.

"Date of sending coupon, —, 187—. Mailed at — post office.

"In case of acceptance, the society will send the policy without delay, and, in case of declining the application, will at once notify the applicant. Should, therefore, the applicant not receive from the society notice of his acceptance or rejection within fifteen days from the date hereof, he is requested to communicate at once with the society.

"No agent is authorized to deliver this 'conditional receipt' without the coupons attached."

Upon the presentation of this paper, its reading was objected to because it was not shown that Murrell or Ruse had signed the same, or that Murrell was authorized to sign it, which objection was sustained. The plaintiff then introduced interrogatories and answers of one Bacon, which had been taken by defendant, to the effect that during June and July, 1873, at which time the receipt appears to have been given, he was clerk in the employ of the Equitable Life Assurance Company; that he identified the application of Brown for \$30,000, forwarded through their agent, Murrell, at Mobile; that the application was not approved and accepted, on account of insufficiency of examination and lack of a certificate; and that he informed Murrell by letter of the suspension of the application until further examination. He also presented and identified a letter written by him, notifying Murrell of the suspension of Brown's application, and one from Murrell in reply, which was as follows:

"The Equitable Life Assurance Society of the United States, No. 120 Broadway, New York.

"Wm. C. Alexander, Pres't; Henry B. Hyde, Vice-Pres't; J. E. Murrell Gen'l Agent, Mobile Co., Ala., and Border Counties of Mississippi.

"Mobile, Ala., July 12th, 1873.

"Geo. W. Phillips, Esq., New York—Dear Sir: I have your lines of the 8th respecting Brown. Mr. Brown gave us a sight draft on New Orleans for the premium, which was protested, and it seems that he was not authorized to draw the draft, there being no such firm in New Orleans; hence the provisional insurance is canceled, and the application must remain declined. The examination was complete, being examined by an outside physician also. The condition of the kidneys normal, but by oversight the blank opposite that question was not filled up, the risk being first class. However, for the reason stated, I do not now deem the case morally acceptable.

"Yours, very truly,

Jos. E. Murrell, Gen'l Agt."

The original record does not show, in the bill of exceptions therein contained, that the receipt which had been objected to and excluded was again presented and permitted to be read in evidence, but an amendment to said record presented at the hearing alleges that it was so presented and admitted and read in the case, and that the record had been properly amended by the action of the court below. Mrs. Brown, who had testified to finding the receipt among her husband's papers, was recalled, and testified that a short time after her husband's death John C. Ruse called upon her, and wanted to see her husband's papers, and showed her her husband's signature upon a piece of paper attached to a small book, which he declined to let her have unless he could see the papers. He also wanted her to give him the receipt of the company, which she refused to do. He also told her that there was a letter at Bay Minette for her husband, but that he would send her a copy of it. He

shortly afterwards sent her a copy of a letter said to have been written to her husband, which was as follows:

"The Equitable Life Assurance Society of the United States, No. 120 Broadway, New York.

"Wm. A. Alexander, President; Henry B. Hyde, Vice President; J. E. Murrell, Gen'l Agent, Mobile, Ala., Mobile County, Alabama, and Border Counties of Mississippi.

"Mobile, Ala., ———, 1873.

"Copy of my letter July 8th: 'H. C. F. Brown, Esq., Bay Minette—Dear Sir: I regret to inform you that your application for \$30,000 in the Equitable Life Assurance Society has not been accepted, and no policy will be issued. Please return me the receipt I gave you and I will forward the sight draft you gave me for the premium. Yours, very truly, Jos. E. Murrell, G. A., per Jno. C. Ruse.'

"N. B. This letter was directed to 'Mr. H. C. F. Brown, Bay Minette, M. & M. R. R.'"

Here the plaintiff rested his case, and John C. Ruse was introduced for the defendant, who testified: That during June and July, 1873, he was clerk in the insurance office of J. E. Murrell, who was general agent for the defendant company. That he recollected H. C. F. Brown, plaintiff's intestate, making application for insurance, in writing, in June, 1873, and that he had signed his name as witness, and that the application was in his handwriting. That Brown never paid any premium in cash for the policy for which application was made, but that he gave a draft upon some house in New Orleans, upon which a receipt was given him. That the draft was promptly forwarded for collection, but was returned with report that the collection could not be made, and the draft was protested. That such draft was never paid, so far as he knew. The draft was returned, and remained with J. E. Murrell, without the said Brown, or any one else, paying the same. He remained with Murrell for a long time, and it was not paid. That the draft was protested for nonpayment. That it was always kept by Murrell, and, if not destroyed, is probably among his papers, he being dead. He admitted that he did ask Mrs. Brown to surrender the receipt given by him to Brown, because upon its face it would have appeared that money had been received, and the company would have to show that it had not. This concluded the testimony in the case; whereupon the counsel for the defendant requested the court to instruct the jury to find a verdict for the defendant, which it did; and, under such instruction, the jury returned such verdict, and judgment was entered accordingly.

The only ground of error alleged is not submitting the determination of the case to the jury, but instructing them to find a verdict for the defendant.

A. J. Rose, for plaintiff in error.

C. M. & J. C. Cooper, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) The first question presenting itself in this case is as to allowing the amendment to the bill of exceptions as originally presented, which shows that the receipt in question was, subsequent to its rejection, again presented, admitted by the court, and read to the jury. It appears that the motion to amend the record was made to the presiding judge during the same term at which the trial was had, considered by him, and the order entered allowing the desired amendment. Unquestionably, it was within the power of the court to so correct any omission, either of the clerk or the party preparing the bill of

exceptions, during the term. Even subsequent to the adjournment of the term the court could, upon application, correct the record so as to show the truth of what actually occurred, and repair any error or omission of its officers, upon proper application being made. *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 263; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487; *Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450. The amendment is allowed. Accepting the bill of exceptions as amended, and considering that the receipt was admitted in evidence, was there then a case made by the entire testimony that would justify the jury in returning a verdict for plaintiff? There was no conflict or contradictory testimony, either of statement or circumstance, that needed weighing and deciding. It is true the existence of the receipt was *prima facie* evidence of payment, but such as was easily explained away. The fact that a sight draft was so far considered a payment as to justify a receipt, and yet was not a transfer of value, and, when payment upon it was refused, was found not to be, presents no inconsistency. The testimony introduced by plaintiff, containing as it did the deposition of Bacon and the letter of Murrell, defendant's general agent, and upon which alone the receipt appears to have been admitted, so explained the entire transaction that it is very doubtful if a verdict for the plaintiff would have been justified upon his testimony alone. But when the testimony of Ruse, the only witness personally acquainted with the facts of the payment and giving of the receipt, and the truth of whose testimony is in no way questioned by anything appearing in the record, is accepted, what shadow of right the plaintiff might have appeared to have disappears. The apparent inconsistency of the date of the letter of Murrell to Brown, informing him that his application had not been accepted, and no policy would be issued, it being July 8th, the same day upon which the application was suspended at the New York office, and which has been commented upon at some length by plaintiff's attorneys, is explained by the last sentence of his letter of the 12th July, wherein he states that he did not deem the case "morally acceptable." Unquestionably, this conclusion had been reached by the 8th of July, the date of his letter, on account of the nonpayment of the draft.

It is a well-established rule of practice in the United States courts that the court may withdraw a case from the jury, and direct a verdict for the plaintiff or the defendant, where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, and the numerous cases therein cited. In this case it is not considered that the evidence would, in any light it might be viewed, giving it the weight to which it was entitled as undisputed and uncontradicted, justify a verdict for the plaintiff, and we find no error in the judge in instructing the jury to find for the defendant. The writ of error is dismissed, and the judgment below affirmed, with costs.

TEXAS LUMBER MANUF'G CO. v. BRANCH et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 202.

VENDOR AND PURCHASER—BONA FIDE PURCHASER.

Henri Rueg, owner of a large tract of unoccupied lands in the state of Texas, died, leaving a posthumous child as his sole heir. His brother and sister subsequently executed a deed for the tract, in which they were described as "the only surviving heirs at law of the above-mentioned Henri Rueg." *Held*, that the grantors had no semblance of title, either legal or equitable, and that the grantee, who had paid full value for the land, and taxes thereon for many years thereafter, was not entitled to protection as an innocent purchaser without notice.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action of trespass to try title, brought by the Texas Lumber Manufacturing Company against Wharton Branch, T. M. McVeigh, C. L. Sisson, Stephen Hines, F. Scroggins, G. J. Collins, and others, in which J. B. Abbington, E. C. Douglass, and others, intervened. The case was tried by the court without a jury, and judgment was rendered in favor of plaintiff, and the defendants and interveners brought the case on error to this court. The judgment was at first affirmed because of defects in the transcript. 4 C. C. A. 52, 53 Fed. 849. A rehearing, however, was granted, and the judgment was thereafter reversed, and remanded for a new trial. 6 C. C. A. 92, 56 Fed. 708. A jury trial was then had, in which plaintiff recovered an undivided one-half interest in the land as against the defendants and the interveners. The interveners recovered as against the plaintiff and the defendants the other half. From this judgment the plaintiff has prosecuted the present writ of error.

H. M. Whitaker, for plaintiff in error.

W. S. Herndon and Ben. B. Cain, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. This is an action of trespass to try title to land in Texas. It was before us on writ of error at our last term. 6 C. C. A. 92, 56 Fed. 707. Three questions were then presented for our determination: (1) Are the declarations of deceased relatives admissible to show the birth of a child? (2) Are the probate proceedings in Louisiana in the Succession of Henri Rueg *res adjudicata* as to heirship to his estate in Texas? (3) Under the law in force in Texas 13th March, 1838, did the wife inherit from the husband, if no legitimate descendants survived him? These questions were considered by this court, and our conclusions thereon announced in our opinion then delivered. We reversed the judgment of the circuit court, and remanded the case for a second trial. The case has been again tried in the circuit court. The parties appear to have withdrawn their waiver of a jury, and to have had their case on this second trial submitted to a jury. There

was a verdict and judgment against plaintiff for the land claimed by the defendants in error. There are now three errors assigned as ground for the reversal of this judgment.

The first of these asks us to reconsider our former ruling on the question as to the probate proceedings in Louisiana in the Succession of Henri Rueg being *res adjudicata* as to who was his heir or were his heirs. We see no reason to doubt the correctness of our former ruling on that subject, or to support our conclusion by additional reasons.

The second error assigned is substantially the refusal of the trial judge to entertain their claim of innocent purchaser for value without notice. The parties respectively claim the land in controversy through Henri Rueg. He died 13th March, 1838, leaving a lawful wife surviving him. She was then pregnant. This pregnancy resulted in the birth of a living child, who died in a few weeks, leaving his mother surviving him. This child was the sole heir to Henri Rueg's land in Texas, and on the death of the child a few weeks after his birth his mother became his sole heir. She, by a subsequent marriage, became the mother of the defendants in error. The plaintiff claims through a deed made by a brother and sister of Henri Rueg, who describe themselves in their deed as "being the only surviving heirs at law of the above-mentioned Henri Rueg." This deed was executed 12th December, 1854, and purports to convey about 30,000 acres of land in Texas, including that in controversy, for \$4,000. This deed was recorded in the proper county on 28th October, 1856. On 24th January, 1887, the grantee in this deed sold the land in controversy in this action to the plaintiff in error. There has never been any actual occupancy of the land by any of the parties to this writ of error. The defendants in error have not paid taxes on the land. There is nothing on the records in the county where the land is situated to show that the defendants in error own the land. Provision has not been made in Texas requiring title by inheritance to be registered. The plaintiff had no actual notice of defendants' title. Plaintiff paid full value for the land. It offered to prove that it and those under whom it claimed had paid taxes on this land since about 1840. The trial judge held that the rules respecting a purchaser without notice do not apply to this case. In the case of *Vattier v. Hinde*, 7 Pet. 270, Judge Marshall said the rules respecting a purchaser without notice are framed for the protection of him who purchases the legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. There is nothing in the Texas decisions extending these rules to a case like the one at bar. Where the words "apparent ownership" are used by Chief Justice Stayton in the opinion referred to and relied on by plaintiff, he expressly limits them by the words, "evidenced as the law requires ownership to be." *Patty v. Middleton*, 82 Tex. 587, 17 S. W. 909. How is the ownership of the brother and sister of Henri Rueg evidenced in this case? By their own deed? It is without evidence, either such

as the law requires or such as a court of equity could receive to show beneficial ownership. They have no semblance of title. They could convey no more than they had. Their grantee took no more than they held. The real owners, legal and beneficial, were not parties to their deed. Being strangers to the title, both legal and equitable, the placing on record of a writing executed by them purporting to convey this land was not constructive notice to any one. If the real owners had actually seen and read this writing the day it was inscribed on the county records, they would not thereby have been charged with any duty affecting their title. The same is true as to the payment of taxes by a stranger. Owners of land in Texas are not charged with the duty of preventing strangers from paying taxes on their land. There is no error in the action of the trial judge in this particular.

The third error assigned does not, in our view, require any further notice than the statement of our conclusion that if there is error in the matter indicated it is not such as to require or warrant the reversal of the judgment. Affirmed.

CITY OF ALMA v. GUARANTY SAV. BANK.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 300.

MUNICIPAL BONDS—VALIDITY—ORDINANCE—RESOLUTION.

Where bonds are issued under Gen. St. Kan. 1889, par. 961, which declares that cities may "borrow money and issue bonds therefor" whenever "the city council shall be instructed so to do" by vote of the inhabitants, it is no objection to the validity of such bonds that the council submitted the matter to the electors by means of a resolution, rather than an ordinance, where there is nothing in the statutes expressly requiring an ordinance in such case. *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212, 10 U. S. App. 692, distinguished.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by the Guaranty Savings Bank against the city of Alma upon coupons on certain municipal bonds. Plaintiff obtained judgment. Defendant brings error.

This was a suit on coupons of municipal bonds which were issued and sold by the city of Alma, a city of the third class of the state of Kansas, situated in the county of Wabaunsee. The power to issue the bonds was derived from section 38, art. 3, of an act to provide for the incorporation of cities of the third class (vide Gen. St. Kan. 1889, par. 961), which is as follows: "The council may provide for making any and all improvements of a general nature in the city, and for the purpose of paying for the same may, from time to time, borrow money, and may issue bonds therefor, and street bonds to contractors and others performing work or furnishing materials; but no such money shall be borrowed or bonds issued until the city council shall be instructed so to do by a majority of all the votes cast at an election held in such city for that purpose. Bonds issued under this section shall be payable in not less than ten years nor more than twenty years from the date of their issue, with interest thereon at a rate not exceeding ten per cent. per annum, with interest coupons attached, payable annually or semi-annually. The council shall levy taxes on all taxable property within the

city, in addition to other taxes to pay said bonds at their maturity and their interest coupons as they respectively become due, which taxes shall be paid in cash only." Acting under the foregoing power, the city council, on March 18, 1889, duly passed and recorded in the journal of its proceedings the following resolution:

"Council Chamber, 18th March (cont'd), 1889.

"Motion by Fred Craft, and seconded by Geo. M. Keene, that the following resolution be adopted: Resolved, that, complying with the request of many citizens and electors, publicly expressed at a meeting of the citizens of the city of Alma held at the courthouse on the evening of the 16th day of March, 1889, we deem it advisable to call a special election to obtain the will of the electors of this city as to whether or not the said electors will instruct the city council of Alma to issue bonds of the said city in the sum of \$25,000.00 for the purpose of carrying on general improvements; that said bonds, if issued, shall be payable in twenty years from the date of their issue, and shall bear interest at the rate of seven per cent. per annum, with interest coupons attached, payable semiannually at the fiscal agency of the state of Kansas at the city of New York, N. Y.; that such election be held on the first Monday in April, 1889, at the courtroom in the courthouse in said city, and that Henry Pauly, Geo. M. Keene, and William K. McDonald, members of the city council, be appointed judges of such election, and that Henry Weygand and V. C. Welch be designated as clerks of such election, and that the polls be opened at eight o'clock a. m., and close at six o'clock p. m., of said day; and that the ballots shall be worded, 'For instructing the city council to issue the bonds,' and 'Against instructing the city council to issue the bonds,' and that the mayor make proclamation of such election by publication in the city official paper."

The proposition contained in the foregoing resolution was voted upon by the inhabitants of the city at an election which was held on April 1, 1889, after being duly advertised, and after due proclamation by the mayor. It so happens that said election was coincident with the regular annual election held on April 1, 1889, for the election of city officers. The vote taken on said proposition was duly canvassed by the city council, and the proposition to issue bonds was found to have been carried by a very large majority of all the votes cast. Subsequently, and on April 3, 1889, the city council passed the following resolution by a unanimous vote, and caused the same to be duly entered in its journal:

"Council Chamber, April 3rd, A. D. 1889.

"Resolved, that acting in obedience to the expressed will of the electors of the city of Alma, at the election held on the 1st day of April, A. D. 1889, in relation to the council issuing improvement bonds in the sum of \$25,000 00-100, and being instructed to so issue said bonds, that said bonds now be issued in the form and upon the terms specified in the proclamation of said election; that said bonds be prepared and executed in compliance with the law in such cases made and provided. And further resolved, that, upon signing and execution of the said bonds and coupons, the mayor of the city be requested to negotiate the same at not less than par per cent. of their face value, and make report of his doings in respect to the same at the next regular meeting of the city council, or at a special meeting called for that purpose before such regular meeting."

Subsequently, the bonds were duly executed under the hand of the mayor and clerk, with the seal of the city attached, and the same were sold, and the city received, and still retains, the proceeds. The bonds thus issued were entitled "Improvement Bond." On their face they contained a recital of the law under which they had been issued, and a copy of the same, to wit, section 38, art. 3, supra, was printed on the back of each bond. They were also duly registered in the office of the auditor of the state of Kansas on April 5, 1889. The case was tried to a jury in the circuit court, and the trial judge directed a verdict against the city, and in favor of the holder and purchaser of the bonds. To reverse the judgment entered on that verdict, the city has sued out a writ of error.

David Overmyer, for plaintiff in error.

J. B. Larimer and J. D. McFarland, for defendant in error.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The city of Alma contests the validity of the judgment rendered by the circuit court, mainly on the ground, that its counsel did not enact an ordinance providing for the submission to the electors of the proposition to issue improvement bonds. It is claimed that under the charter of the city a resolution of the council, such as was in fact adopted, was not the proper mode of inviting an expression of the popular will touching an issue of improvement bonds, and that, because a resolution was passed in lieu of an ordinance, all subsequent proceedings taken thereunder were invalid, and the bonds are void. Incidentally, it is suggested that as the charter provided that improvement bonds "shall be payable in not less than ten years, nor more than twenty years from the date of their issue," bonds like those now in suit, which were "to be paid in twenty years after date," do not conform to the charter, and are therefore invalid. We may dispose of the latter suggestion with the remark that, in our judgment, a bond made payable "in twenty years after date" is, by the common acceptance of those terms, a bond which matures at the expiration of 20 years, and that neither the payor nor the payee can enforce the payment of a bond thus drawn until the lapse of that period. We have no doubt that the bonds in suit conform to the charter, so far as respects the time of payment.

The other contention, that an ordinance should have been passed, in lieu of a resolution, rests upon no charter provision which expressly requires an ordinance to be passed for the purpose of obtaining an expression of the popular will, but is founded altogether upon inferences drawn from various charter provisions which do in fact require the council to enact ordinances for certain well-defined purposes. For example, the charter of the city empowered the council to enact ordinances "to levy and collect taxes for general revenue not to exceed ten mills on the dollar * * *; to open and improve streets * * * and alleys, make sidewalks, build bridges, culverts, and sewers." Another section of its charter prescribed the form of all ordinances that might be passed by the council, and directed them to be published in a certain way, and to be entered in an ordinance book. Another section of the charter, and the one most relied upon, provided, in substance, that the mayor and council should have no power "to appropriate or issue any scrip, or draw any order on the treasurer for any money, unless the same had been appropriated or ordered by ordinance." And a proviso to this section enacted "that no ordinance * * * for borrowing * * * money, levying taxes, or appropriating money, shall be of any validity unless a majority of all the councilmen * * * shall vote for such ordinance, and such vote shall

be taken by yeas and nays and * * * entered on the record." Vide Gen. St. Kan. 1889, pars. 939, 943, 959, 967. The foregoing sections, we believe, embrace all of the charter provisions on which this court is asked to base an inference that an ordinance was necessary to submit a proposition to the inhabitants to issue improvement bonds, and that an ordinance was also necessary to direct the execution and sale of such bonds after the vote had been taken. We have given careful attention to the argument presented in behalf of the city, with the result that we are unable to assent to the proposition that the bonds in suit are void for the reasons above stated. The law is well settled that a municipal corporation may declare its will as to matters within the scope of its corporate powers, either by a resolution or an ordinance, unless its charter requires it to act by ordinance; and generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution, where it is enacted with the same formalities which usually attend the adoption of ordinances. If the action taken by a municipality amounts to prescribing a permanent rule of conduct, which is to be thereafter observed by the inhabitants of the municipality, or by its officers in the transaction of the corporate business, then, no doubt, the rule prescribed may be more properly expressed in the form of an ordinance; but it is eminently proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act. Beach, Pub. Corp. § 484, and cases there cited. *City of Lincoln v. Sun Vapor Street-Light Co.* (decided at this term) 59 Fed. 756. In the present case the resolutions in question appear to have been passed, and entered at large upon the journal of the council, in the same manner that the council was then in the habit of passing and recording ordinances. The record also discloses that the vote was taken by yeas and nays, and that the resolution of March 18, 1889, directing an election to be held, was published in substantial compliance with the provisions of the charter touching the publication of ordinances. The most that can be alleged against the resolutions is that they were not put in the form of ordinances, and that after the council had been instructed by the inhabitants of the city to issue the bonds, at an election held for that purpose, the council did not publish its final resolution to issue the bonds, which had been passed in obedience to the popular mandate. It is also noteworthy that all of the proceedings taken to secure an issuance of the bonds were conducted with the greatest publicity and apparent fairness. It is not charged that the resolutions were rushed through the council secretly, or with indecent haste, or that any one has been defrauded, or that the city did not receive full value for its bonds. Moreover, it is apparent, from an inspection of the first resolution, that, before the council took any action, the project of issuing the bonds had been discussed at a public meeting of the inhabitants of the city, and that the council had been requested to order an election. Under these circumstances, the bonds in suit should not be declared invalid, in the hands of any holder of the same, unless the charter

of the city contains unmistakable evidence that the council could not lawfully act otherwise than by an ordinance. It is sufficient to say that we find nothing in the various provisions of the charter, to which our attention has been directed, which can be said to clearly indicate that the power to call an election to vote on a proposition to issue improvement bonds can only be exercised by ordinance; and we think that, after such an election had been lawfully called and held, the council had an undoubted right to order an issuance of bonds by a resolution, inasmuch as it had been instructed to issue them by a popular vote. Indeed, it might well be claimed, in view of the peculiar language of section 38, art. 3, *supra*, that a popular vote instructing the council to issue bonds for general improvements, was so far mandatory as to deprive the council of all discretion, and make it obligatory upon that body to obey the popular mandate. But, waiving that point, it is to be observed, that, whenever the charter in question authorizes particular acts to be done by ordinance, it is dealing with matters wholly foreign to the issuance of bonds for general improvements, which can in no event be issued without the sanction of a popular vote; that is to say, it is dealing with the subject of levying taxes, opening streets and alleys, building sewers, appropriating money, and drawing warrants or other like orders, usually termed "scrip," on the city treasury. In the section relating to the issuance of bonds for public improvements, which is quite full and complete in itself, the word "ordinance" is not employed. We are unable, therefore, to discover in the aforesaid provisions of the charter any imperative reasons why a proposition to issue bonds, as contemplated by section 38, may not be submitted to the people in the form of a resolution as well as in the form of an ordinance. If, as in the present instance, the proposition upon which the citizens of the municipality are asked to vote is fairly stated in the resolution, and the same is duly proclaimed or advertised, we cannot conceive of any substantial reason why a resolution does not answer all of the purposes of an ordinance.

In support of its contention that the bonds in suit should be held to have been issued without authority of law, much stress is laid on a recent decision of this court in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212, 10 U. S. App. 692; but an examination of the opinion and statement in that case will show that it is readily distinguishable from the case at bar. In the case last referred to the town was required to act in obedience to laws which are materially different from the charter provisions involved in the present suit. But it is more important to observe that the laws of Colorado which were then under consideration, in terms, required the town to act by ordinance, and it had assumed to so act but in doing so it had utterly failed to comply with certain mandatory provisions of a state statute, which rendered the pretended ordinance utterly void, as this court then held. The ordinance in question had neither been recorded, nor authenticated by the signature of the presiding officer, nor published as the statute of Colorado required, by reason of which facts it had not become operative. Nothing was decided in the last-mentioned case which can be said to con-

trol the decision in the case at bar. Our conclusion is that the record now before us discloses no material error, and the judgment of the circuit court is therefore affirmed.

MORGAN v. CITY OF DES MOINES.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 340.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIMITATIONS—INFANCY.

Act Iowa, Feb. 17, 1888, which limits to six months a right of action against cities for injuries resulting from defective sidewalks, unless notice is served on the city within 90 days from the injury, applies as well to infants as to adults.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Action by Allelia R. Morgan, by her next friend, B. W. Morgan, against the city of Des Moines, for personal injuries. Defendant obtained judgment on demurrer to the petition. Plaintiff brings error.

William A. Park, for plaintiff in error.

Hugh Brennan, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. The plaintiff in error, Allelia R. Morgan, a minor, by her next friend, B. W. Morgan, brought suit against the city of Des Moines, Iowa, in the United States circuit court for the southern district of Iowa, to recover damages for an injury resulting from a defective sidewalk in the city. The petition alleged that the injury occurred on the 25th day of April, 1891, and this suit was commenced on the 29th day of August, 1892. On the 17th of February, 1888, the general assembly of the state of Iowa passed the following act:

"Chap. 25. Suits and Claims against Municipal Corporations.

"An act limiting the time of making claims and bringing suits against municipal corporations including cities organized under special charters.

"Be it enacted by the general assembly of the state of Iowa:

"Section 1. That in all cases of personal injury resulting from defective streets or sidewalks or from any cause originating in the neglect or failure of any municipal corporation, or its officers, to perform their duties in constructing or maintaining streets or side-walks, no suit shall be brought against the corporation after six months from the time of the injury, unless written notice specifying the place and circumstances of the injury shall have been served upon such municipal corporation within ninety days after the injury.

"Sec. 2. All the provisions of this act shall be applicable to all cities in this state now organized under special charters. Approved February 17, 1888."

The petition did not aver that written notice specifying the place and circumstances of the injury had been served upon the city,

within 90 days after the injury, as required by the statute; and the city demurred to the petition for that reason, and upon the ground that it showed the cause of action was barred. The court below sustained the demurrer (54 Fed. 456), and rendered final judgment in favor of the city, and thereupon the plaintiff sued out this writ of error.

The contention of the plaintiff in error is that the provision of the general statute of limitations of the state (section 2535, Code of Iowa), which declares that minors shall have one year after the termination of their disability within which to commence an action, should be imported, by construction, into the statute which we have copied. To do so would be judicial legislation. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537; *Bennett v. Worthington*, 24 Ark. 487; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854. The act of February 17, 1888, is not an amendment of any previous act on the subject to which it relates. It is new and independent legislation, and complete in itself. It establishes the rule for the class of cases to which it relates. The power of the legislature to enact the statute is not questioned. It would be entirely competent for the legislature to enact a general statute of limitations putting minors and adults on the same footing as to all causes of action, and such would be the legal effect of a statute which contained no saving clause exempting infants from its operation. This principle has never been questioned. It is clearly and forcibly stated by Mr. Justice Miller in delivering the opinion of the supreme court in *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854, as follows:

"It is urged that, because the plaintiff in error was a minor when this law went into operation, it cannot affect her rights. But the constitution of the United States, to which appeal is made in this case, gives to minors no special rights, beyond others, and it was within the legislative competency of the state of Louisiana to make exceptions in their favor, or not. The exemptions from the operation of the statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but, in every instance, upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights."

The ground upon which saving clauses in statutes of limitation in favor of infants and married women are upheld is the injustice of barring the cause of action of one who is technically incapable of suing. Theoretically, this reason is extremely persuasive; but, speaking for myself, I give it as my deliberate judgment, after 40 years' experience at the bar and on the bench, that the saving clauses in statutes of limitation, exempting infants and married women from their operation, have been productive of more hardship and injustice than would have resulted from the absence of such provisions. An examination of the Reports will disclose the fact that the most flagrantly unjust and inequitable judgments and decrees that courts have been compelled to render resulted from these saving clauses. Technically, an infant cannot maintain a suit, and, in contemplation of law, is ignorant of his rights; but, in fact and in practice, infants, through their guardians and next friends, are commonly the most diligent and persistent of suitors, and the in-

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stances are few where any meritorious right is allowed to slumber. The self-interest of those who desire to administer the infant's estate usually results in a speedy action for its recovery. But, however this may be, the argument against the justice and wisdom of the statute which contains no saving clause in favor of infants must be addressed to the legislature, and not to the courts. In *Blivens v. City of Sioux City (Iowa)* 52 N. W. 246, the supreme court of Iowa gave effect to the statute under consideration, and declared that its "evident purpose was * * * to give the municipal corporation such notice of injuries for which it is claimed to be liable as will enable it to investigate the injuries, and the circumstances under which they were received, while witnesses who knew and remember the facts can be found, to the end that fraud may be prevented and justice be done." The judgment of the circuit court is affirmed.

NEW ORLEANS & C. R. CO. v. SCHNEIDER.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1893.)

No. 157.

1. NEGLIGENCE OF PASSENGER—QUESTION FOR JURY.

A passenger, while seated by an open window in a street-railroad car, was struck on the arm by an iron post placed near the track. There was a conflict of testimony as to whether the passenger had her arm out of the window at the time of the accident. *Held*, that the question of negligence was properly submitted to the jury.

2. SAME—GUARDS IN FRONT OF WINDOWS.

It is for the jury to determine whether reasonable diligence requires that a street-railroad company should place guards in front of the car windows in order to prevent passengers from exposing their hands and arms.

3. EXCESSIVE DAMAGES—BROKEN ARM.

A verdict of \$2,000 *held* not to show that jury were influenced by prejudice, where arm of passenger was broken by post adjacent to the track, while traveling in a street car.

4. VERDICT—CERTAIN AMOUNT.

A verdict in the sum of \$2,000, "with legal interest from judicial demand," is not uncertain, although requiring a mathematical calculation to get the sum of the finding.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by Elizabeth Schneider against the New Orleans & Carrollton Railroad Company, a street railroad, for personal injuries. Plaintiff obtained a verdict in the sum of \$2,000, "with legal interest from judicial demand," and judgment was subsequently entered thereon. 54 Fed. 466. Defendant now brings error.

John M. Bonner, for plaintiff in error.

E. Howard McCaleb, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The defendant in error was a passenger on one of the cars of plaintiff in error, and her arm was

broken by coming in contact with an iron post planted near the track. She sued the company, claiming damages for this injury. She alleged that she was seated by a window that was open when she entered, and took her seat in the car, and that afterwards she rested her arm upon the window sill; that the car turned, and (while running on a switch recently constructed for temporary use by the plaintiff in error) suddenly passed so close to an iron post standing near the track that the post violently struck her arm, and broke it between the elbow and the shoulder. The plaintiff in error excepted to the petition, in that it showed no cause of action. The overruling of this exception is the first of the assigned errors.

The plaintiff in error, after the proof was closed, requested the trial judge to direct a verdict for the company, and assigns as error his refusal to withdraw the case from the jury. To support this assignment all the evidence is brought up. The party injured testifies that she did not have her arm out of the window before the accident, but had it resting on the sill of the window. The surgeon who attended her testified "that the arm showed no bruise at any other point than at the seat of the fracture, which was just halfway between the elbow and the shoulder; the fracture was a simple fracture, evidently from a direct blow just over the seat of the fracture. Had the arm been projecting out of the window, and the post struck it, the injury would have been below the elbow,—would have been below where it was in this case,—and my impression, therefore, is that the arm was broken by a blow received just over the seat of the fracture, because there was no perceptible injury at any other place, and a very slight mark of injury over that." One witness, who was in the car when the accident occurred, and seated on the other side of the car, just opposite to and facing the lady who was hurt, testifies that "her elbow was resting on the sill of the car window, and, as the car went on this temporary switch, * * * the car jolted very much, * * * that caused the arm to be thrown out of the car, and come in contact with the post." One witness, in the car at the time, sitting on the same side with the party injured, and next to her, about one foot away, testifies that she put her elbow out of the window. "I saw by her position; I remember that by her position her arm was out of the car, because I looked that way just about that time." Being asked, "When you came onto that switch, did you notice where her arm was?" answered: "No, sir; never noticed it; only, after the accident, she pulled it in, and I remarked then I saw her elbow out of the window." "Before the accident?" "Yes, sir." "Now, do you remember whether at the time of the accident she was resting her elbow on the window sill or not,—could you say?" "I could not see then, because I was looking across the car." In our view, the trial judge did not err in overruling the general exception to the petition, and in refusing to direct a verdict for the company.

The plaintiff in error requested the trial judge to charge the jury that "the defendant [below] was not required to barricade the windows of its cars, or to so construct them as to prevent its passengers from putting their heads or arms out of the windows."

This charge as requested is not applicable to the whole proof in the case. It should not have been given, but, attention having been called by it to that feature of the case, the judge not improperly instructed the jury "that the defendant, in order to prevent its passengers from being injured, was bound to take those precautions, and those alone, which reasonable diligence required. It is for the jury to say whether reasonable diligence required that barricades or guards should have been used by the defendant to prevent its passengers from putting their hands and arms out of the windows." We do not feel called on to approve or question the doctrine of the case of *Summers v. Railroad Co.*, 34 La. Ann. 139. On the authorities most favorable to the plaintiff in error, it was not error in this case to submit the question of negligence to the jury in the manner it was done by this charge.

The other request refused assumed that the defendant had exposed her arm outside of the window, and was properly refused because that fact was not admitted or clearly established by the proof. On the contrary, there was a substantial conflict of testimony on that point. If there was error in the charge given in place of that request refused, it was an error of which the plaintiff in error could not complain. That part of the general charge complained of presents no error for which the judgment should be reversed.

In our opinion, the amount of the verdict is not such as to show that the jury were influenced by prejudice against the defendant. Within the limit just indicated, it was the province of the jury to assess the damages. The form of the verdict is not material. The amount found by them is not uncertain, because they chose to put their verdict in a form that required a mathematical calculation to get the sum of their finding. The trial judge could have required them to make the calculation, but it was not necessary that he should. When all the elements of a calculation so simple as the one involved in this verdict are given, no uncertainty can lurk there. The judgment is not for a greater amount than the jury found. If it is for slightly less, the plaintiff in error cannot be heard to complain. The judgment of the lower court is affirmed.

LIGHTCAP v. PHILADELPHIA TRACTION CO.

(Circuit Court, E. D. Pennsylvania. January 23, 1894.)

No. 16.

1. STREET RAILWAYS—NEGLIGENCE—EVIDENCE—RES GESTAE.

In an action for injuries to plaintiff, resulting from the collision of a cable car with his wagon, evidence that, while the vehicles were in actual contact, the gripman called out, "God damn you! Get out of the way," is admissible as part of the *res gestae*.

2. SAME—NEGLIGENT RINGING OF GONG—INSTRUCTIONS.

There was evidence that plaintiff's horse was standing about 10 feet from the track, evidently very much frightened, as the cable car approached; that the gripman, when about 10 feet from where the vehicle was struck, saw the horse, and rang his gong very violently; and that

the horse thereupon became unmanageable, and jumped on the track, where the collision occurred. *Held*, that it was proper to charge that ringing the gong too violently, and too near a frightened horse, might be negligence, and that it was for the jury to say whether it was so, under the circumstances.

At Law. On motion for new trial. Action by John A. Lightcap against the Philadelphia Traction Company for negligence. There was verdict for plaintiff, and defendant seeks a new trial. Motion denied.

S. Morris Waln, for plaintiff.

Thomas A. Leaming, for defendant.

DALLAS, Circuit Judge. This is an action for the recovery of damages for personal injury sustained by the plaintiff in consequence of a wagon in which he was driving having been struck by a cable car of the defendant at the intersection of Market street and Eleventh street, in the city of Philadelphia. The cause having been tried, and a verdict rendered for the plaintiff for \$5,000, the defendant moved for a new trial, and that motion has been argued and considered. Seven reasons have been assigned in support of the motion. The first three are that the verdict was against the law, the evidence, and the weight of the evidence. These do not require separate consideration, and the more specific assignments, with the exception of the seventh, do not seem to present any serious difficulty.

The fourth reason is that the court "erred in declining to strike out from the testimony the evidence of Joseph Smith, a witness for the plaintiff, who, in rebuttal, and without any evidence upon the subject in the plaintiff's case in chief, was asked by plaintiff's counsel, under objection and exception by defendant's counsel, and answered in the affirmative, whether he heard the gripman say, as the car and wagon were in actual collision, 'God damn you! Get out of the way.'" If my recollection of this matter—which accords with my notes of the trial—be not at fault, there is a mistake in this reason, as it is presented. I think there was no objection made to the question referred to, at the time it was asked, or to the answer, when it was made. But, be this as it may, it is certain that the motion to strike out was based solely upon the ground that the evidence to which it related was irrelevant, and that it was because it was held that the exclamation testified to was admissible as part of the *res gestae* that the motion was denied. No other point was made or passed upon. I am still of opinion that the ruling of the court was not erroneous, and I do not think that its action worked any injustice to the defendant.

The fifth reason is that the court "erred in affirming the plaintiff's points." This, however, was not pressed upon the argument. The instructions given to the jury upon the subject of damages were clearly correct; and I am satisfied that, if the plaintiff was entitled to anything, the verdict was not excessive.

The sixth reason is that the court erred in not giving binding instructions for the defendant. But neither upon the question of

negligence nor of contributory negligence was the evidence such that no conclusion or inference reasonably deducible therefrom would justify a verdict for the plaintiff. On the contrary, the case, as presented, was, in my judgment, one that it would have been manifestly improper to withdraw from the jury; and, accordingly, it was left to them upon the facts, with instructions as to the law which fully covered the nine additional points submitted on behalf of the defendant.

The most important question is that which is raised by the seventh reason assigned. In his brief, the learned counsel for defendant states that the court "charged that the jury might find defendant negligent in ringing the bell too violently, and too near a frightened horse;" and in this, it is alleged, there was error. There was some evidence that the plaintiff's horse was standing on the Eleventh street track, about 10 feet from the Market street track; that he was obviously very much frightened by the approaching car; and that when the car, also, was about 10 feet from the intersection of the two tracks, the gripman so sounded his gong as to cause the horse to jump forward on the track, and thus cause the collision. This, however, was not the theory upon which the plaintiff presented his case. His own testimony was to the effect that the car had been signaled to stop by a policeman, who at the same time directed him to proceed, and that he, in consequence, voluntarily drove upon, and was crossing the track when his wagon was struck. Yet, as I have said, there was some testimony that the horse became uncontrollable, and was caused to spring upon the track, by the ringing of the gong; and it was with reference to this aspect of the case that, in his fifth point, the counsel for the defendant requested that the jury should be told that if the horse became unmanageable from having been scared by the ringing of the gong, and jumped in front of the cable train before it could be stopped, this would not be evidence of negligence. The fifth point was, in other respects, affirmed, but with the qualification, as to this part of it, that the violent ringing of a gong in close proximity to a frightened horse might be negligence, but the question whether, if the gong was so sounded in this case, it was, under all the circumstances, an act of negligence, was submitted to the jury upon the evidence, and, of course, in connection with instructions as to what is meant by the word "negligence," as it is used in the law, to which no objection has been made. But the contention for the defendant seems to go to the length of insisting that the ringing of the gong used upon cars of this character can never be wrongful, no matter under what circumstances or in what manner it may be done. It is said (citing *Steiner v. Traction Co.*, 134 Pa. St. 199, 19 Atl. 491,) that "the supreme court of Pennsylvania has decided, emphatically, that the alarm gong of these cable trains should be rung vigorously, and as often as possible, especially at crossings, and that there is no liability for the consequent frightening of horses." This question is one not of local, but of general, law, and is to be determined upon principles which this court is not called upon to administer in harmony with the views of the court of last resort of the state in which the cause of action arose, but in

accordance with its own independent judgment, (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914;) and, although inclining to lean towards agreement with the supreme court of Pennsylvania,—for whose judgments the highest respect is entertained,—it would not be possible for me to follow them, if, indeed, they maintained the broad proposition which the defendant asserts they support. Alarm gongs are now in use in Philadelphia and elsewhere to a very considerable extent, and are about to be even more extensively introduced. It is necessary that cars which are propelled by steam or electricity on crowded thoroughfares should employ some means of giving warning of their approach; and nothing, I believe, less objectionable than the gong, has as yet been devised for the purpose. Yet, while its proper use is therefore rightful, it is no less true that it may be so used as to endanger the safety of those who, equally with the operators of street railways, are entitled, without encountering unnecessary peril to person or property, to the enjoyment of the public highways; and it is not, in my opinion, too much to insist that a device which may both avert and occasion casualties shall be used with that degree of care which, under the circumstances, a man of ordinary prudence would exercise as well to avoid causing accidents as for their prevention. I agree that the law not only permits, but requires, the proper use of the gong; but this does not sanction its wanton and needless use, nor relieve from liability for any harm resulting from unnecessarily, recklessly, and violently ringing it, where, by due prudence, such harm might be properly avoided. And I cannot yield my assent to the proposition that because it is, in general, the duty of the gripman to ring his gong with sufficient emphasis upon proper occasions, therefore he may ring it violently in the face of a frightened horse, and without any necessity whatever. I must not be understood to imply that this was done in this case. But there was evidence tending to show that the plaintiff's horse so plainly evinced his fright that it could scarcely have failed to be observed by the gripman; that there was no person at the horse's head; and yet that the bell was rung within a few feet of him, without any apparent actual necessity. And this, I think, was sufficient to require that the plaintiff's point, that if the jury believed "that the horse became unmanageable from having been scared by the ringing of the gong, * * * and jumped in front of the cable train before it could be stopped, this is not evidence of negligence," should be qualified, as it was, by the statement that a gong might be so rung, and under such circumstances, as to amount to negligence; the question with respect to the character of the ringing, and the circumstances, as they appeared from the evidence, being left to the jury for decision.

I do not understand that the views I have expressed are necessarily in conflict with those of the supreme court of Pennsylvania, as disclosed in the case of *Steiner v. Traction Co.*, *supra*, cited on behalf of the defendant. The right determination of each case of this character is dependent on its peculiar facts. The facts of that case were materially different from those of the present one, and that learned court does not anywhere say that in no case, and under

no circumstances, could liability arise from the sounding of a gripman's gong. But even if the judgment referred to should be understood as maintaining this extreme doctrine, and I, in consequence, be constrained to dissent from it, yet is it gratifying to note that the difference would be rather upon an assumption of fact than on a question of law. That eminent tribunal, apparently implying that its conclusion might have been different if the cause of the catastrophe in that case had been a steam whistle instead of a gong, said:

"There is no analogy between this case and the use of a steam whistle, wantonly blown in a crowded place. The steam whistle naturally tends to alarm horses. The traction bell does not."

My observation does not enable me to concur in this statement. My impression is that the traction bell does tend to alarm many horses, and that the difference in this respect between it and a steam whistle is only one of degree. Indeed, if some of the evidence in this case is believed, there can be no doubt that the plaintiff's horse was very greatly alarmed by the ringing of such a gong. And it may be added that, if the gripman saw the indications of fright which some of the witnesses testified that this horse exhibited even before the gong was rung, it must have been apparent to him that this particular horse was likely to be further alarmed by the noise of the bell, no matter what its effect might or might not be as to horses in general. I have discussed this subject at more length than I would otherwise have felt it necessary to do, because of the earnestness and ability with which counsel for the defendant has urged upon my attention the opinion of the supreme court of Pennsylvania, to which I have particularly referred. Since the foregoing was written, the judgment of that court in the case of *Lott v. Railroad Co.* has come to my attention; and as the opinion touches several matters which I have considered, and is not yet officially reported, I quote it in full, but without further comment:

"In view of the testimony, it was clearly the duty of the learned trial judge to submit the case to the jury; and he did so in a clear, concise, and impartial charge, of which the defendant company has no just reason to complain. To have instructed the jury as requested in either of the defendant's points recited in the first four specifications would have been plain error. Instead of showing 'that there was unnecessary or wanton sounding of the whistle,' etc., the testimony tended to prove quite the contrary. The defendant company's right to use Kensington avenue was not exclusive. It was in common with the public. And, wherever such common user of a highway exists, it is the duty of railway companies to exercise such watchful care as will prevent, as far as possible, accidents or injuries to persons and property. In such circumstances, a greater degree of care on the part of the railway company, as well as the public, is required. The degree of care to be exercised must necessarily vary with the circumstances of each case. *Gilmore v. Railway Co.*, 153 Pa. St. 31, 25 Atl. 651. The testimony was also conflicting, and presented questions of fact which were necessary for the consideration of the jury. In any view that can be taken of the case, it could not have been withdrawn from their consideration. There is nothing in either the specifications of error that would justify a reversal of the judgment. Judgment affirmed." 28 Atl. 299.

The motion for new trial is denied.

MADDOX et al. v. THORN.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1894.)

No. 132.

1. APPEAL—OBJECTIONS NOT RAISED BELOW—RECEPTION OF EVIDENCE.

A jury was waived in a cause, and the issue therein, which was upon the disputed boundaries of a grant, was submitted to the court. The court, after hearing the evidence and arguments at the trial, held the cause for further evidence, and, some 15 months afterwards, appointed a person to make survey of the grant. Its finding was announced as based on the evidence heard and the report of the surveyor, the parties or their attorneys being all present. No objection was made to the appointment of the surveyor or to the consideration of his report, nor any suggestion that the case had been held so long that it was desirable to offer additional evidence or to re-examine the former witnesses. *Held*, that it was too late to raise these objections on appeal.

2. PLEADING—AMENDMENT—CITIZENSHIP—OBJECTION NOT RAISED BELOW.

Where a motion in arrest of judgment is made on the ground that the complaint fails to show diversity of citizenship between the parties, the court has power to allow the defect to be remedied by amendment, (Rev. St. § 954;) and an assignment of such amendment as error is not well taken, especially when defendant has indicated no purpose to contest such amended allegation of citizenship.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

At Law. This was an action by Leonard M. Thorn against Maddox Bros. & Anderson. There was judgment for plaintiff, and defendants bring error.

West & McGown, for plaintiffs in error.

Myron R. Geer, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The plaintiffs in error make eight specifications of error in their assignment. The fifth, sixth, seventh, and eighth are substantially that the circuit court's findings of fact do not support the judgment as rendered. This assignment, to our view, is manifestly not well taken, and will not be further discussed. The fourth assignment is substantially that the judgment leaves it as uncertain where the lines of the survey are to be found on the ground as when issue was joined between the parties as to the disputed boundary of the Gonzales survey. We think that a careful examination of the calls of the judgment for the corners and lines of the land claimed by the defendant in error, and found for him and adjudged to him, shows that this fourth assignment is not well taken. The second and third assignments of error we cannot consider, because they are taken for the first time in this court. There is no bill of exception showing that the action of the circuit court complained of in these assignments was objected to or excepted to in the circuit court at the time when the trial judge could have obviated the objection if it had been duly made. Justice to the adversary party, and common respect for the

trial court, alike require that a party aggrieved by the action of the trial court pending the progress of the case to judgment in that court shall, by proper motion and saving exception, call the attention of the court and of the adverse party to the ruling or action claimed to be erroneous. These assignments are instructive illustrations of the propriety of this rule, if the rule was not too well understood to call for support. In this case a jury was waived, and the issues of fact, as well as of law, were submitted to the judge. The real issue was the fixing of the disputed boundary or boundaries of an undisputed grant. The judgment filed and entered in the case September 15, 1892, recites:

"Defendants, Maddox Bros. & Anderson, [plaintiffs in error,] announcing ready for trial on June 5, 1891, and the court, after hearing the evidence and argument of counsel, passed the cause, and held the same for further testimony, and on the 1st day of August, 1892, appointed A. Q. Nash, of Sherman, Texas, to make a survey of the lands in controversy, and report his action to this court, and, said report of surveyor Nash being filed and the parties heard thereon, and the court, being fully advised as to all the facts in the cause, finds," etc.

This announcement of the judge's finding was made in open court, with the parties or their attorneys all present. No objection was then made, or had previously been made, to the appointment of Nash, or to his report of his survey being received and considered by the judge; nor was any suggestion made impeaching the report in any particular, or leave asked for time or opportunity to disprove or impeach the same, nor was any suggestion, by motion or otherwise, made to the court that the judge had held the case so long, to consider, that the defendants wished to be further heard in offering additional proof, or again examining witnesses produced and examined 15 months before. It is now too late for them to complain that:

"The trial court erred in rendering judgment in the case at its September term, 1892, upon the evidence taken and heard herein at the June term of said court, in 1891, because two terms of said court had passed since the submission of said cause at its June term, 1891; and, the case not having been decided at that term, the court ought to have directed a retrial of same, as he had no power to carry the case over, from term to term, after its submission."

Or that:

"The trial court erred in appointing the surveyor A. Q. Nash to make a survey of the land in controversy, and in considering said report as evidence in this cause, because his appointment was made after all the evidence had been introduced, the cause submitted at the June term, 1891, and the court adjourned for that term, and because these defendants had no opportunity to disprove or impeach the report of said A. Q. Nash."

There remains to be considered the first assignment of error, which has been earnestly pressed on our attention in the oral argument, and in the printed brief submitted on behalf of plaintiffs in error. It is that:

"The trial court erred in allowing the plaintiff to amend his petition in this cause so as to show diverse citizenship of the parties, plaintiff and defendants, after the court had, from the bench, rendered his judgment herein, and after defendants had moved to arrest said judgment, because there was no allegation and no proof of diverse citizenship of the parties, and the court had no jurisdiction over the case, and because to allow an

amendment at that time, and hear testimony upon a new issue, was, in effect, to compel defendants to defend a new suit, without notice or time for preparation, as appears from defendants' bill of exception No. 1."

Bill of exception No. 1 (there is no other bill of exception in the record) shows:

"That on September 14, 1892, the court announced its judgment in favor of the plaintiff, Thorn, and against the defendants, Maddox Bros. & Anderson, for the land in controversy; whereupon the said defendants filed a motion in arrest of judgment, and, no service being had upon plaintiff, who was present by his counsel in open court, his counsel consenting to the hearing of said motion, the court gave plaintiff's counsel until September 15, 1892, to be heard upon said motion. The judgment of the court was announced as stated, but was not entered of record until after both of said motions were heard, on September 15, 1892; and on September 15, 1892, plaintiff, Thorn, came with a motion to amend his pleading, as filed January 2, 1891, so as to show diversified citizenship of plaintiff and defendants, and said motion in arrest and motion to amend, both, at the same time, came on to be heard; and, the court being fully advised thereof, did order that said motion in arrest of judgment be overruled, and that plaintiff be allowed and permitted to amend his plea to show such diversified citizenship, and the defendants consented, subject to their motion in arrest of judgment, and the action of the court thereon that said plea be amended without rewriting said entire plea; but said amendment was granted by the court upon the terms that plaintiff, Thorn, pay one-half of said costs, and Maddox Bros. & Anderson pay the other half of said costs, as now taxed; and for more particularity reference is made to each of said motions, and likewise the orders of the court in reference thereto,—to which action of the court, as hereinbefore recited, in open court, the defendants excepted."

It is not necessary to recite the motions referred to and the orders thereon. The parties were all in court. This case was up. The parties had just been heard on Nash's report. It was known that the judge was ready to announce his decision. The parties were giving expectant attention. The judge announced his decision in favor of the plaintiff below, (the defendant in error,) doubtless, as the manner is on such occasions, stating orally his views of the case. On the instant the plaintiffs in error made their motion in arrest of judgment on the ground that the record did not show diversity of citizenship of the parties. Thereupon (we presume on oral motion or request) the court gave plaintiff's counsel until the next day to be heard on said motion. The counsel for the plaintiff immediately prepared an amendment of his pleadings, fully showing such diversity of citizenship, made oath to it before the clerk, got the counsel for the motion in arrest of judgment to accept service of the amended pleading, subject to motion in arrest of judgment, and filed the amendment thus verified, and service thereof accepted, with the clerk, on the day the decision was announced and the motion in arrest of judgment made. Doubtless, the matter progressed continuously as rapidly as was practicable. The trial judge had suspended the entry of judgment until the next day, when the parties were to be heard on the motion in arrest of judgment. On the next day the matter was again taken up. The plaintiff presented his motion for leave to amend his pleadings. All the parties were present and before the court, as on the day before. The defendants could then have suggested that they would want to contest the allegations of the amendment, and would

need time to obtain proof to support such contest. No such suggestion was then made by them. No suggestion is yet made that the citizenship of the parties is not, in fact, as is alleged in the amendment. Appellants stand on the proposition that after the judge had announced what his decision was, and what the judgment of the court would be, (for it was not yet entered,) the court could not, under any circumstances, permit the defect in the record to be cured without awarding a new trial. Without reviewing the authorities (which are very numerous) on the subject of the trial judge's discretion to allow amendments of substance, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which says any court of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe," is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and proceeding to judgment. This discretion is a legal discretion, and subject to review. The amendment offered was one of vital substance. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested,—is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is prima facie sufficient. The pleading having been sworn to by the plaintiff's counsel, who was still present in court to be cross-examined if the defendants so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken. There being, therefore, no error in the judgment which the plaintiffs in error are in a position to urge, the judgment should be affirmed. The writ of error sued out by the plaintiff below, having been consolidated with this case in this court, and the two writs, and the returns thereon, having been treated as one case and one record, is disposed of by our judgment herein. Affirmed.

NEWMAN v. CROWLS et al.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 148.

1. JUDGMENTS—SERVICE OF PROCESS.

Though the judgment of a court of general jurisdiction recites that the defendants were duly cited by publication, as required by law, the presumption in favor of the judgment, thence arising, cannot prevail against the return of the sheriff and the actual publication, where they appear in the record and are insufficient.

2. ESCHEAT—PUBLICATION OF CITATION.

Sayles' St. Tex. art. 1770, provides that all lands of which the owner may die seised, without any devise thereof, and having no heirs, shall escheat to the state. Article 1771 authorizes proceedings to enforce such escheat on behalf of the state; and article 1773, as amended in 1885, pro-

vides that, in such proceedings, "citation shall be published as required in other civil suits." *Held* that, as the object of these proceedings is to determine judicially that the owner died without heirs, the citation must be published for eight weeks, as required by article 1236, relating to claims against property which has vested in unknown heirs.

8. SAME—AMENDMENT OF STATUTE.

Such article 1773, before the amendment of 1885, required that the order of court to "all persons interested in the estate to appear and answer" should be published as required by article 1236. *Held*, that the omission of specific reference to this article in article 1773, as amended, does not warrant the presumption of a legislative intent that publication according to the requirements of that section should no longer be necessary.

4. SAME—JUDGMENT—VARIANCE.

The petition in escheat proceedings alleged that one C. died seised of the land in question, having no heirs, and the citation to unknown heirs, required by the statute, followed the petition. On the hearing the evidence showed that the land was patented to the heirs of C., who died in the military service of the republic of Texas, on a land certificate issued to them 16 years after C.'s death; and the judgment, reciting these facts, and the fact that such heirs had exercised no active ownership within seven years, purported to direct the escheat, and to vest the land in the state. *Held*, that this judgment did not bind such heirs.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action of trespass to try title, brought by William O. Crowls and others against J. F. Newman. There was a judgment for plaintiffs on a verdict directed by the court, and defendant brings error.

This suit was instituted in the United States circuit court for the northern district of Texas by defendants in error, citizens of the state of Louisiana, to recover from plaintiff in error, a citizen of the state of Texas, 640 acres of land situated in Fisher county, Tex., patented by the state of Texas to the heirs of George W. Crowls on June 9, 1890, by virtue of a land certificate issued by the adjutant general of the state of Texas to the heirs of George W. Crowls on February 17, 1852, in accordance with an act of the legislature of Texas approved February 10, 1852. The action was brought in the ordinary form of trespass to try title, as provided by the laws of Texas, plaintiff in error answering by plea of not guilty. Defendants in error (plaintiffs below) proved that they were the only heirs of George W. Crowls, deceased; that he died a soldier in the army of the republic of Texas on November 6, 1836; that a bounty certificate of 640 acres of land was issued to them, as the heirs of George W. Crowls, by the adjutant general of the state of Texas, on February 17, 1852, in accordance with an act of the legislature of Texas approved February 10, 1852, which granted and secured to the heirs of George W. Crowls, deceased, 640 acres of land, "to which they are entitled by virtue of the services and death of said Geo. W. Crowls in the army of the republic of Texas," and authorized the issuance of a bounty warrant for said 640 acres of land to the heirs of said George W. Crowls; that the land in controversy was located by virtue of said bounty certificate, and was patented on June 9, 1890, to the heirs of George W. Crowls, deceased. Plaintiff in error (defendant below) introduced in evidence, and relied upon, a judgment of the district court of Fisher county, Tex., in the cause of *The State of Texas v. The Heirs of Geo. W. Crowls et al.*, (No. 18,) rendered March 14, 1890, (which was a proceeding to escheat the land in controversy,) an order of sale issued in said cause on May 12, 1890, and a deed to plaintiff in error, of date June 3, 1890, from the sheriff of Fisher county, Tex., reciting the judgment and order of sale above mentioned, alleging the due advertisement and sale of the property in controversy thereunder to plaintiff in error for the sum of \$1,920 cash, and purporting to convey to plaintiff in error all of the estate, right, title, and interest which the heirs of George W. Crowls and other defendants (squatters upon the land) and the state of

Texas had in and to the land in controversy. It was shown that plaintiff in error was the highest and best bidder at said sale; that the land was sold to him for \$1,920 cash, which sum he paid the sheriff on receipt of deed to the land; and that the sheriff paid over to the treasurer of the state of Texas \$1,636.40 of this money, that being the balance left after payment of the costs of the escheat proceeding. Defendants in error then introduced in evidence a duly-certified copy of the transcript of the complete proceedings in the said cause of *The State of Texas v. Heirs of Geo. W. Crowls et al.*, (No. 18,) in the district court of Fisher county, Tex. Said transcript shows, among other things, service by publication, as follows:

"The State of Texas to the Sheriff or any Constable of Fisher County, Greeting: Oaths therefor having been made as required by law, you are hereby commanded that you make publication of this citation in some newspaper published in said county once a week, for four consecutive weeks previous to the return day hereof you summon all persons interested in the estate of Geo. W. Crowls, deceased. Defendants to be and appear before the district court to be holden in and for the aforesaid county of Fisher, at the courthouse thereof, in the town of Roby, on the first Monday in September, 1888, then and there to answer the petition of the state of Texas, by R. C. Crane, county attorney of Fisher county, plaintiff, filed in said court on the 8th day of August, 1888, and numbered on the docket of said court 18, against P. A. Williams, a resident of Taylor county, and J. F. Newman, a resident of Nolan county, and the heirs of the said Geo. W. Crowls, deceased, alleging, in substance, as follows: That in the year 1853 a bounty warrant was issued to the said Crowls by the state of Texas, and said bounty warrant was in said year located by him on 640 acres of land situated in Fisher county, Texas, now known and designated as 'Survey No. 325, Block 16, Abstract No. 19,' lying on the south bank of the Clear Fork of the Brazos river; that no patent was ever issued by the state of Texas to the said Geo. W. Crowls upon said land, or to any one claiming under or through him; that said Crowls has departed this life, and left no heirs, or any one having a legal claim to said land; that said P. A. Williams and J. F. Newman are claimants of said land; and that said Newman is now in possession thereof. Plaintiff asks for judgment vesting title to said land in the state of Texas, and for a writ of possession for said land in behalf of the state of Texas, for costs and general and equitable relief. Herein fail not, but have you then and there before said court this writ, with your return thereon, showing how you have executed the same.

"Issued this 6th day of August, A. D. 1888.

"Witness:

W. S. Rector,

"Clerk District Court, Fisher County.

"Given under my hand and the seal of said court, at office, this 8th day of August, A. D. 1888.

[Seal.] "Attest:

W. S. Rector,

"Clerk District Court of Fisher County."

"Sheriff's Return.

"Received this writ on the 8th day of August, A. D. 1888, at 10 o'clock a. m. of said day; and I executed the same by publishing the same in Fisher County Call, a newspaper published in the county of Fisher, once in each week for four consecutive weeks, previous to the return day thereof. Said publication was made on the 9th, 16th, 23d, and 30th days of August, A. D. 1888, and a printed copy thereof herewith accompanies this return.

"Witness my hand, officially.

C. E. Roy.

"Sheriff Fisher County."

Indorsed as follows: "No. 18. In District Court. The State of Texas v. Heirs of Geo. W. Crowls. Citation by publication. Issued this 8th day of August, 1888. W. S. Rector, Clerk."

Said transcript also shows the judgment of the district court of Fisher county, Tex., in favor of the state of Texas, and against the heirs of George W. Crowls and others, as follows:

"On this day came on to be heard the above styled and numbered cause, and the state of Texas appearing by her county attorney, W. W. Beall, and R. C. Crane and F. Keifer, attorneys for the state of Texas, and it appearing to the court that the heirs of G. W. Crowls, though duly cited as required by law, by making publications in the Fisher County Call, a weekly newspaper published in Fisher county, Texas, of the citation issued herein, prior to the return day of the September term, A. D. 1888, of this court, failed to appear and make answer herein, but wholly made default; and it further appearing to the court that Allen Williams and J. F. Newman, defendants herein, though duly cited by law, failed to appear and make answer in the said cause, but wholly made default; and it further appearing to the court that Mrs. P. A. Williams, a defendant herein, having been duly cited, appeared and made answer herein at the September term, A. D. 1889, of this court, and neither the state of Texas nor either of the defendants herein demanding a jury, the court therefore proceeded to hear the evidence and determine the issue upon the pleadings and evidences in said cause. And it appearing to the court that the only claim of the heirs of G. W. Crowls upon the tract of land herein sued for is by virtue of a certificate issued by the state of Texas to the said heirs in the year A. D. 1853, and that the said certificate was by said heirs located upon the tract of land herein sued for, and situated in Fisher county, Texas, and that no patent has ever been issued from the state of Texas to the said heirs of G. W. Crowls, or to any other party, for said tracts of land, and that the title thereto still remains in the state of Texas, and it further appearing to the court that no act of ownership has been exercised by the said heirs of G. W. Crowls, or any person or persons claiming by, through, or under them, for a period of more than seven years preceding the institution of this suit, and that no lawful claim has been asserted within the said time by any party; and it further appearing to the court that no one of said defendants herein has set up any title to said tract of land, or has offered any evidence of title thereto, though duly cited as before stated; and it further appearing to the court that said tract of land is reasonably worth the sum of at least \$3.00 per acre,—it is therefore the opinion of the court that the law and facts are with the plaintiff, and that he have and recover the tract of land herein sued for and hereinbefore described. It is therefore ordered, adjudged, and decreed by the court that the state of Texas do have and recover of the defendants, heirs of G. W. Crowls, J. F. Newman, P. A. Williams, and Allen Williams, all that tract or parcel of land situated in Fisher county, Texas, hereinafter more particularly described by metes and bounds as follows."

The court, on the evidence, instructed the jury to return a verdict for defendants in error for the land in controversy, which was accordingly done, and judgment was rendered in accordance with said verdict.

James W. Brown, for plaintiff in error.

Branch K. Miller and T. W. Gregory, for defendants in error.

Before PARDEE, Circuit Judge, and TOULMIN and BOARMAN, District Judges.

PARDEE, Circuit Judge, (after stating the facts.) The only question to be determined in this court is, whether or not the judgment in the escheat proceeding was binding on the defendant in error, (plaintiff in the court below.) All of the assignments of error raise this question, in one form or another, and need not be recapitulated. It is contended that as the judgment in question was rendered by a court of general jurisdiction, and contains a recital that the heirs of George W. Crowls were duly cited as required by law, by making publications, etc., the same is conclusive and binding on all parties as to the sufficiency of the service by publication on the said heirs, and cannot be inquired into, nor attacked collaterally, in that re-

spect, although the return of the sheriff, and the actual publication had, are shown by the record, and are insufficient. In *Galpin v. Page*, 18 Wall. 350, it was held:

"The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. When the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

In *Settlemier v. Sullivan*, 97 U. S. 444, it was contended that the recital in the entry of the default of the defendant in the case in the state court, that, "although duly served with process, he did not come, but made default," was evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission, but the court held that:

"The recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, —the record being complete,—can only be considered as referring to the former."

We further quote from the same:

"We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority,—that is, within the boundaries which the law assigns to it with respect to subjects and persons,—is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But, if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. 'If, for example,' to give an illustration from the case of *Galpin v. Page*, 18 Wall. 350, 'it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears, in like manner, that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also.'"

In *Cheely v. Clayton*, 110 U. S. 701-708, 4 Sup. Ct. 328, it is said:

"The notice and return appearing of record in the proceedings for divorce control the general recital in the decree that due service had been made upon the defendant therein."

The whole subject is reviewed by the supreme court in *Guaranty Trust, etc., Co. v. Green Cove, etc., R. Co.*, 139 U. S. 147-148, 11 Sup. Ct. 512, and *Galpin v. Page*, *Settlemier v. Sullivan*, and *Cheely v. Clayton*, *supra*, are approved. These authorities control the question in this court.

The judgment of the district court of Fisher county, state of Texas, in the escheat proceeding entitled "*State of Texas v. The Heirs of Geo. W. Crowls*," was rendered in a suit which was com-

menced August 8, 1888. The suit was therefore instituted and prosecuted under the escheat law of Texas, as amended March 24, 1885, and as it now exists, (Sayles' St. Tex. p. 560 et seq.) and we quote therefrom the following:

"Title 36. Escheat.

"Article 1770. Estates shall Escheat, When. If any person die seized of any real or possessed of any personal estate without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state; provided, that where no will is recorded or probated in the county where such property is situated within seven years after the death of the owner it shall be prima facie evidence that there was no will, and where no lawful claim is asserted to, or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner and of the failure of heirs, and the court trying the cause may, if such evidence is not rebutted, find therefrom in favor of the state.

"Article 1771. Petition for Escheat Filed by District or County Attorney, When. When the district or county attorney shall be informed or have reason to believe that an executor under the will of any person who has died without heirs and without having devised his estate, has not accepted the trust, and that no administrator with the will annexed has been appointed; or where such attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted; or where such attorney finds any estate real or personal, in the condition specified in the next preceding article (1770) he shall file a petition in behalf of the state in the district court of the county where such property or any part thereof lies, which petition shall set forth a description of the estate, the name of the person lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts or circumstances in consequence of which such estate is claimed to have escheated, praying for a writ of possession for the same in behalf of the state.

"Article 1772. Citation Issued as in Other Cases. The clerk of the court shall issue citation as in other civil causes for such of the defendants as shall be alleged in the petition to hold possession of or claim such estate, requiring them to appear and answer at the next term of court.

"Article 1773. Citation for Publication Issued, When, etc. The clerk shall also issue a citation, setting forth briefly the contents of the petition for all persons interested in the estate to appear and answer at the next term of court, which citation shall be published as required in other civil suits."

The last article quoted provides for publication of citation for all persons interested in the estate, "as required in other civil suits." When the proceeding to escheat the estate of Crowls was instituted, two articles of the Revised Statutes of Texas prescribed the manner in which citation shall be published in civil suits, as follows:

"Art. 1235. Citation for Non-Resident Defendants, etc. Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending. But if there be no newspaper published in such judi-

cial district then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once in each week for four successive weeks previous to the return day thereof.

"Art. 1236. For Unknown Heirs. Where any property of any kind in this state may have been granted or may have accrued to the heirs, as such, of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and if the plaintiff, his agent or attorney, shall, at the time of instituting the suit or any time during its progress, make oath that the names of such heirs are unknown to the affiant, the clerk shall issue a citation for such heirs addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action and shall command the sheriff or constable to summon the defendant by making publication of the citation in some newspaper of his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for eight successive weeks previous to the return day of such citation." Sayles' St. Tex. pp. 418, 419.

A comparison of these two articles shows a marked difference between them. Article 1235 prescribes the method for serving a defendant whose name is known; for his name must be known before an oath can be made that he is a nonresident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to affiant. Article 1236 prescribes a method for serving unknown heirs, and is applicable when property is sought to be affected which may have been granted or may have accrued to the heirs, as such, of any deceased person, and their names are unknown to the plaintiff. In such event, they may be sued as the heirs of such deceased ancestor. Under article 1235, the citation must be published for four weeks, and, under article 1236, for eight weeks; the reason for the distinction being that where parties are known and named the publication is much more likely to attract and call attention than where the parties are unknown, unnamed, and can only be indefinitely described as the heirs of so and so, deceased. In the present case, the citation is directed to the sheriff or any constable of Fisher county, and commands him to summon all persons interested in the estate of George W. Crowls, deceased. It recites that plaintiff has filed a suit against certain persons by name, and the heirs of George W. Crowls, deceased. It further recites, as alleged in the petition, that the said Crowls has departed this life, and left no heirs, or any one having a legal claim to said lands. Article 1770 of the escheat act, *supra*, shows clearly that the ground for the escheat proceeding is that the last owner died without issue, etc.; that this proceeding is brought to judicially determine that fact; and that the heirs of such deceased owner must be cited, and given an opportunity to contest. It would seem, in the case made, that the article 1235 could not apply, because the names of the heirs are unknown. In fact, the entire proceeding seems to be based on the averment that no such persons exist. And it is to be noted that the service on the heirs of Crowls by publication was not obtained on the ground that they were nonresidents of the state, or absent from the state, or transient persons, or that their residence was unknown. Article 1236 prescribes the method

for publishing citations for unknown heirs when any property of any kind in the state may have been granted, or may have accrued to the heirs, as such, of any deceased person. The record shows that the land in this case was granted to the heirs, as such, of a deceased person, to wit, George W. Crowls. Article 1236 applies when the names of such heirs are unknown, in which event they may be sued as the heirs of such ancestor, naming him. They were sued, in the case in hand, not by name, but as the heirs of George W. Crowls, deceased, and in relation to property which had been granted or accrued to them as heirs of George W. Crowls.

It is argued on behalf of the plaintiff in error that because article 1773, prior to the amendment of 1885, provided that the order of court requiring "all persons interested in the estate to appear and show cause," etc., should be published as required by article 1236, and, when said article was amended, provision was made that a citation shall issue "for all persons interested in the estate to appear and answer at the next term of court, which citation shall be published as required in other civil suits," a legislative intention is to be inferred that the publication under the existing law shall not be under article 1236, but may be for the shorter term provided in article 1235. If the amendments of the escheat law had been restricted solely to article 1773, and with reference to the time of publication of notice summoning all persons interested in the estate to be escheated, there would be strong reason to hold that the legislative intention was to permit publication under article 1235. An examination, however, of the amendments, as made, shows that the purpose of the amendments was to substitute citations as in other civil suits for scire facias and orders of court as to publications, and to enable the clerk to issue the citations in vacation without an order of court. In making these changes, it was natural that the provision with regard to publication of the citations should be (like the citations) "as required in other civil suits;" but from this change of language a legislative intent cannot be inferred that article 1236 was to be ignored in escheat cases, when unknown heirs were to be cited, because, if for no other reason, article 1236 provides the method "required in other civil suits" for service of citation by publication on unknown heirs, when impleaded in reference to the property of their ancestor.

The trial judge ruled that in proceedings under the escheat law in question, and construing article 1773, *supra*, the publication of the citation, in order to bar unknown heirs, should be made under article 1236, as "required in other civil suits," to reach that class of defendants. In our opinion this ruling was correct.

And we are inclined to the opinion that the ruling that the judgment in the case of *State of Texas v. The Heirs of Geo. W. Crowls* was no bar to the defendants in the court below can be sustained upon another ground. Article 1773 of the act provides that "the clerk shall issue a citation setting forth briefly the contents of the petition for all persons interested in the estate to appear and answer," etc. By the term "estate" is meant the estate sought to be escheated. Articles 1770 and 1771, *supra*, show clearly that an

estate is escheated only when the person seised of said estate has died without any devise thereof, and leaving no heirs. The undisputed evidence in this case shows that the certificate or warrant for the land in controversy was issued to the heirs of George W. Crowls in 1852, 16 years after his death, in accordance with a special act of the legislature passed the same year, in which it was recited that the heirs were entitled to it by virtue of the services and death of George W. Crowls in the army of the republic of Texas. George W. Crowls, therefore, did not die seised of any estate in this land, was never in possession of the certificate, or seised of the land itself; and from the time the certificate issued up to the time the land was located, the certificate which evidenced the right to the land, and afterwards the land itself, have been the property of Amanda C. Foster et al., the heirs of George W. Crowls, and plaintiffs in the court below. Now, the petition in the suit in Fisher county seeks the escheat of the estate of George W. Crowls, deceased. It recites that the bounty warrant was issued to the said Crowls by the state of Texas, and was located by him on the land in controversy; that the said Crowls was the last person lawfully seised of said land; and that said Crowls was dead, and left no heirs, etc.; and the citation contains the same recitals. The judgment in the case, however, recites that the certificate was issued to the heirs of George W. Crowls, that it was located by the said heirs on the land in controversy, and that the heirs of George W. Crowls have exercised no active ownership over the land for more than seven years. In other words, the suit and the citation look to the escheat of the estate of George W. Crowls, and make persons interested in the estate of George W. Crowls parties, while the judgment actually rendered escheats the estate of the heirs of George W. Crowls. The plaintiffs in the court below could have had no interest in defending a suit to escheat the estate of George W. Crowls in the land in controversy; and to escheat any other estate, they were not brought into court by any sort of publication or other service of citation. We find no error in the judgment of the circuit court, and it is affirmed, with costs.

TELFENER v. RUSS.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1894.)

No. 183.

1. TEXAS LANDS—RIGHT ACQUIRED BY APPLICATION TO PURCHASE—ASSIGNABILITY.

The right to purchase lands from the state of Texas, which is acquired by making application therefor to the county surveyor, and the acceptance and filing thereof by him, in accordance with the requirements of the statute, (Act Tex. July 14, 1879,) is a valuable right, which may be lawfully assigned. 57 Fed. 973, affirmed.

2. BREACH OF CONTRACT—DAMAGES.

Plaintiff, having made applications, which were accepted and filed by the county surveyor, to purchase certain lands from the state of Texas, (under the act of July 14, 1879,) contracted to sell all his rights therein to defendant, who was to have until November 15, 1882, and no longer, to make the payments. On the same day the parties made another con-

tract, whereby plaintiff, for a new consideration, became bound, in case the sale and transfer were completed as agreed, to make, at his own expense, all surveys, maps, etc., and file them with the county surveyor, and in the general land office of the state, within the 60 days required by the act. Defendant, however, failed to complete the purchase on the date named, or at any subsequent time. *Held*, that the right of plaintiff to damages for the breach of contract became fixed on that date, and it was immaterial whether he made the surveys, etc., according to the second contract, or ever made them at all.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action by George W. Russ against Count Joseph Telfener to recover damages for breach of a contract to purchase certain rights acquired by plaintiff in lands belonging to the state of Texas. There was a verdict and judgment for plaintiff, which, on a writ of error, was reversed by the supreme court of the United States, and the case remanded for a new trial. See 12 Sup. Ct. 930. Verdict and judgment have again been rendered in favor of plaintiff, (see 57 Fed. 973, for the court's charge to the jury,) and defendant now brings the case on error to this court.

The following statement of the facts was made by Mr. Justice Field when the case was before the supreme court:

On the 14th of July, 1879, the legislature of Texas passed an act "to provide for the sale of a portion of the unappropriated public lands of the state," and the investment of the proceeds. The following are the sections of the act which bear upon this case: "Sec. 2. That any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated. Sec. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and, within sixty days after said survey, to certify and record a map and field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in the other cases. * * * Sec. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay, or cause to be paid, into the treasury of the state, the purchase money therefor at the rate of fifty cents per acre, and, upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so conveyed and paid for." "Sec. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to the surveyors in relation to the survey of the public lands under the provisions of this act as may best subserve all interests of this state, and carry into force and effect the intent and purposes of this act. Sec. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void. Sec. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm, or corporation who shall pay into the treasury the purchase money therefor." An amendment of the act in 1881 extended its provisions to unappropriated land in other counties than those originally mentioned. On the 22d of January, 1883, both acts were re-

pealed. While the first of these acts was in force the plaintiff below, the defendant in error here, claimed to have acquired a valuable and transferable interest in a large body of these lands, exceeding in extent a million of acres, and to have sold the lands to the defendant below, Count Joseph Telfener, at 25 cents an acre. To recover damages for breach of this alleged contract, and a supplementary contract of the same date accompanying it, the present action was brought in a state court of Texas. The petition of the plaintiff, the first pleading in the action, alleges that the plaintiff is a resident of Texas, and that the defendant is not a resident of the state, but a transient person then temporarily in the state of New York; that on the 1st day of November the plaintiff was the sole owner of a certain valuable, valid, and transferable interest in the whole of a certain body of land containing, as subsequently ascertained by survey, 1,813 tracts of 640 acres each, being an aggregate of 1,160,320 acres, situated in the county of El Paso, in the state of Texas, and forming part of what is known as the "Pacific Reservation;" and that he had become such owner by complying with the requirements of the act of July 14, 1879, mentioned above, and of the amendatory act of March 11, 1881. The petition then details the mode in which the plaintiff became such owner, namely, that during the month of October, 1882, being a responsible party, and intending to purchase the said body of land which was subject to sale under the terms of the acts mentioned, he applied to the surveyor of the county of El Paso for the purchase and survey of the 1,813 tracts, describing them by metes and bounds as a whole; that he made the application pursuant to the instructions of the commissioner of the general land office of the state to the surveyors of the counties and land districts containing lands subject to sale; that the application was filed and recorded in the office of the surveyor in October, 1882; that, having thus made due application for the purchase and survey of said lands, he was, on the 1st day of November, 1882, about to have them surveyed into tracts of 640 acres each, when the defendant, by his duly-authorized agents, applied to him to purchase his interest in the lands thus acquired; and that thereupon the plaintiff, not yet having paid to the state of Texas the 50 cents per acre to which the state was entitled, and the defendant offering to assume such payment, and desiring simply to contract with the plaintiff for the purchase and assignment of his right to purchase from the state, they entered into the contracts contained in the exhibits annexed, marked "M" and "N," which are as follows:

"Exhibit M.

"The State of Texas, County of Dallas—ss.: This contract and agreement entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows: Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the state of Texas, under and by virtue of an act of the legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso county, at Ysleta; and whereas, the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the state of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his application and files; In order, then, that the said contract of purchase and sale and assignment may be effected, the said parties agree as follows: The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly

and properly made as aforesaid, and according to the provisions of said law and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made, in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the state of Texas, the said parties shall ascertain by reference to said application and files and the maps of said county in said surveyor's office, and in the office of the commissioner of the general land office of the state at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, titles, and interests that the said Russ now has or may be entitled to in and to said lands, by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same, or any part thereof, by, through, or under him. It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid. After the transfer and assignment as aforesaid shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted, and the field notes thereof returned and filed according to the provisions of said law. Upon the completion of said surveys and field notes, the number of acres embraced in said lands so sold and transferred shall be ascertained, and, if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

"Witness our hands this 1st day of November, 1882.

"Geo. W. Russ.

"J. Telfener, by C. Baccarisse, Agt.

"Witness:

"Chas. Fred. Tucker.

"Wm. McGrain."

"Exhibit N.

"This contract and agreement entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows: Whereas, the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the legislature of Texas approved July 14, 1879, known as the '50-Cent Act;' and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land, and file the field notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the general land office at Austin, within the time required by the said law: Now, therefore, it is agreed by the said Russ that if the sale and transfer shall be made under the said contract as aforesaid, he will, at his own proper cost and expense, make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and

in the general land office of the state, at Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the commissioner of the general land office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field notes, and maps to be correct; and in consideration of said services and payments to be rendered and paid by said Russ the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz.: Three (3) cents per acre when the survey and field notes shall be completed, and one (1) cent per acre when the field notes shall be filed in the land office, and the balance when the patents shall issue.

"Witness our hands this 1st day of November, 1882.

"Geo. W. Russ.

"J. Telfener, by O. Baccarisse, Agt."

The petition alleges that by the contracts set forth the plaintiff sold and agreed to assign to the defendant, and the defendant purchased and agreed to accept from the plaintiff, at the price of 25 cents an acre, a conveyance of plaintiff's application to purchase of the state 1,813 tracts of land, being part of the Pacific reservation, and that at the time the plaintiff was able and authorized to make the contracts, and to execute and deliver a proper and valid assignment and transfer of his said application, and of all his rights, titles, and interests thereunder, to the defendant. The petition also contains various allegations as to arrangements made by the parties for ascertaining whether or not the application of the plaintiff for the purchase of the lands had been regularly and properly made, and according to the provisions of the laws of Texas, and, among others, that such conformity being shown as would entitle the plaintiff to become the purchaser, the defendant agreed to pay him 90 per cent. of the purchase price stipulated. It also alleges the readiness of the plaintiff to fully comply with the contract, and the failure of the defendant in all things to comply with the same on his part, to the damage of the plaintiff of \$400,000. The plaintiff, therefore, prayed judgment for the sum of 25 cents per acre alleged to be due to him for said 1,160,320 acres, and also for the sum of \$58,016, alleged to be due him on the supplementary contract contained in Exhibit N, together with legal interest on both sums, and for such further judgment and decree as on the hearing might seem equitable and just. The defendant appeared to the action, and for answer said—First, that the petition was insufficient in law, wherefore he prayed judgment; second, that he denied all and singular the allegations of the petition; and, third, that he denied that he executed, by himself or agent, the instruments, or either of them, annexed to the petition. The case was subsequently, on application of the defendant, removed from the state court to the circuit court of the United States for the western district of Texas, and there the defendant had leave to file an amended answer, which averred (1) that the petition was insufficient in law to require him to answer it, upon which the judgment of the court was prayed; (2) that the so-called Pacific reservation was not subject to sale by the state of Texas; and (3) that if Baccarisse, mentioned in the petition as the agent of the defendant, ever had any authority to negotiate in regard to the purchase of lands in Texas, it was merely as an employe under one Westcott, and his employment was merely to inquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands in that state subject to the inspection and approval of an expert or inspector sent out by a London syndicate for that purpose, such contract not to be final and binding unless ratified by the defendant after the approval of the expert; that the defendant never knew, until shortly before the present suit was instituted, that Baccarisse had attempted to execute any contract, as set up in the petition; and that he never authorized him to make any contracts, nor ever approved or ratified any made by him. This answer was again amended, by leave of the court, by the addition of a further defense, in which the defendant averred that if any such contract or

contracts as are referred to and exhibited with the petition were entered into by his authority or ratified by him, which is denied, the same were without any consideration, or, if there was any valid consideration therefor, the same failed in this: that the law which permitted the purchase of the lands was repealed before the steps required thereby to obtain title, or any vested interest therein, could have been or were taken, and by reason thereof all right, if any, which defendant acquired or could have acquired under the contracts were lost to him.

J. L. Peeler, for plaintiff in error.

Charles Fred. Tucker, Clarence H. Miller, and Franz Fizet, (Hancock & Shelley, of counsel,) for defendant in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

PARDEE, Circuit Judge. This case has been once before the supreme court of the United States, and is reported in 145 U. S. 522, 12 Sup. Ct. 930. That report contains a full statement of the general merits and pleadings in the case. In the supreme court, two questions were presented—First, whether the plaintiff below acquired any assignable interest in the real property described in the contract upon which the action was brought; and, second, assuming that he had an assignable interest, whether the rule for the measure of damages for breach of the contract for such interest by the defendant was correctly stated to the jury by the court. The first question was discussed, but not decided. The court, however, intimated "that if a right to purchase land, for however short a period, is vested in one, it is a valuable right, and is in that sense property, and, in the absence of express prohibition, would be therefore assignable." The case was reversed and remanded because of error in the charge of the trial court as to the measure of damages. On the second trial, there was another verdict for the plaintiff in the court below, and the case is brought here for review on several assignments of error, which will be considered in order.

The first assignment of error relates to permitting the plaintiff to offer in evidence and read to the jury, over defendant's objection, certain telegrams from one C. K. Westcott to one C. Baccarisse in regard to executing the contract between plaintiff and defendant, sued on; and the second assignment of error complains of the charge to the jury, as follows:

"If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from, and knowledge and consent of, defendant, empowered Baccarisse to execute it. If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created."

The contract sued on purported to have been executed on the part of the plaintiff in error by one C. Baccarisse, agent. The amended answer denies the authority of C. Baccarisse as agent, but impliedly admits the agency of C. K. Westcott; so that the question of agency

was substantially raised by the pleadings, and the evidence tending to support or disprove the agency of either Baccarisse or Westcott could work no surprise. The bill of exceptions taken to the admission of the evidence complained of, and to the charge of the trial court in relation to such evidence, contains no statement of the facts otherwise proved, or attempted to be proved, in relation to agency, so as to enable this court to determine whether the evidence objected to was or was not admissible, or whether the charge of the court was relevant. The objection assigned to the admission of the evidence and to the charge of the court is that the plaintiff did not allege in his pleadings that Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said Baccarisse to make the contract sued on. As we have seen, the question of agency was raised by the pleadings, so far as to fully inform each party that the lawful agency of both Baccarisse and Westcott would be an issue in the case. The charge of the court implies that evidence had been offered tending to show that Westcott had authority as agent of the plaintiff in error to empower Baccarisse, and that there was also evidence tending to show that Baccarisse had authority direct from the plaintiff in error himself. In either case, the evidence objected to was admissible, and the charge complained of was proper. As the case is presented to us under the bill of exceptions, however, we are unable to determine the admissibility of the one, or the propriety of the other.

The third assignment of error is the refusal of the trial court to charge the jury as follows:

"The court instructs the jury that the 'right, title, and interest' of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the 1st day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of the plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider, or include in the measure of damages."

The evidence relating to this matter shows that the plaintiff had made application, in two instruments of writing, for the survey of 1,813 sections of land described in his petition, which was addressed to, and the applications filed by, the county surveyor of El Paso county, on October 4 and 5, 1882, respectively. It shows, also, that the surveys of said land, for which said Russ had made application, were made at and prior to the time of the execution of the contract sued on, saving and excepting 98 sections, of 640 acres each, surveys of which were made between November 1 and November 9, 1882. These surveys were filed in the general land office on the 8th day of January, 1883. The instrument executed between the plaintiff and the defendant November 1, 1882, was an executory contract, by which the plaintiff, for and in consideration of a sum of money promised to be paid by the defendant, agreed on the 15th day of November, 1882, to transfer and assign to defendant all his right, title, and interest in and to the land in question, acquired by virtue of plaintiff's application. This contract was a valid and binding contract, at the time it was entered into, unless it was prohibited by law or public policy, which is not con-

tended. Under this state of the law and of the evidence, the instruction asked for did not present the law of the case, and, if technically correct, as a general proposition, was calculated to mislead, and was therefore properly refused. The actual charge of the court, given in this regard, is as follows:

"You are further instructed that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications, as set forth in the contract and shown by the evidence, was a valuable right, and one which could be lawfully assigned."

And it seems to have correctly presented the law of the case.

The fourth assignment of error complains of the refusal of the trial court to charge the jury as follows:

"You are instructed that the law required the field notes of the land to be returned to and filed in the general land office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the general land office within said sixty days. Therefore, the court charges you that you can only consider plaintiff's right in twenty-four sections of land."

This assignment, relating to the filing in the general land office of the surveys made under the application of the plaintiff in the court below, may be disposed of with the fifth assignment of error, which relates to a question as to whether the surveys made under the plaintiff's application, and returned to and filed in the general land office, were actual surveys on the ground, or were "chimney-corner" or office surveys. In the view that we take of the case, it is wholly immaterial whether the surveys made under the application of the plaintiff, and returned to the general land office, were made and returned within 60 days after the date of the survey, or were returned at all, and also whether the surveys made under the said application were actually made on the ground, or were office surveys.

With regard to the return of the surveys to the general land office, with the field notes, within 60 days after the date of the survey, a reference to the law will show that the duty of making such return devolved, not upon the applicant, but upon the surveyor, and that the failure to make such return within the time, on the part of the surveyor, is not a reason for forfeiture, under the terms of the act. The ninth section of the act is the only section of the same which provides for the forfeiture of the rights secured by the application, and that provision is that should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same, at the rate of 50 cents per acre, within the time prescribed in section 5 of the act, he shall forfeit all rights thereto, and he shall not be allowed, thereafter, to purchase the same. But, be this as it may, the contract sued on is an agreement to transfer from Russ to Telfener, all and singular, the rights, title, and interest that the said Russ now has or may be entitled to in and to said lands, by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that, if such actual surveys had been made, he (Russ) would cause them to be returned

and filed in the general land office at any time, or in any manner whatever. The contract made the same day between the same parties provided that Russ, at his own proper cost and expense, should make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and in the general land office of the city of Austin, Tex., in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made under the contract first mentioned at the time agreed on, to wit, November 15, 1882.

As it is conceded that Telfener made default under the first-mentioned contract on the 15th of November, 1882, and that the sale and transfer under said contract was never carried out, the second-mentioned contract became wholly inoperative and irrelevant; and the rights of the plaintiff became fixed, definite, and certain, on the 15th of November, 1882, at the time defendant, Telfener, made default. Under these circumstances, we fail to perceive any obligation resting upon Russ to either complete the surveys, or file the same in the general land office. Whatever was done by Russ after the 15th of November to perfect the surveys and file the same was done at his own cost and at his own risk, and could in no wise affect the plaintiff in error, Telfener, because the rule for damages in the case was, as declared by the supreme court in *Telfener v. Russ*, supra, as follows:

"On the 15th of November, he [Russ] possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damage suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

The sixth assignment of error is that the court erred in overruling the defendant's motion for a new trial, and in not setting aside the verdict rendered and granting a new trial. It is well settled that a refusal to grant a new trial cannot be assigned as error. On the record, as presented to us, we find no reversible error, and therefore we are compelled to affirm the judgment.

MANHATTAN LIFE INS. CO. v. P. J. WILLIS & BRO. et al

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 172.

1. PARTIES—PLEADING—WAIVER OF OBJECTIONS.

Where, in a suit on a life insurance policy by an assignee holding it as collateral security, the administrator of the assured is made a defendant, but in a petition for removal to the federal court he aligns himself on the side of plaintiff, and becomes an actor against the insurance company, the latter, if it desires him to abandon his position as defendant, and assume that of plaintiff, and plead specially as such, must make the objection before going to trial on the merits, as otherwise it will be waived.

2. PLEADING AND PROOF—VARIANCE—DESCRIPTION OF INSURANCE POLICY.

It is sufficient to describe generally a policy sued on as a policy of insurance covenanting to pay to the assured, his executors, etc., a specified

sum upon satisfactory proof of his death during the continuance of the policy, without stating the other terms and conditions thereof, and the policy cannot be excluded because of this omission, as variant from the one described.

3. LIFE INSURANCE—APPLICATION—INTERPRETATION OF ANSWERS.

A check mark (v) placed opposite a question as to whether any proposition, negotiation, or examination for insurance on the applicant's life had been previously made, on which no policy was issued, cannot be construed as a negative answer when it appears that like check marks were placed opposite certain other questions which previous answers seemed to render immaterial, apparently meaning that the question was noted but no answer was deemed necessary, and that, as a matter of fact, although the applicant had made other applications, he could not have known at the time in question whether or not policies had been issued thereon.

4. SAME—IMPERFECT ANSWERS—WAIVER.

The issuance of a policy upon an application in which some of the questions are imperfectly, or not satisfactorily, answered is a waiver of objections thereto, and renders such imperfections immaterial. *Insurance Co. v. Raddin*, 7 Sup. Ct. 500, 120 U. S. 190, followed.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

P. J. Willis & Bro., a West Virginia corporation, sued in the district court of Galveston county, state of Texas, the Manhattan Life Insurance Company, a New York corporation, and the administrator of Andrew Peyton, deceased, a resident of Falls county, Texas, on a policy of the Manhattan Company on the life of Andrew Peyton. P. J. Willis & Bro. alleged that the policy had been assigned to it as collateral, and that the debt (open account) did not amount to the face of the policy. The administrator of Andrew Peyton answered that the amount claimed by the plaintiff as due by the estate was correct, and joined in the pleadings of the plaintiff as against the Manhattan, and asked judgment for the amount above the debt due the plaintiff. The Manhattan Company answered by a general denial, and specially that the statements in the application by Peyton for the policy were, by its terms and the policy, warranties, and that clause No. 11 of application was falsely answered. The allegation of answer setting out the clause is as follows: "That in and by said application and clause 11, therein contained, a requirement and question was propounded to, and to be answered by, the said Andrew Peyton, in terms and substance as follows, to wit: '(1) If any proposition or negotiation or examination for life insurance' (meaning on the life of said Andrew Peyton) 'has been made in this' (meaning this defendant) 'or any other company or association, on which a policy has not been issued, state when and in what company,'—and following said requirement and question a blank space was left in said application, to be filled with the answer of the said Andrew Peyton to the said requirement and question. That in said blank space the said Andrew Peyton made no other or further answer or reply beyond a simple check mark, as follows, to wit, v, indicating, and by the said Andrew Peyton intended, and by this defendant understood, to indicate, in answer to said requirement and question, that no proposition or negotiation or examination for life insurance on the life of said Andrew Peyton had been made in this defendant company, or in any other company or association, on which a policy had not been issued, and the said requirement and question was not otherwise noticed or answered by said Andrew Peyton in said application." The Manhattan Company alleged, in this connection, that applications to three other companies were pending at the time Andrew Peyton signed this application. The Manhattan Company further alleged that the insured stated he was in sound health, when he knew he was not in sound mental or physical condition. The Manhattan Company removed the cause to the United States circuit court, eastern district of Texas, on the ground of diverse citizenship, and alleged in the petition for removal as follows: "That the matter in dispute in said cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, and, so far as this defendant is concerned therein, the controversy in said suit is wholly between

citizens of different states,—that is to say, between the said P. J. Willis & Bro. and S. Peyton, on the one part, as claiming from this defendant the amount of ten thousand dollars on account of the policy of insurance sued on, and the penalty for nonpayment of said sum, and this defendant, the Manhattan Life Insurance Company, on the other part, as resisting the enforcement of said claim,—and said controversy can be fully determined as between said P. J. Willis & Bro. and S. Peyton, as parties of the one part, and this defendant, as party of the other part." The plaintiff, Willis & Bro., filed in the United States circuit court a supplemental petition, excepting to the answer of the company on the ground that it showed that question No. 11 was not answered, and that the issuance of policy was a waiver of answer; that the answer does not allege that Peyton had been refused by any company when he applied to the Manhattan; and that this was the gist of question No. 11, and so understood by Peyton and the agent who filled out the application. The supplemental petition, by way of rebuttal to the Manhattan Company's answer, alleged that Charles Vidor, who made the application for Peyton, was agent for that purpose for the Manhattan, and was also agent for, and made out applications to, the other three companies for Peyton, at the same time he applied to the Manhattan Company, is estopped by Vidor's agency; that Vidor, the agent, and Peyton understood No. 11 to mean whether any company had refused Peyton; that the company is estopped by the issuance of the policy to say it did not waive question No. 11. Peyton's administrator amended, adopting all the pleadings of Willis & Bro., and praying for judgment for the part of the policy not claimed by Willis & Bro. The Manhattan Company answered to the pleadings of Peyton's administrator by general demurrer and general denial. The case went to trial in this state of the pleading, and without objection to the right of Peyton, administrator, though nominally a defendant, to recover, if the merits warranted. On the trial, the court sustained the Manhattan's exceptions to so much of the supplemental petition of Willis & Bro. as set up agency of Vidor, and an estoppel thereby, and overruled all other exceptions of both parties.

The plaintiff offered in evidence the policy sued on. The Manhattan Company objected on the ground that the suit was on a policy payable on condition of death, and the policy showed it was only payable on condition of truth of statements in application. The court overruled the exception, and the policy was put in evidence. It was agreed by the Manhattan Company that the assignment of this policy was made by Peyton to P. J. Willis & Bro. on the policy on February 16, 1891, consideration named as \$1, and might be admitted in evidence, and it was admitted by the Manhattan Company that proof of death had been duly made. The administrator and Willis & Bro. agreed on their respective amounts of the proceeds of the policy and Willis & Bro. and Peyton's administrator, and the same went in evidence without objection. The Manhattan Company, defendant, then offered in evidence the application, admitted by Willis & Bro. and Peyton's administrator to be the original application, on which the policy sued on was issued. The Manhattan Company stated the ground on which it offered the application to be to show that applicant check-marked question No. 11 in the application, and thereby meant no, and that this was a false answer in that. This application to the Manhattan Company was made January 28, 1891, and depositions were offered to show that on January 22, 1891, applicant had made application to the Mutual Life, which was declined February 16, 1891, and that on January 28, 1891, the applicant also made application to the Equitable Life, on which a policy was issued February 4, 1891, but was recalled on February 9, and canceled. In connection with the application of Andrew Peyton to the Manhattan Company, there were offered, "for the purposes aforesaid, and none other," the depositions of a number of New York officers of various life insurance companies. To the introduction on this ground of the application and depositions Willis & Bro. and Peyton's administrator excepted, on the ground that the application showed the question No. 11 had not been answered, and that any evidence as to the question No. 11 was irrelevant. The court sustained the objection. The court instructed the jury to find against the Manhattan Company the full amount of the policy, and interest at 6 per cent., and for the Willis & Bro. corporation the amount due it from Peyton's estate, and the balance to the administrator of Peyton. The Manhattan

Company asked the court to charge that Willis & Bro. were legal owners of the policy, and the administrator of Peyton could not recover anything in this action. The court refused to give this charge, and the Manhattan Company excepted.

W. O. Hart, Max Dinkelspiel, and James Otis Hoyt, for plaintiff in error.

G. E. Mann and J. A. Martin, for defendants in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

PARDEE, Circuit Judge, (after stating the facts as above.) The first, fifth, sixth, seventh, and eighth assignments of error present the same question in different aspects, and they may be disposed of together; and that question is whether the administrator of Andrew Peyton, deceased, had any such standing in the case as authorized a recovery in his favor of the balance of the amount due on the policy sued on, after satisfying the debt due the plaintiff, the Willis & Bro. corporation, assignee of the policy as collateral security only. The Willis & Bro. corporation, as assignee, had the right to sue on the policy in its own name, (Rev. St. Tex. art. 267; *Merlin v. Manning*, 2 Tex. 351-354; *Devine v. Martin*, 15 Tex. 26; *Guest v. Rhine*, 16 Tex. 549;) and even in the federal court had a right to sue on the law side, (*Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, and cases there cited.) In such a suit the administrator of Peyton, interested in the assignment and in the balance of the debt due after the Willis & Bro. corporation should be satisfied, was a proper, if not a necessary, party, and, unless he consented to join as plaintiff, was properly made a defendant. The defendant insurance company in the petition for removal, before the administrator had appeared in the case, aligned his interest on the side of the plaintiff. In the subsequent pleading, the administrator, although nominally a defendant, was an actor, and this without specific objection until on and after the trial. If the insurance company had desired the administrator to abandon the name of defendant, and assume that of plaintiff, and plead specially as such, it could and should have so demanded before going to trial on the merits. These assignments of error under consideration are not well taken, but, even if they were, it is difficult to see how the plaintiff in error was in any wise prejudiced by the matters assigned.

The second assignment of error is that the court erred in admitting in evidence over the objection of the insurance company, as stated in its bill of exceptions, the policy of insurance sued on. Reference to the bill of exceptions shows that the objection assigned at the time was because the pleadings in the case, and the proof offered in and by said policy, were variant from each other in that the said pleadings described and declared on a contract payable absolutely and without conditions, and with no alternative, to Andrew Peyton, his administrators, executors, or assigns, the sum of \$10,000, upon satisfactory proof of the death of said Andrew Peyton, during the continuance of said policy of insurance, and the policy of insurance offered in evidence is in the alternative and

upon conditions as hereinbefore set forth; the conditions referred to being a warranty as to the truth of certain answers in the application for insurance, and in relation to proof of death, the time within which suit should be brought on the policy, the truth of the statements made in the application, the payment of the premiums, etc. The policy is not set forth in *haec verba* in the petition, but is described, generally, as a policy of insurance covenanting and promising to pay to Andrew Peyton, his executors, administrators, or assigns, \$10,000, upon satisfactory proof of the death of said Andrew Peyton during the continuance of said policy. The original answer of the insurance company fully set forth all the terms and conditions of the policy sued on, without specific objection to the general character of the original petition.

In our opinion, when the amount agreed to be paid on the death of Andrew Peyton matured by his death, it was sufficient for the plaintiff to bring suit therefor, without negating other terms and conditions referred to in the policy, which were immaterial under the circumstances. If the statements in the application upon which the policy was based were untrue, or if there were special warranties in favor of the insurance company, and calculated to defeat the policy, they were matters of defense which, as it appears in this case, the insurance company could and did plead.

In this connection it may be noticed that, in this court, plaintiff in error makes a point not made in the bill of exceptions or the assignments of error, and says the variance was because the petition was not on an instrument under seal. If this objection were worth anything, it should have been made in the court below, but in fact there is no distinction, under Texas pleading, between sealed and unsealed writings.

The third assignment of error is that the court erred in admitting in evidence, over the objections of the Manhattan Life Insurance Company, as stated in its bill of exceptions, the transfer annexed to said policy. The record shows there was no exception taken to the admission in evidence of the transfer or assignment; on the contrary, its verity was expressly admitted, and the transfer was admitted in evidence, apparently by consent, as shown by the bill of exceptions.

The fourth assignment of error raises the only important question in the case, and is "that the court erred in excluding the evidence offered by the Manhattan Life Insurance Company, as stated in defendant's bill of exceptions, the said evidence being as follows, to wit," (then reciting the evidence as set forth in the bill of exceptions.) The bill of exceptions shows that the insurance company offered in evidence the original application on which the policy sued on was issued, and stated the ground on which it offered the application to be that applicant check-marked (V) question No. 11 in the application, and thereby meant that no proposition or negotiation or examination for life insurance on the life of said Andrew Peyton had been made in any other company on which a policy had not been issued, and that this was a false answer in respect to said question, and that in said application the said Andrew Peyton warranted and represent-

ed to the life insurance company that the statements and answers in said application were full, complete, and true in every respect, and that the same were offered as a condition for the insurance therein applied for; that this application was made January 28, 1891, and depositions were offered to show that on January 22, 1891, said Peyton had made application to the Mutual Life Insurance Company, which was declined February 16, 1891; that on January 28, 1891, the said Peyton also made application to the Equitable Life Insurance Company, for which a policy was issued February 4, 1891, but was recalled on February 9, 1891, and canceled, and, in connection with the application of Andrew Peyton to the Manhattan Life Insurance Company there was offered, "for the purposes aforesaid, and none other," the depositions of a number of New York officers of various life insurance companies with reference to applications made to other life insurance companies, and the refusals of the same; and that when the application to the Manhattan Life Insurance Company was received and acted upon by that company, and the policy issued thereon, the said company had no information, other than what was contained in said application regarding the propositions, negotiations, or examinations for life insurance made on the life of said Andrew Peyton in said Manhattan Life Insurance Company, or any other company or association on which a policy had not been issued. The bill of exceptions further shows that to the introduction of such application to the Manhattan Company and to the depositions and evidence of the witnesses to the effect as aforesaid, and for the purposes for which they were so offered as aforesaid, the plaintiff objected, because clause 11, and the question and requirement thereby propounded, were not answered at all by the said Andrew Peyton in and by said application; and that the check mark (✓) following said clause indicated nothing, and was no answer thereto; and that the warranty at the close of said application, that the statements and answers therein contained were full, complete, and true in every particular, had no application to clause 11 aforesaid, because said clause was not answered at all, nor to the failure on the part of said Andrew Peyton to answer said clause 11, and that the evidence so offered was on that account wholly irrelevant; and that the court sustained each and all of the objections so made, and excluded said applications and depositions, as aforesaid, so offered for the purposes aforesaid.

The question presented seems to be whether the check mark (✓) was, or was intended to be, an answer to the eleventh question. An examination of the application, which was afterwards admitted in evidence, apparently by consent, shows that two other questions were not answered otherwise than by a check mark (✓) and that in the answers of the agent of the insurance company and also of H. L. Mather, the person to whom the applicant, Andrew Peyton, referred for information respecting his general health and habits of life, certain questions are also not answered otherwise than by (✓). These check marks are made to questions which previous answers apparently render irrelevant, and the check mark (✓) in these cases

means, if it means anything, that the question is noted, but no answer is deemed necessary.

The thirteenth question in the application signed by Peyton is: "If any intention exists of changing residence or occupation, state in what manner." Of this question there is no notice taken, saving check mark, (V.) From these examples it is seen that it is impossible to predicate upon the mere check mark (V) any sort of answer to any question; and, if we examine the question 11, in which it is particularly urged that the check mark (V) was intended to mean, and did mean, that no proposition or negotiation or examination for life insurance had been made by said Peyton in any other company, on which a policy had not been issued, in connection with the depositions offered, it is easy to see that the question could not have been answered by the applicant Peyton because, although he had made application to other companies, he could not know, and did not know, whether or not a policy had been issued upon any such application.

In our opinion, the check mark (V) referred to could and did mean only that the question was noted, but not answered, and that thereby the Manhattan Life Insurance Company was fully notified that the question was not answered, although noticed by the appellant, and that the company, in accepting the application in that shape, waived all answers thus marked (V) as irrelevant, and not necessary to be answered.

The authorities are well settled that a qualified answer requires rejection of the application if not satisfactory to the company, (*Insurance Co. v. France*, 94 U. S. 567;) and that where, upon the face of the application, a question appears to be not answered at all, or to be answered imperfectly, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. *Insurance Co. v. Luchs*, 108 U. S. 509, 2 Sup. Ct. 949; *Insurance Co. v. Raddin*, 120 U. S. 190, 7 Sup. Ct. 500. In the last-cited case the whole question is reviewed upon principle and authority, and fully sustains the trial judge in the ruling complained of.

On the whole record, we find no reversible error, and the judgment of the circuit court is affirmed.

DUNLAP et al. v. GREEN.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 118.

1. DEEDS—VALIDITY—MADE TO PARTNERSHIP IN FIRM NAME.

A deed made to a partnership in the firm name, without naming as grantees the individual partners, is good in equity, and, by implication, vests in the members of the firm the power to convey; and hence such deed is admissible, as a muniment of title, in favor of one who claims title to the land in question through the grantee of such partnership.

2. VENDOR AND VENDEE—VENDOR'S LIEN—DEFAULT.

Where a vendor's lien is reserved for the purchase money of land, and the vendee fails to pay the last installment of such purchase money, and abandons the contract, the vendor may rescind it without notice to the vendee, and pass a valid title to the land to another purchaser, free of any equities in favor of the former vendee. *Kennedy v. Embry*, 10 S. W. 88, 72 Tex. 390, followed.

3. SAME—BONA FIDE PURCHASERS—VALUABLE CONSIDERATION.

Plaintiff sued to recover land for which the consideration given by him was the surrender of a note given by his grantors, and evidencing a valid indebtedness from them to him; and it appeared that the note was surrendered at a time so long before the eviction complained of that the debt was barred by the statute of limitations. Plaintiff purchased without notice of any adverse claim to the land. *Held*, that he was a purchaser for valuable consideration, and as such entitled to protection on account of his want of notice.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This is an action of trespass to try title, filed on the law side of the circuit court, by Marquis Green, Henry Darcy, and Caroline Garthwaite against William L. Dunlap, James Tullis, and Daniel Higgins for the title and possession of 1,000 acres of land in Ft. Bend county, Tex., part of the Robert Peebles league, known as the "Dunlap Place." Tullis and Higgins disclaimed, except as tenants of Dunlap, and Dunlap pleaded not guilty. Afterwards, the coplaintiffs of Green were dismissed, and Green filed an amended original petition, prosecuting the suit alone. The heirs of William Dunlap, deceased, except William L. Dunlap, who was already a party defendant, intervened in the suit, and, together with William L. Dunlap, asserted title to the lands as heirs of William Dunlap, and prayed that their title and possession be confirmed. By appropriate pleadings the plaintiff sought to recover the land from all of said heirs, and the issue was whether the superior legal title was in the plaintiff or in the heirs of William Dunlap. Some of the heirs are minors, and a guardian ad litem was duly appointed. A jury was duly waived, and the case was tried before the court. During the trial, all the evidence was incorporated in a bill of exceptions,—the only one taken in the case,—which bill closes as follows: "And, the foregoing being all the evidence adduced in said cause, the defendants duly objected to the introduction of the deed from Robert Peebles to Darcy & Wheeler, as above stated, because said deed was to a firm, and did not give the full name of either partner, and was not to a person or corporate entity, and therefore did not pass the legal title, but only an equitable title, which could not be set up in this common-law suit of trespass to try title; and said objections were overruled, and said deed admitted and considered by the court, and defendants duly excepted to said ruling; and, upon the said evidence for the plaintiff and the defendants, the court held that plaintiff had shown a superior legal title to the land in controversy, and accordingly gave judgment for the plaintiff therefor, and for \$625.00 damages for use and occupation; and to said ruling and to said judgment defendants duly excepted, and in open court gave notice of a writ of error to the honorable circuit court of appeals of the fifth circuit, and tender this, their bill of exception, which is allowed and signed in open court at Galveston, this October 26, 1892."

The court found the following conclusions of fact and law: "The court finds from the testimony, as set out in the defendants' bill of exceptions, the following as conclusions of fact: First. That the balance of the purchase money, amounting to \$3,500, mentioned in the deed from Robert Peebles to Wm. Dunlap, of date October 12, 1858, was never paid; that about the year 1868 the administrator of the estate of the said Wm. Dunlap, deceased, abandoned all claim to the land in controversy, and never paid taxes or asserted ownership of the same thereafter, he having been previously informed of the existence of a lien on the land in favor of the said Peebles. Second. That in January, 1870, by the deed recorded April 1, 1870,

the said Robert Peebles reconveyed the tract of land in controversy to the firm of Darcy & Wheeler, said firm at that time being composed of Henry G. Darcy, Wm. G. Wheeler, and J. O. Garthwaite, the consideration of this conveyance being the settlement of a debt due said firm of Darcy & Wheeler from the said Robert Peebles; that in October, 1878, by the deed recorded October 19, 1878, the said firm of Darcy & Wheeler conveyed the tract of land in controversy to Pierpont Phillips, under whom plaintiff claims as residuary legatee; that the consideration of the deed to said Pierpont Phillips was the delivery up and cancellation of a note for the sum of \$8,000, executed by the said firm of Darcy & Wheeler in favor of said Pierpont Phillips, evidencing a valid indebtedness for like amount due the latter from said firm. Third. That at the time of the execution of said deeds, to wit, the deed from said Peebles to the said Darcy & Wheeler, and also the deed from the said Darcy & Wheeler to the said Pierpont Phillips, neither the said Pierpont Phillips nor any member of the firm of Darcy & Wheeler had any knowledge, actual or constructive, of the existence or execution of the instrument of date October 12, 1858, from the said Peebles to the said Dunlap, and the said Phillips never had any knowledge, actual or constructive, of any previous sale of the land in controversy, or contract of sale with reference to same, from the said Peebles in favor of the said Wm. Dunlap. Fourth. That, from the year 1870 down to the year 1886, Wm. E. Kendall, as agent for Darcy & Wheeler, and afterwards as agent of the said Pierpont Phillips and Marquis Green, plaintiff, paid taxes on the land in controversy, or on portions of the same, and that in 1881 he put a tenant in possession of the land, as agent as aforesaid, who remained on same until ordered off the land by the defendant Wm. Dunlap in January, 1887. Said tenant, for said period from January, 1881, to January, 1887, recognized the said Wm. E. Kendall as landlord and agent of the owners represented by him. Fifth. That in January, 1887, said tenant placed on the land by the said Kendall as aforesaid was ordered off it by the defendant W. L. Dunlap, who from that time until January, 1892, remained in possession of the land through tenants placed on same by him, and appropriated its fruits and revenues, during said period from January, 1887, to January, 1892, to his own use and benefit, the same being of the reasonable value of \$125 per annum." "Conclusions of law: From the facts above referred to, the court deduces the following conclusions of law: First. That the instrument of date October 12, 1858, from Robert Peebles to Wm. Dunlap, vested in Dunlap merely an inchoate right to the land, which right could only be vested and perfected by payment in full of the purchase money; that, at the time of the execution of that deed from Peebles to Darcy & Wheeler, the superior title was in Peebles, and the title to the land in controversy passed by said deed to Darcy & Wheeler, and from them the plaintiff has shown a regular chain of title to himself. Second. That the settlement of an antecedent debt is not a valuable consideration, sufficient to protect an innocent purchaser in good faith, under the registration laws of Texas, from the effects of a prior unrecorded instrument. Hence the fact that said instrument of date October 12, 1858, from Peebles to Dunlap, was never recorded, and the fact, also, that the said grantees under the instrument of date January, 1870, from Robert Peebles to Darcy & Wheeler, purchased the land in controversy in good faith, without actual or constructive knowledge of said prior contract or sale, is immaterial, and could avail the plaintiff nothing. Third. That the evidence is insufficient to sustain in plaintiff a title by limitation,"—and thereupon rendered judgment for the plaintiff, Marquis Green, and the defendants sued out this writ of error, assigning errors as follows:

"First. The court erred in admitting in evidence, to show a legal title in plaintiff to the land in controversy, the following deed from Robert Peebles, the original grantee of the land, from the government of Coahuila and Texas, and common source of title, to Darcy & Wheeler, viz.:

"The State of Texas, De Witt County.

"Know all men by these presents, that I, Robert Peebles, of the state and county aforesaid, for and in consideration of one thousand dollars to me

in hand paid, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents bargain, sell, convey, and deliver, to Darcy & Wheeler, of the city of New Orleans, state of Louisiana, a certain tract or parcel of land containing one thousand acres, situated as follows. [Here follows a description of the land.] To have and to hold unto the said Darcy & Wheeler and their heirs and assigns forever, relinquishing to them all right, title, or interest I may have in and to the same. Given under my hand this 31st day of January, A. D. 1870.

[Signed]

“Robert Peebles.”

“Said deed was objected to as evidence by the defendants and interveners because same was to a firm, and did not give the full name of either partner, and was not to a person or corporate entity, and did not pass the legal title, but only an equitable title, which could not be set up in this suit at law, of trespass to try title, and the court erred in overruling said objections, and admitting said deed as evidence of legal title in plaintiff, and in holding that the same passed the legal title from the grantor.

“Second. The court erred in holding that, at the time of the execution of said deed to Darcy & Wheeler, the superior title to the land in controversy was in Peebles, and that by said deed the title passed to Darcy & Wheeler, because the evidence clearly showed that Peebles had, long before his deed to Darcy & Wheeler, divested himself of all legal and equitable title to the land, having sold the same to Wm. Dunlap, the ancestor of defendants and interveners, and that he received all the purchase money therefor from said Dunlap, except the last payment, evidenced by a promissory note, and which note he had transferred to Wm. Ryan, a third party, so that thereby Peebles, at the time of his execution of his deed to Darcy & Wheeler, had no title to said land to convey; and the evidence further clearly shows that plaintiff and those under whom he claims were not bona fide purchasers from said Peebles, but had full notice, through their title papers read in evidence, of said prior conveyance to Dunlap, and also had such notice from Dunlap’s possession, and from statements made by Peebles, and also through their agent, W. E. Kendall; and, further, that the plaintiff, and those under whom he claims, had not paid a valuable consideration for said land, and, under the uncontradicted facts, judgment should have been rendered against the plaintiff.

“Third. The court erred in holding that the balance of the purchase money, amounting to \$3,500, mentioned in the deed from Robert Peebles to Wm. Dunlap, of date October 13, 1858, was never paid. The evidence clearly shows that the first and second payments were made, and that Peebles had duly transferred the last payment to Wm. Ryan, so that he had been fully paid, as between him and Dunlap, for the land, and had no title or interest whatever to convey to Darcy & Wheeler at the date of their deed.

“Fourth. The court erred in holding that neither plaintiff nor those under whom he holds had any knowledge, actual or constructive, of the existence of the said instrument from Peebles to Dunlap, dated October 12, 1858. The evidence clearly showed notice to plaintiff and his grantors by the title papers in evidence, and by statements from Peebles, and the facts and circumstances in evidence were such as to put plaintiff’s grantors on inquiry as to Peebles’ conveyance to Dunlap.”

S. W. Jones, for plaintiffs in error.

Henry F. Ring and Pressley K. Ewing, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts as above.) The plaintiffs in error have brought to this court for review the whole case,—pleadings, evidence, rulings, and findings,—as if the case were on appeal instead of writ of error; but, as the action in the court below is one at law, and was tried by the court under the

statute permitting a waiver of the jury, we can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon the rulings on matters of law properly preserved by the bills of exception. Rev. St. § 700. The bill of exceptions recites all the evidence adduced in the case, but does not show any request to find any specific fact, nor any objection to any or all the facts as found by the court, save an exception to a ruling, upon all the evidence in the case, that the plaintiff has shown a superior title to the land in controversy, and, accordingly, gave judgment for the plaintiff therefor, and for \$625 damage for use and occupation; and the only ruling on matter of law shown to have been duly excepted to is the ruling admitting the deed from Peebles to Darcy & Wheeler in evidence.

1. The bill of exceptions shows that the land in controversy was granted to Robert Peebles by the government of Coahuila and Texas; that Peebles executed a conveyance, January 31, 1870, to Darcy & Wheeler, of the city of New Orleans, state of Louisiana; that thereafter, on October 10, 1878, J. C. Garthwaite and H. C. Darcy, of the city of Newark, N. J., and W. D. Wheeler, of the city of New Orleans, La., composing the firm of Darcy & Wheeler, conveyed said land to Pierpont Phillips, of East Woodstock, Conn.; and that Pierpont Phillips, who died in 1882, bequeathed the land to Marquis Green, plaintiff in the court below, defendant in error here. The heirs of William Dunlap, in their pleadings and by evidence, asserted title under an unrecorded conveyance from Robert Peebles to William Dunlap, October 12, 1858, which conveyance expressly retained a lien or mortgage for the unpaid purchase money. The objection to the admission of the deed to Darcy & Wheeler was because it was to a firm, and did not give the full name of either of the parties, and was not to a person or corporate entity, and therefore did not pass legal title, but only an equitable title, which could not be set up in this common-law suit of trespass to try title. "While a conveyance to a partnership in the partnership name is insufficient to convey the legal title, a partnership not being a legal person, either natural or artificial, it is valid as a contract to convey, and vests such an equitable title in the partnership as will defeat an after-acquired title; and where the firm name consists of the name of one partner, with the addition of '& Co.,' or some other partnership designation, the title is vested in the partner whose name is used, clothed with a trust for the benefit of the partnership." 17 Am. & Eng. Enc. Law, 559, 560, and cases there cited. "It is also necessary that the parties, grantor and grantee, should be sufficiently described in the deed. A deed is void which does not in some way point out the grantor and grantee. The usual method of describing a person is by giving his name in full; but this is not the only method. Any other description would suffice which would distinguish him from others; as, for example, where one is described by his office or by his relation to other persons." 5 Am. & Eng. Enc. Law, 432, and cases there cited. In the present case the deed was to two individuals who composed a firm by

their proper surnames, describing them as residents of the city of New Orleans, state of Louisiana. The grantees were as effectually and certainly designated as in many other cases in which, on good authority, the grantee has been held to be sufficiently named. See *Hogan v. Page*, 2 Wall. 607; *Shaw v. Lowd*, 12 Mass. 447; *Den v. Hay*, 21 N. J. Law, 174; *Morse v. Carpenter*, 19 Vt. 613. The office of a name at common law is merely to identify, and for that purpose the description in the deed objected to seems to be sufficient. If evidence should develop that there was more than one Darcy, or more than one Wheeler, in the city of New Orleans, state of Louisiana, or more than one firm of Darcy & Wheeler in said city, it would be merely a case of latent ambiguity, arising from extraneous evidence capable of being removed, and in every such case of doubt the true party may be shown by parol. *Games v. Dunn*, 14 Pet. 322. The general rule is that, where a deed to a firm or a partnership is not sufficiently definite in a description of the persons grantees, it is not void, but good in equity as conveying a full equitable title. "It may be conceded that, at law, a deed made to or by a partnership in the firm name, the full name of neither partner being given, would not pass title to the land, but such is not the rule in equity." *Frost v. Wolf*, 77 Tex. 455-460, 14 S. W. 440, citing numerous authorities. And it would seem clear enough on principle that a deed to a firm, being good in equity, vests in the members of the firm, by implication, the power to convey; and, in this view of the case, the deed of Peebles to Darcy & Wheeler, treated as a power of attorney only, under which a deed conveying the full equitable and legal title to Phillips was made, was admissible in evidence as a muniment of title.

2. The first conclusion of fact found by the court is as follows:

"The balance of the purchase money, amounting to \$3,500, mentioned in the deed from Robert Peebles to William Dunlap, dated October 12, 1858, was never paid, but about the year 1868 the administrator of the estate of the said William Dunlap, deceased, abandoned all claim to the land in controversy, and never paid taxes or asserted ownership of the land thereafter, he having been previously informed of the existence of a lien on the land in favor of said Peebles."

The fifth finding of fact was to the effect that in January, 1887, the tenant placed on the land by the agent of Pierpont Phillips and Marquis Green was ordered off by the defendant W. L. Dunlap, who, from that time until January, 1892, remained in possession of the land, through tenants placed on the same by him, and appropriated its fruits and revenues during said period from January, 1887, to January, 1892, to his own use and benefit, the same being of the reasonable value of \$125 per annum. The other findings of fact show a regular chain of title from Robert Peebles, who conveyed to Darcy & Wheeler in 1870, down to Marquis Green, the plaintiff in the court below. The question raised on these findings as being sufficient to warrant a judgment in favor of Marquis Green, plaintiff, for the land in controversy, and for the sum of \$625, the fruits and revenues, is whether, under the facts, the superior title to the land in controversy is in the heirs of Dunlap

or in Marquis Green; and the answer to that question depends upon whether, under the peculiar conveyance made by Robert Peebles to William Dunlap, Robert Peebles had the right to rescind the said contract without notice, on the ground of nonpayment of the vendor's lien expressly reserved, and of abandonment. The rule in regard to such cases is declared in the case of *Kennedy v. Embry*, 72 Tex. 390, 10 S. W. 88, as follows:

"Under such contract, upon total failure of performance on the part of the vendee, the vendor has the right to either sue for the purchase money and foreclose his mortgage, or he may rescind the contract and recover the land. Where there had been part performance by the vendee, as paying a portion of the purchase money, or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. * * * If the vendee has actually abandoned the contract, or has so acted as to create a reasonable belief, on the part of the vendor, that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee. Where there has been no attempt to perform any part of the contract, and the time for performance has expired, no equities exist in favor of the vendee, and the vendor may rescind without notice to the vendee of his intention to do so, and convey the land to another without foreclosing his lien for the purchase money,"—citing *Dunlap v. Wright*, 11 Tex. 597; *Webster v. Mann*, 52 Tex. 416; *Jackson v. Palmer*, Id. 427; *Ufford v. Wells*, Id. 619; *Thompson v. Westbrook*, 56 Tex. 265.

The cases cited show that they fully sustain the text, and there are many others of like effect which could be cited, all showing the rule in Texas to be that, where a vendor retains in the deed a mortgage or an express lien for the payment of the purchase money, the superior title remains in the vendor until the purchase money is fully paid. As in the instant case, the conveyance from Peebles to Dunlap retains an express lien for the payment of the purchase money, and, as the court has found as a fact that the Dunlap claim under said conveyance has long since been abandoned, we agree with the trial judge in holding that the title in the defendant in error is the outstanding superior title. The judgment of the circuit court, as based upon the facts in the case, can be sustained on the further ground that the deed to Pierpont Phillips, defendant's ancestor, was a full conveyance of the property, as the findings of fact show that Phillips purchased without any notice whatever of the claim of Dunlap, and paid a full and fair price. The only objection that is urged against Phillips as a purchaser for value without notice is that the consideration paid by him, though it was a full and fair price for the land, was the extinguishment of an antecedent indebtedness, and, for this reason, insufficient to give him the protection of the registration laws. It is true, ordinarily, that, where the consideration is a pre-existing debt, the purchaser is not protected against an unrecorded deed. The reason generally given is that the purchaser, in such case, parts with no new consideration, and is in no worse condition by his purchase than he was before. *Spurlock v. Sullivan*, 36 Tex. 517; *McKamey v. Thorp*, 61 Tex. 648; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248. In the present case, the court found that the consideration of the deed to Phillips was the delivery up and cancellation of a note

for the sum of \$8,000, executed by the firm of Darcy & Wheeler in favor of Pierpont Phillips, evidencing a valid indebtedness for a like amount due the latter from said firm; and the record shows that this was done such a length of time before the date of eviction that the debt was long previously barred by the statutes of limitation; so that it appears that Phillips, if denied the benefit of the plain language of the statute, will lose his debt and the surrendered security entirely. The case of *Alstin v. Cundiff*, 52 Tex. 465, was a case where the holder of an unrecorded instrument sought, after long lapse of time, to prevail over a purchaser for the consideration of an antecedent indebtedness. The court says:

"As between the immediate parties, the payment of a pre-existing debt due from one to the other should be as valuable a consideration to support a contract as though the amount was then for the first time advanced."

—Thus recognizing that such a purchaser comes within the protecting language of the statute.

The court further says:

"There was no offer to refund this indebtedness, and no evidence that, in respect to their collection, the creditors, from want of the bar of limitations, insolvency of the debtors, or other good cause, particularly after so long a lapse of time, could be placed in as good condition as before the execution of the deeds. * * * Under these circumstances, it would seem but reasonable and equitable that, before she (the one relying upon the unrecorded instrument) should prevail, it should be shown that if the deed were set aside because the consideration was a pre-existing debt, that *Alstin* (the creditor) would not be prejudiced in the collection, otherwise, of this indebtedness."

In our opinion, the case of *Alstin v. Cundiff* was well ruled, and we know of no subsequent Texas case questioning or overruling it. Considering *Alstin v. Cundiff*, and the maxim, "*cessante ratione legis cessat ipsa lex*," we are of the opinion that, in the case in hand, on the facts as found by the trial judge, Pierpont Phillips should be considered and treated as an innocent purchaser for value, and that, as against him and his heirs and assigns, the unrecorded instrument of Peebles to Dunlap should be held wholly void. The judgment of the circuit court is affirmed, with costs.

POLICE JURY OF JEFFERSON v. UNITED STATES *ex rel.* FISK.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1894.)

No. 152.

1. MANDAMUS—TO PARISH OFFICERS—CONSOLIDATION OF PARISH.

A mandamus against the police jury of a division of a parish, to compel a levy of taxes to pay a judgment, may be enforced, after a consolidation of the divisions, against the police jury of the parish thus formed. *State v. Police Jury of Jefferson*, 3 South. 88, 39 La. Ann. 979, and *U. S. v. Port of Mobile*, 12 Fed. 768, followed.

2. RES JUDICATA—MANDAMUS—MERGER OF JUDGMENTS.

Questions which have been decided by courts of last resort, on application for mandamus to enforce certain judgments against a parish, are *res judicata*, on a subsequent application by the same party to enforce a new judgment, into which unpaid balances on the original

judgments have been merged together with other judgments, in so far as the remainder of the original judgments are concerned, but not as to the additional judgments merged with them.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

On the 14th of February, 1881, Josiah Fisk, a judgment creditor of the parish of Jefferson, Left Bank, presented his petition for a mandamus in the district court for the parish of Jefferson, asking for a levy of a special tax to pay his judgments, reciting in said petition the following: Judgment for \$150, with 5 per cent. interest from April 9, 1872; clerk's and sheriff's costs, \$112.70. Judgment for \$1,833.37, with 5 per cent. interest from April 20, 1874; clerk's and sheriff's costs, \$16. Judgment for \$364, with 5 per cent. interest from March 1, 1875; clerk's and sheriff's costs, \$8.50. Judgment for \$2,107, with 5 per cent. interest from March 18, 1878; clerk's and sheriff's costs, \$50. The writ was granted by the lower court for a part of the demand, and the police jury of the parish took an appeal to the supreme court of Louisiana, which court reversed the judgment of the district court, and refused the writ of mandamus. 34 La. Ann. 41. On the 21st March, 1881, Josiah Fisk, the holder of two other judgments against the parish of Jefferson, Left Bank, for the payment of which a tax had been ordered to be levied at the time of the rendition of the judgment, to wit, for \$358.23, with legal interest from March 1, 1875, and one for \$482.10, with interest at 8 per cent. per annum from April 30, 1875, took a rule in the district court for the parish of Jefferson against the sheriff, ex officio tax collector, and the police jury of Jefferson parish, Left Bank, to show cause why a mandate should not issue, ordering the said sheriff to collect a tax sufficient to pay said judgments in accordance with the terms thereof. This rule, on hearing, was made absolute, and the police jury of the parish of Jefferson, Left Bank, and the sheriff, appealed to the supreme court of the state, which court reversed the judgment of the district court, and rejected plaintiff's demand. From both adverse judgments rendered in the supreme court of the state, the plaintiff, Fisk, sued out writs of error to the supreme court of the United States.

The federal question involved in each case, which was decided adversely to Fisk in the supreme court of the state, was whether Fisk's judgments were based on contract claims between him and the parish of Jefferson, Left Bank, of which the right of taxation to pay the same as provided by the laws limiting taxation then in force was an element, and whether such contract rights could be affected or impaired by the restrictive provisions in regard to the limits of taxation permitted to municipalities found in the constitution of 1879 and 1880. Both cases were heard together in the supreme court of the United States, and that court decided that Fisk had contract rights with the parish of Jefferson, Left Bank, involving the limits of parish taxation, which could not be impaired by the restrictive provisions of the constitution of 1879-80, and thereupon reversed the judgment of the supreme court of the state of Louisiana, and remanded the cases to that court for further proceedings not inconsistent with their opinion. 6 Sup. Ct. 329. Mandates being filed in the supreme court of the state of Louisiana, that court, in the first-mentioned case, proceeded to amend and affirm the judgment of the district court for the parish of Jefferson in favor of Fisk, and thereupon ordered, adjudged, and decreed "that said defendant the police jury levy an additional tax of six mills on the dollar of all the assessed property of the parish, to pay the above judgment, interest, and costs, and that the sheriff and ex officio tax collector proceed to collect said tax; the same, when collected, to be paid to the relator in satisfaction of said judgments, pro tanto." And "it was further ordered, adjudged, and decreed that the alternative writ of mandamus prayed for be made peremptory, fully reserving relator's right to an additional tax, if six mills' levy proves inadequate." In the second-mentioned case, the supreme court of the state held "that their former judgment was correct, upon grounds not inconsistent with the opinion of the supreme court of the United States," and thereupon adjudged that their

"former decree should remain undisturbed, and that all costs of the district court and of this court be taxed against the plaintiff and appellee, without prejudice, however, to his right to enforce his judgments against defendants by such other and further proceedings as he may be entitled to under the decree of the supreme court of the United States."

It appears that, during the pendency of these proceedings in the courts, the divisions of the parish of Jefferson known as the "Right" and "Left Banks," by an act of the legislature of the state known as "Act 92 of 1884," were united, constituting the one parish of Jefferson, with one police jury. Shortly after the decrees by the supreme court of Louisiana aforesaid, a rule was taken by the police jury of Jefferson to vacate said decree ordering the tax of six mills, and declare its nullity, as also that of the judgment of the supreme court of the United States, on the ground that the said police jury of Jefferson was not a party to the proceeding in which said judgment was rendered; that said proceeding was instituted and conducted against the police jury of Jefferson parish, Left Bank; and that said judgment could not, therefore, embrace or affect the parish of Jefferson, or its present police jury. This rule was quashed and dismissed in the district court, and on appeal was affirmed by the supreme court of the state; that court holding, under the facts of the case, that the police jury of Jefferson was the successor of the police juries of Jefferson, Right and Left Banks, and that the decrees of the supreme court of the state in the cases aforesaid were directed against the police jury of the parish of Jefferson. 3 South. 88.

The tax of six mills was levied and collected to such an extent that payments amounting to \$2,528.80 were made at different dates on the judgments embraced in the first-mentioned suit, but not sufficient to fully pay the same. Thereupon, Fisk, who had in the mean time become a citizen of the state of Iowa, brought suit in the circuit court of the United States for the eastern district of Louisiana against the police jury of Jefferson parish to recover the amount due on all of his judgments, so far as they were unpaid. Having obtained a judgment and having issued execution, and the same being returned "nulla bona," relator, Fisk, sued out a writ of mandamus to compel the police jury of the parish of Jefferson, and the individual members of the jury, (naming each of them,) to levy a special tax of $1\frac{1}{2}$ per cent., or as much thereof as may be necessary to pay the judgments, interest, and costs. To the petition for a mandamus, the police jury of the parish of Jefferson, and the individual members thereof, filed a lengthy answer, wherein they asserted the constitutional provisions and restrictions imposed by the constitution of 1879-80; denied the relator's contract rights; denied that the supreme court of the state or the supreme court of the United States had finally decided anything, conclusively, against the defendants; alleged that the limit of taxation authorized by the laws of the state had been levied in the years 1870 to 1879, inclusive, covering all the time when Fisk was employed by the parish of Jefferson, Left Bank, and that the power of the police jury to levy taxes for all purposes during the years specified was limited to four mills per annum, and the limit therein allowed had been exhausted at the time.

On the trial, after the evidence was submitted, the court directed a verdict in favor of the relator, and the defendants sued out this writ of error.

Seasonable bills of exception were taken, and the case, on the law and the facts, is fully presented; the following being the errors assigned, on which a reversal is claimed:

"First. The court erred in directing a verdict for relator on the testimony and evidence in the cause; said testimony, evidence, and direction being set forth in the bill of exceptions No. 1, settled, signed, and filed of record herein, April 3, 1893, and referred to as part of this assignment. Second. The court erred in refusing the request of respondents that the court should charge the jury as to the legal limitations on the taxing power of the parish of Jefferson, Left Bank, and the parish of Jefferson, from and after the year 1870, and should charge the jury that, if the jury should find from the evidence said legal limitations had been reached in the levy of taxes by said police juries, a verdict must be found for the respondents. This as set forth in bill of exceptions No. 2, settled, signed, and filed of

record April 3, 1893, and referred to as part of this assignment. Third. The court erred in refusing to instruct the jury that the present police jury of the parish of Jefferson, created by Act No. 92 of 1884, defendant in this cause, is a different legal being from the police jury of the parish of Jefferson, Left Bank, with whom relator alleges he made his contracts in the year 1871, and that under the said act of 1884, and especially in its sixth section, the relator is not entitled to a mandamus against the present respondents in the premises; the request and the said refusal being set forth in bill of exceptions No. 3, settled, signed, and filed of record herein April 3, 1893, and referred to as part of this assignment. Fourth. The court erred in refusing the request of the respondents that the court should charge the jury to find a verdict for the defendant, and in directing a verdict for relator, as set forth in the bill of exceptions No. 4, settled, signed, and filed of record April 3, 1893, and referred to as part of this assignment. Fifth. The court erred in directing a verdict for the relator. Sixth. The court erred in rendering judgment in favor of relator."

W. W. Howe, S. S. Prentiss, and James David Coleman, for plaintiff in error.

Chas. Louque, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts as above.) The assignments of error present two questions, the disposition of which will dispose of the case. The police jury of the parish of Jefferson, appellant, contended in the court below that it was a different legal being from the police jury of the parish of Jefferson, Left Bank, and, as shown by the third bill of exceptions in the record, on the trial of the case, requested the court to charge the jury "that the present police jury of the parish of Jefferson, defendant in this cause, is a different legal being from the police jury of the parish of Jefferson, Left Bank, which is alleged by the relator to have made the contracts with him in 1871, and that under the Act No. 92 of 1884, creating the present parish of Jefferson, and especially the provisions of the sixth section, the relator is not entitled to a mandamus against the present respondents," which charge, as requested, the court refused. A similar question was presented upon similar facts in the case of *U. S. v. Port of Mobile*, 12 Fed. 768, and it was there held that "the liability of the port of Mobile for the relator's judgment is settled by the judgment. All questions in the case back of that judgment are *res judicata*. See *U. S. v. New Orleans*, 98 U. S. 395; *Wolff v. New Orleans*, 103 U. S. 360." This authority ought to settle the matter, but, as between the parties here, the question is conclusively settled by the decision of the supreme court of the state of Louisiana in *State v. Police Jury of Jefferson*, 39 La. Ann. 979, 3 South. 88, where precisely the same question now made was adjudicated against the plaintiff in error.

The next question presented in different forms by several bills of exceptions and in different assignments of error is how far the demand of the relator is *res judicata* between the parties, and this in relation to the force and effect of the restrictions upon municipal taxation found in the constitution of 1879-80, in regard to the matter of fact whether the parish of Jefferson, Left Bank, had ex-

hausted the limit of municipal taxation for the years 1871 to 1877, inclusive, and also as to whether the rate of municipal taxation allowed by law for those years was 4 mills or $14\frac{1}{2}$ mills. The supreme court of the United States decided between these same parties that Fisk's claims against the parish of Jefferson, Left Bank, growing out of his employment as parish attorney, were based on a contract with the parish, and that, thereunder, Fisk had a right to look to the rate of taxation allowed by law during the term of his employment; and, further, that the provision of the constitution of 1879-80, restricting the limit of municipal taxation, so far as it was in conflict with the acts in force during Fisk's employment, and as applied to the contract of Fisk, impaired its obligation, by destroying the remedy, *pro tanto*. - The supreme court of the state of Louisiana, in *State ex rel. Fisk v. Police Jury*, 38 La. Ann. 505, decided between these same parties that, as to the judgments embraced in the first mandamus suit, (as set forth in the statement of facts,) the limit of taxation for parochial purposes in the parish of Jefferson, Left Bank, during the years 1871 to 1877, inclusive, was as follows: For 1871, ———; for 1872, $21\frac{1}{2}$ mills; for 1873 to 1876, inclusive, $14\frac{1}{2}$ mills; for 1877, 13 mills,—and that during that period of time the rate of taxes levied by the police jury was 10 mills on the dollar, with the exception of 1876, when the rate was increased to $14\frac{1}{2}$ mills. And the same court, in the same case, gave judgment for the relator, Fisk, directing that a tax of 6 mills be levied, assessed, and collected, and applied to relator's judgments described in the case, and fully reserving relator's rights to an additional tax, if 6 mills should prove inadequate. In the case of *Fisk v. Police Jury*, 38 La. Ann. 508, which was an appeal from the judgment of the district court on a rule for a mandamus to compel the levy of a tax to pay certain judgments described in the second suit mentioned in the statement of facts, the supreme court of Louisiana held and decided that, irrespective of the restrictive provisions in relation to municipal taxation found in the constitution of 1879-80, the relator was not entitled to the relief prayed for, because of defects in his form of proceeding, but reserved to him his right to enforce his judgments by other and further proceedings, as he might be entitled to. From this statement, it appears, in regard to all the judgments included in the first-mentioned suit for a mandamus, all the questions arising between the parties as to the effect of the constitution of 1879-80 on Fisk's demands; as to the limit of municipal taxation in the parish of Jefferson, Left Bank, for the years 1871 to 1877, inclusive, and with regard to whether that limit had been reached, and the power of taxation exhausted,—were all adjudicated and settled by courts of the highest authority, and that the same are now *res judicata*, and in no respect open for further dispute between the parties. It further appears that as to the other judgments of the relator, Fisk, against the police jury of the parish of Jefferson, Left Bank, although now merged in a judgment against the police jury of the parish of Jefferson, there has been no adjudication concluding the police jury of the parish of Jefferson in any other matter than as to

the application of the restrictive provisions of the constitution of 1879-80.

On the trial in the court below the court ruled that the admissions of the defendants and the judgment of the supreme court of the United States and of the supreme court of Louisiana, above referred to, were decisive of the cause in favor of the relator, and directed a verdict accordingly. In our view of the case, this ruling was incorrect, so far as it included the whole judgment of the relator against the police jury of the parish of Jefferson. The verdict in favor of relator should have been restricted to that part of the judgment of the circuit court based upon the judgment claims included in the first suit for mandamus, (described in the statement of facts,) and confirmed by the supreme court of the state in 38 La. Ann. 505. As the judgment claims of Fisk are recited in detail in the judgment of the court below, the error is one which can be corrected by amendments, without awarding a venire de novo.

It is therefore ordered, adjudged, and decreed that the judgment of the circuit court be, and the same is hereby, amended by striking out the fifth claim, of \$482.10, with 8 per cent. interest thereon from March 1, 1875, until paid, and \$8.50, clerk's and sheriff's costs, and the sixth claim, for \$358.22, with 5 per cent. interest from March 1, 1875, and \$5.95, clerk's costs, and \$5.75, sheriff's costs, and that otherwise the judgment of the circuit court be, and the same is hereby, affirmed. It is further ordered, adjudged, and decreed that the defendant in error pay the costs of this court.

BURLINGTON INS. CO. v. MILLER.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 346.

1. PLEADING—REPLY—WHEN NECESSARY.

Under Mansf. Dig. Ark. §§ 5043, 5072, which forbid a plaintiff to reply to new matter contained in the answer, unless such new matter constitutes a set-off or counterclaim, a plaintiff may prove, without pleading them, facts showing that the defendant has waived, and is estopped from asserting, breaches by plaintiff of the contract sued on, such breaches having been averred in the answer by way of confession and avoidance.

2. TRIAL—OBJECTION TO EVIDENCE.

An objection to evidence as "incompetent, irrelevant, and immaterial" is too general to sustain the point on appeal that the evidence relates to matters not pleaded.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Sophia Miller against the Burlington Insurance Company upon a policy of fire insurance. Plaintiff obtained judgment. Defendant brings error.

A. B. Quinton and E. S. Quinton, for plaintiff in error.

U. M. Rose, W. E. Hemingway, and G. B. Rose, for defendant in error.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. The plaintiff in error was sued in the circuit court of Jefferson county, Ark., on a policy of insurance which it had theretofore issued to Sophia Miller, the defendant in error, insuring her in the sum of \$2,900, for the term of one year, against loss and damage by fire to certain property situated in the town of Pine Bluff, Ark. The defendant company removed the case to the United States circuit court for the eastern district of Arkansas, where there was a trial before the court, a jury having been waived, and a judgment against the insurance company in the sum of \$3,001. To reverse that judgment it has sued out the present writ of error. It appears from the record that the complaint on which the case was tried was an ordinary declaration on an insurance policy. The complaint averred that on April 29, 1891, the defendant company had executed and delivered to the plaintiff its certain contract of insurance, the substance of which was fairly stated according to its legal effect; that on March 15, 1892, while the policy was in force, the property covered by the policy had been totally destroyed by fire; that the plaintiff had duly fulfilled all of the conditions of insurance on her part, and that the loss sustained, amounting to \$2,900, had not been paid. The defendant filed an answer to the complaint, wherein it pleaded specially that the plaintiff had violated several of the provisions of the policy. Among other things, the answer averred that the policy contained a provision to the effect that, in case of loss, the assured should give immediate notice of the loss to the company, in writing, and within 30 days thereafter should deliver to it "a particular account of said loss, under oath, stating the time, origin, and circumstances of said fire," etc. The answer further averred that the plaintiff had failed to give the notice required by the aforesaid condition, and had failed to make and deliver proofs of loss within the aforesaid period of 30 days, and had failed to furnish any proofs of loss whatever. No reply was filed to the aforesaid special plea. On the trial of the case, certain oral and written evidence was introduced by the plaintiff, which clearly showed that the defendant company, by its dealings with the plaintiff subsequent to the fire, had waived the aforesaid provision of its contract touching notice and proofs of loss, and that it was also estopped from insisting upon a violation of that provision as a defense to the action.

The only assigned error in the record that we are called upon to review is whether the trial court properly admitted the oral and written testimony above referred to. It is insisted, in behalf of the plaintiff in error, that the testimony in question was improperly admitted, because the plaintiff had neither pleaded a waiver nor an estoppel in response to the new matter stated in the answer with reference to the violation of the condition with respect to notice and proofs of loss. There are two good and sufficient reasons why the exceptions taken to the admission of such testimony cannot prevail in this court. As the pleadings were framed when the case went to trial, the defendant admitted the execution and delivery of the contract as described in the complaint, but averred specially, by way of confession and avoidance, that the plaintiff was not entitled

to recover, because of a noncompliance with one of the conditions of the contract. In most of the states, no doubt, it would have been the duty of the plaintiff to have filed a reply to the new matter alleged in the answer, if she intended to show a state of facts constituting an estoppel in pais or a waiver of the condition of the policy. But, under the Arkansas Code, a plaintiff is not allowed to file a reply to new matter contained in the answer unless the new matter alleged constitutes a set-off or a counterclaim. Section 5043 of Mansfield's Digest provides as follows: "There shall be no reply except upon the allegation of a counter-claim or set off in the answer." Section 5072 also provides that "the allegation of new matter in the answer, not relating to a counter-claim or set-off, * * * is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require." Under these sections, it appears to be held by the Arkansas courts that a plaintiff may prove any facts, without pleading them, which will suffice to overthrow or rebut a special plea or defense stated in the answer by way of confession and avoidance, such as was interposed in the present case. *Lusk v. Perkins*, 48 Ark. 243, 2 S. W. 847. It follows, therefore, that the same rule of pleading should be observed by the federal courts sitting in Arkansas in the trial of common-law cases. Vide Rev. St. U. S. § 914.

For another reason, as well, we must ignore the alleged error of the circuit court in admitting the testimony tending to establish a waiver and an estoppel. It nowhere appears from the bill of exceptions that the trial court was asked to exclude the testimony in question because it tended to establish or to raise an issue that had not been made by the pleadings. Throughout the record it appears that the evidence was objected to, in the most general language, because it was "incompetent, irrelevant, and immaterial." It is not shown that in a single instance the attention of the trial court was directed to the fact that the plaintiff had failed to plead a waiver or an estoppel, and that it was asked to exclude the objectionable testimony for that reason. If the evidence had been challenged on that ground, for aught that we can now tell, the testimony might have been excluded, or the plaintiff's attorney might have asked and obtained leave to amend the pleadings so as to forestall every possible objection to the testimony on that ground. Instead of pursuing that course, the defendant's attorney thought proper to employ language which was as well calculated to conceal the real ground of his objection to the evidence as to disclose it. Appellate courts have on many occasions condemned the practice of stating objections to testimony in language that is so general or obscure that it may not have served to advise the trial court, or the opposite party, of the precise nature of the objection intended to be urged and to be relied upon. A specification of the particular reasons upon which a party asks the trial court to exclude or to admit certain testimony is essential for three reasons: First, to prevent a violation of the fundamental rule that a litigant must abide in an appellate court upon the theory which he has advocated *at nisi prius*; second, to prevent an appellate tribunal from becom-

ing something quite different from a court of review; and, lastly, that the opposing party and the trial court may be fairly advised of the force and nature of the objection intended to be urged, and have a fair opportunity to consider it, and, if need be, obviate it. *Insurance Co. v. Frederick*, 58 Fed. 144;¹ *Turner v. People*, 33 Mich. 363, 382; *Shafer v. Ferguson*, 103 Ind. 90, 2 N. E. 302; *State v. Hope*, 100 Mo. 347, 13 S. W. 490; *Lewis v. Railroad Co.*, 123 N. Y. 496, 501, 26 N. E. 357; *Ward v. Wilms*, (Colo. Sup.) 27 Pac. 247; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Elliott*, App. Proc. §§ 770, 779. While an objection to testimony for the reason that it is "incompetent and immaterial" may be adequate in some cases, where the testimony is obviously or clearly inadmissible, yet, as every practitioner knows, it frequently happens that an objection in that form is not sufficient to advise the court or the opposite party of the ground on which the objection is predicated. In the present case, there is nothing in the record which fairly shows that the precise question which we are asked to determine affecting the admissibility of the testimony to which the objection relates was ever considered or determined by the trial court, and for this reason as well,—that is, because the objections stated were too general,—we must decline to notice the alleged erroneous rulings. For both of the reasons heretofore indicated the judgment of the circuit court is hereby affirmed.

UNITED STATES v. JAMES et al.

(District Court, N. D. Illinois. February 26, 1894.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE ACT—COMPELLING SELF-INCRIMINATION.

Act Feb. 11, 1893, which declares that no person shall be excused from testifying or producing documents in proceedings based upon the interstate commerce act on the ground that it may tend to criminate him, but that he shall not be prosecuted or punished on account of any matter concerning which he may testify, violates the fourth and fifth amendments to the United States constitution, which declare that the right of the people to be secure against unreasonable searches and seizures shall not be violated, and that no person shall be compelled in any criminal case to be a witness against himself.

Rule to punish James G. James and Gordon McLeod for contempt of court in refusing to answer questions asked by the grand jury. Rule discharged.

T. E. Milchrist, U. S. Dist. Atty.

J. N. Jewett and Aldace F. Walker, for defendants.

GROSSCUP, District Judge. The grand jurors report to the court that, on the 16th day of February instant, they were duly engaged in inquiring into certain alleged violations, in this district and division, of the interstate commerce act by the Lake Shore & Michigan Southern Railway Company, and other railroads and common carriers, and

¹ 7 C. C. A. 122.

that James G. James, being before them in response to a subpoena as a witness, and being inquired of respecting his knowledge of the shipment of certain products from Chicago east at a less freight rate than was named in the open tariffs then in force, declined to answer the question, for the reason that an answer thereto would tend to criminate himself personally, or would disclose a source of evidence which would tend to criminate him personally, under the provisions of the interstate commerce act. Certain other questions of a like tenor were propounded, and the answers refused by the witness substantially for the same reasons. On the same day Gordon McLeod appeared before the grand jurors as a witness, and, after answering that he was the general manager of the Merchants' Dispatch Transportation Company at Chicago, was asked if, in response to a subpoena to that end, he was ready to produce certain reports, or copies thereof, made to the Central Traffic Association, the Trunk Lines Association, or any person connected therewith, by the Lake Shore & Michigan Southern Railway Company, the Merchants' Dispatch Transportation Company, or any person connected therewith, relating to the shipments of property from Chicago to points outside of the state of Illinois in September, 1892, and certain other documents of the same character. To which he responded that he was not, and, upon being inquired of why not, he refused to answer the question, for the reason that the answer might tend to criminate him, or lead to disclosures that would criminate him.

This report brings to the court the question whether the act of February 11, 1893, is violative of the letter or spirit of the fourth and fifth amendments to the constitution of the United States. The fourth amendment provides "that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated;" and the fifth amendment declares "that no person shall be compelled in any criminal case to be a witness against himself." The act of February 11, 1893, in effect provides that no person shall be excused from testifying or producing books, papers, tariffs, contracts, agreements, and documents in any case or proceeding, criminal or otherwise, based upon the interstate commerce act, on the ground that the same may tend to criminate him, or subject him to a penalty or forfeiture, but that any person so testifying shall not be prosecuted, or subjected to any penalty or forfeiture, on account of any transaction, matter, or thing concerning which he may testify, or produce the documentary or other evidence.

Every man's life is, so far as society is interested, a series of personal acts. Each act, not impinging unlawfully upon the rights of others, or falling within the definitions of the criminal statutes, is a personal right of the individual. The criminal code is a series of definitions which, for the purposes of public safety or welfare, designate certain of these personal acts, either isolated, or in connection with other acts or intentions, as crimes against the commonwealth. The identification of the acts with the definitions of the criminal code is dependent upon such knowledge as can be ob-

tained, either from the observation of others, or the disclosures of the person himself. The methods of such identification have been formulated into what may be called the science of evidence. These personal acts, however, like the events of natural law, are interlinked with others, and are each a part only of a connected and cohering series of acts. The student of nature uncovers her unknown events by seizing upon a known event, and, with the knowledge and suggestions thus acquired, proceeds according to the laws of known connection to others. Thus, an event remote from the one that is the ultimate object of the inquiry becomes the clue or break from which the process of unraveling begins. Judicial tribunals, in search of personal acts that fall within the criminal code, are served by a like law of connection and cohesiveness. A known act in a person's life is made the beginning of the tribunal's work of unraveling, and, though apparently remote from the actual criminal deed, is so linked therewith that the judicial following out of the intervening thread will eventually bring out the full disclosure of the criminal act. The disclosure of such a remote act is therefore indirectly, but effectually, a disclosure of the criminal act itself. Since the Counselman Case, 142 U. S. 547, 12 Sup. Ct. 195, it is admitted law that every person is protected by the fifth amendment against self-disclosure in any proceeding, civil or criminal, of such of his own acts as would subject either the act, or any connected act, to the dangers of incrimination. The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial. No person can be subjected to the penalties of the law unless every fact essential to the identification of the act charged with the crime is apparent from sources other than himself, or his own voluntary disclosures. The accused can stand, as against the menace of the law's penalties, upon the sanctity of his own personal knowledge, and the constitutional guaranty puts a seal upon that knowledge that no legislative or judicial hand can break. Of course, this immunity or personal right can only protect against the danger that was in contemplation of the constitution, and cannot, therefore, be diverted, as mere pretexts, to uses beyond that point. To avoid its misuse upon such pretexts, and at the same time secure to the person's knowledge the sanctity that is intended, it devolves upon the court, in each instance, to determine, from all the circumstances of the situation, when the question arises, whether the disclosure sought for carries any real menace of self-incrimination.

But, while the Counselman Case establishes this guaranty to the extent thus pointed out, it leaves undecided the most interesting and important question connected with the subject. In the case under investigation now it is claimed that the act of February 11, 1893, affords all the immunity that the fifth amendment was intended to provide. If the guaranty of the fifth amendment be simply against a compulsory self-invoking of the penalties and forfeitures of the law, as distinguished from the other consequences of self-accusation, the claim is, in my opinion, well founded. The act of Feb-

ruary 11, 1893, is a broad prohibition against the prosecution of a person for any act to which the disclosure relates. It unquestionably refers to a criminal procedure like this, and the immunity stated in the latter clause of the act relates, undoubtedly, not simply to the causes or proceedings before the interstate commerce commission, but to any cause or proceeding, criminal or otherwise.

It is urged with much emphasis that congress cannot compel, even upon conditions of pardon, that which the constitution forbids,—that the constitution cannot be amended by a simple legislative act. The proposition in the abstract is true. If the fifth amendment is intended to grant to the person complete immunity against all the consequences of self-accusation of crime, irrespective of the nature of such consequences, no legislative act can cut down or diminish such immunity. The prohibition against prosecution would, in that case, not be coextensive with the right or immunity accorded by the constitution. But, if the fifth amendment be simply a guaranty against the law-inflicted pains and penalties that might follow compulsory self-accusation, it is clear that the abrogation of such pains or penalties, so far as they are applicable to the person interested, is a complete fulfillment of the constitutional guaranty. If the amendment were made for that purpose only, it is only prohibitory of legislation that might interfere with that purpose. If that purpose be effectually recognized and protected in the legislative act, it cannot be said that such act either repeals or violates the constitution. Every person is subject, in respect of his duty to give testimony, to the legislation of congress, except as the power of congress in that respect is curtailed by the constitution. The act is operative upon the individual, if it preserves inviolate his constitutional immunity; and, if that immunity is against the law-inflicted penalties and forfeitures of crime only, the abrogation of such penalties and forfeitures prevents the legislative act and the immunity from coming in conflict. The argument, in so far as it admits that the amendment grants an immunity against the law-inflicted pains and penalties of self-accusation only, and still insists that it is a repeal of the constitution, is fallacious, because it assumes that the language of the amendment is broader than its admitted purpose. The argument introduces a confusion of terms, by giving to the language of the amendment one meaning, and to its real intention a narrower one. Harmonize the language of the amendment and its supposed real purpose in one term,—as, for instance, "No person shall suffer the law-inflicted pains and penalties of a conviction, to the bringing about of which his involuntary self-accusation has contributed,"—and the act of February 11, 1893, is at once seen to be no impingement upon the fifth amendment.

The question, then, comes back to this: What was the real purpose of the framers of the fifth amendment? Did they intend to guaranty immunity thereby against compulsory self-accusation of crime, so far as it might bring to the witness law-inflicted pains and penalties only? Or, was it the purpose to make the secrets

of memory, so far as they brought one's former acts within the *definitions of crime*, inviolate as against judicial probe or disclosure?

The Counselman Case leaves this question undecided. Some of the dicta of the opinion seem to show that the court purposely left it undecided. As, for instance, the opinion states: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one; at least, unless it is so broad as to have the same extent in scope and effect." So far, therefore, as the supreme court of the United States is concerned, I regard the question as an open one.

There is a long line of decisions in the several state courts upon provisions of the state constitutions identical with, or analogous to, the fifth amendment of the federal constitution. None of these decisions, so far as I am advised, except *Respublica v. Gibbs*, 3 Yeates, 429, an early Pennsylvania case, held that the immunity was against any consequence of compulsory self-accusation other than the penalties and forfeitures inflicted by the law. No decision of any state has been called to my attention in which the constitutional provision was construed in the light of a statute granting complete immunity against prosecution. There are many states, however, in which the courts of last resort have held that similar constitutional provisions are not violated by the compulsory self-accusation of a witness, where a statute exists making it unlawful to use his disclosures in any future prosecution. It is interesting to note, however, that all of these cases related to offenses, the wisdom of which were then somewhat debated questions, and the prosecution of which was, to some extent, the triumph or defeat of the prevailing popular opinion. Thus, in *Arkansas v. Quarles*, 13 Ark. 307, and *Higdon v. Heard*, 14 Ga. 255, the prosecution was under the gaming laws; in *Indiana*, (*Wilkins v. Malone*, 14 Ind. 153,) under the usury laws; in New York, (*People v. Kelly*, 24 N. Y. 74,) on an inquiry relating to bribery at an election; in New Hampshire, (*State v. Nowell*, 58 N. H. 314,) under the liquor laws; and in still another New York case, (*People v. Sharp*, 107 N. Y. 427, 14 N. E. 319,) in a prosecution for bribery of aldermen. Some of these cases naturally aroused the indignation of the community in which the court sat. All of them were cases, doubtless, where the immunity claimed by the witness aroused no just sympathy. They each presented a situation where the fifth amendment, if construed broadly, seemed to offer an obstacle to a just administration of the criminal law. All of these cases are, however, expressly overruled in the Counselman Case. There are other cases,—especially the *Emery Case*, 107 Mass. 172, and *Cullen v. Com.*, 24 Grat. 624,—in which the supreme courts of the state where they arose held that the immunity granted by the constitutional provision was not simply against the use of the self-accusatory evidence in subsequent prosecutions; and the statutes to that effect did not, therefore, fully meet the constitutional requirement. These were the chief predecessors of the Counselman Case, and to that extent met with the approval of the supreme court of the United States.

It is unquestionable that all of these cases, either in the matter decided, or in the dicta of the opinion, commit the respective courts deciding them to the doctrine, that a statute which in effect forecloses any prosecution on account of anything disclosed in the testimony meets fully the purpose of the constitutional provision. But the nature of these cases, and the fact that all but two of them have been partially disapproved by the supreme court, must be borne in mind.

The case at bar, like those cited, inspires no wish in the court to protect the witnesses. The interstate commerce act is a law of the land, and the witnesses ask for the protection of the amendment under circumstances which indicate that, having violated it before, they have no intention to cease violating it now. It is the contest of people who disbelieve in the expediency of the law against the attempt to enforce it. The protection is asked, not so much to keep inviolate the secrets of the human breast, as to have immunity in further violating a law of the land. Judged by this specific instance, the fifth amendment, if construed broadly enough to afford the witnesses immunity against testifying, is an obstruction in the path of the administration of law. But the fifth amendment must not be judged by a single specific instance. It was placed in the organic law of the land for a purpose, and that purpose, when ascertained, must be enforced, howsoever it may affect sporadic cases, or even the great body of cases, that may come before the court.

What, then, was the intention of the makers of the fifth amendment? This can only be ascertained by transferring ourselves as nearly as possible to the time in which they lived, and to the influences and conceptions that were then in vogue. From the earliest times the governmental systems of the Anglo-Saxon and the Latin races have been widely different. Among Latin peoples the chief thought has been for their welfare and advancement as a collective entity. Thus was depressed into comparative obscurity the rights or happiness of the individual. Among Anglo-Saxons, on the contrary, the individual always remained the most prominent purpose in governmental conception. The man never became blended in the mass, and his rights and personal happiness were not lost sight of in the movements of the time. Thus it was that, while in Latin countries men could be lawfully carried off, their homes and property confiscated, their private papers given up to the public, and their memories searched by all the processes of menace and torture; in the British Islands the home was a castle into which the sovereign could not enter, the individual could not be compelled to respond to accusation, except upon indictment by his peers, and his private papers and memory were inviolate against search. The progress of the English-speaking people to the highest form of civil and religious liberty is not adventitious or accidental, but is due to this ennoblement of the individual in the conceptions and practices of the English law.

The same criminal procedure could not grow from such different soil.

In the one, the national entity—only another name for the ruling power—would brook no obstacle that blocked its way. Influenced by passion, revenge, fanaticism, and the myriad of civil and religious whims, it erected inquisitions and torture stalls, and sought thereby to explore the depths of the human breast, as it had already power to search the closets of human habitations. In the other, the individual lived for himself and family, and, except within certain governmental relations, was in no sense legally interwoven with the rest of mankind. Government was for him; not he for the government. He could lock his door against the messenger of the crown, and his breast against any search that would bring him within the crown's displeasure.

In the one, grew up a criminal procedure that was almost purely inquisitorial, and whose history now appalls the enlightened conscience; in the other, grew up a system purely accusatory, where the offending individual could lawfully stand in silence, and demand proof from sources other than himself. In the one, the power of the sovereign pervaded every nook and corner of the individual; in the other, the power of the sovereign came only to the outward person of the subject, and there stopped. This jealousy against any touch, until the right of individual liberty was shown forfeited, proved the corner stone of popular liberty.

But English public opinion, upon subjects both civil and religious, was in a constant state of change and ferment. The accepted views of to-day became the heresies and treasons of to-morrow. The view in power is always the right view, and is wishing for the means to enforce itself universally. It is no wonder, therefore, that sparks of the continental system landed on the English islands, and found spots where the fuel was ready for ignition. Early the ecclesiastical bodies, by the oath of *ex officio*, attempted, under penalties of excommunication, to extort confessions of heresy and sin from communicants. Later, the star chamber and high commission put for a time in practice the same methods of compulsory self-disclosure of offenses against the state. However, the general English jealousy of personal sanctity resisted, and numerous statutes were passed guarantying the right of silence against the accusation of both the church and the crown. But, in the generation of Englishmen and English colonists in America who lived to see our Constitution adopted, and whose counsels were unquestionably embodied therein, there sprang up in England a formidable revival of prosecutions for the so-called seditious offenses. A paper, a speech, talk among friends, an understanding or confederacy to right some particular wrong, was made the basis of prosecuting the participants, if the sentiments therein prevailing could be distorted into any seeming hatred or contempt of the crown, the peers, the commons, or any of the national functionaries. Some of the men who were tried possibly deserved their punishment, but the illimitable opportunities thereby opened up to outlaw every species of sentiment and progression that did not meet the views of the prevailing government shocked the Anglo-Saxon intelligence. The most stirring state trials of history occurred, in which the government was on the one side

and the almost universal intelligence and conscience on the other. These trials, and their possible consequences on the fate of personal liberty, were not history simply, to the framers of the fifth amendment. Those men had lived through these trials, and taken on their coloring and excitement. They themselves, in their early plannings against the trespasses of the English crown, had been exposed to the danger of like prosecution and punishment. In the shadow of such a menace, progress and personal safety must separate, unless the right of unbroken silence were among the immutable personal privileges. Nearly all of the ten amendments to the constitution breathe this apprehension, and erect against it the barriers of organic law. This is forcibly shown by the fact that the amendments were insisted upon by the states most jealous of the central general government, and most apprehensive that such a government might become the oppressor of their personal rights.

The privilege which the framers of the amendment secured was silence against the accusation of the federal government,—silence against the right of the federal government to seek out data for an accusation. This privilege of silence was, as they believed, and as events then looked, in the interest of progress and personal happiness, as against the narrow views of adventitious power. Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so.

Happily, the day when this immunity is needed seems to be over. It is difficult for us, who live in a time when there are few, if any, definitions of crime that do not meet with the approval of universal intelligence and conscience, to appreciate these conceptions of our fathers. The battle for personal liberty seems to have been attained, but, in the absence of the din and clash, we cannot comprehend the meaning of all the safeguards employed. When we see the shield held before the briber, the liquor seller, the usury taker, the duelist, and the other violators of accepted law, we are moved to break or cast it aside, unmindful of the splendid purpose that first threw it forward. But, whatever its disadvan-

tages now, it is a fixed privilege, until taken down by the same power that extended it. It is not certain, either, that it may not yet serve some useful purpose. The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless, and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence, against a criminal accusation, guarantied by the fifth amendment, was meant to extend to all the consequences of disclosure.

The effectiveness of the statute of February 11, 1893, might well be questioned on another ground. It is a statute of pardon. Until the witness makes his disclosure he is chargeable with the offense within his personal knowledge. The pardon becomes effective only at the moment and upon condition of disclosure. But pardon is not necessarily unilateral. No person is compelled to accept the legislative or executive grace. Chief Justice Marshall, speaking for the supreme court, so held in *Wilson's Case*, 7 Pet. 150, where a pardon was granted by the president for a capital offense. In the case at bar, it must be assumed that the witness is guilty of some offense. In the absence of the statute of February 11, 1893, he has the undoubted constitutional right of silence. It is said that that right is taken away by the immunity or pardon extended by the statute. But he chooses not to accept such immunity or pardon. His refusal to answer the question is such refusal of acceptance. He prefers to stand upon his constitutional right and take his chances of conviction, rather than expose himself to the civil liabilities and the odium of self-confessed crime. It may be that the offense is of an ancient date, and has been succeeded by years of immaculate conduct and citizenship. Exposure, self-confessed exposure, would lose him his place in society, his good name in the world, and, like a bill of attainder, taint his blood and that of all who inherit it. It might well be that he would refuse to give up the sacred privilege of silence for a pardon. It is not difficult to suppose a case where the inquiry of the government was not directed to his crime, but to something immeasurably less important and inconsequential. The benefit to society might be a trifle, compared with the catastrophe to him and his descendants. I am not impressed with the belief that he has no right to stand upon the constitutional privilege of silence, and thus refuse the grace of the legislative or executive power. For the foregoing reasons the rule will be discharged.

In re DEERING.

(District Court, N. D. California. March 3, 1894.)

No. 2,903.

1. CONVICTS—GOOD BEHAVIOR—COMMUTATION.

Act Cong. March 3, 1875, § 1, (18 Stat. 479,) provides that all persons convicted of an offense against the United States, "and confined, in execution of the judgment or sentence upon such conviction, in any

prison or penitentiary of any state or territory," shall be entitled to a certain commutation of their sentences for good behavior. *Held*, that the act does not apply to offenders confined in county jails.

2. SAME—PRISONERS IN COUNTY JAILS.

Rev. St. U. S. § 5543, provides that all persons convicted of offenses against the United States, and confined in a "state jail or penitentiary," shall be entitled to a prescribed commutation of their sentences for good behavior. This section is confined in its application to jails and penitentiaries where no credits for good behavior are allowed; and section 5544 provides that, where such credits are allowed the state prisoners, United States prisoners shall be entitled to the same. *Held*, that a United States prisoner in a county jail in California is entitled to the commutation fixed by section 5543; for, under the California law, commutation is allowed only to prisoners in the state prison.

Application for a Writ of Habeas Corpus.

A. P. Van Duzer, for petitioner.

Charles A. Garter, for the United States.

MORROW, District Judge. This is an application for a writ of habeas corpus on behalf of F. C. Deering, imprisoned in the county jail of Alameda county under a sentence of this court. The question presented involves a construction of the statutes of the United States in relation to the deduction to be allowed the prisoner from the term of his sentence. The petitioner was tried in this court in March, 1893, and found guilty of the crime of bringing within the United States, and landing, 29 Chinese laborers, contrary to law; and on March 22, 1893, he was sentenced to pay a fine of \$14,500, and to be imprisoned for the period of one year in the Alameda county jail. It is alleged that the petitioner cannot pay the fine, and is ready to take the oath prescribed by section 1042 of the Revised Statutes of the United States; but, as no question is raised concerning the imprisonment on account of the nonpayment of the fine, that feature of the case may be dismissed without further consideration. The controversy is as to what, if any, deduction should be made from the term of sentence under the provisions of the law on that subject. Section 5543 of the Revised Statutes provides as follows:

"All prisoners who have been, or may be, convicted of any offense against the laws of the United States, and confined in any state jail or penitentiary, in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the attorney-general."

Section 5544 provides as follows:

"The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jail or penitentiaries of any state for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."

Section 1 of the act of March 3, 1875, provides as follows:

"That all prisoners who have been, or shall hereafter be, convicted of any offence against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary

of any state or territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison penitentiary of such deduction shall be entered on the warrant of commitment: provided, that, if during the term of imprisonment the prisoner shall commit any offence for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled." 18 Stat. 479.

It is claimed that the deduction or credit provided in the act of 1875 would entitle the prisoner to his discharge. The district attorney contends that, as the state of California has a system of commutation for its prisoners, this act does not apply. Section 23 of the act of April 15, 1880, (St. Cal. 1880, p. 73,) provides a system of credits for convicts confined in the state prison, for the purpose of securing faithful labor and obedience to the rules and regulations of the prison. This act does not apply to persons imprisoned in the county jails, and the petitioner therefore claims that he is entitled to the benefit of the act of congress. The answer to this claim is that the act of congress applies only to United States prisoners who are confined in a prison or penitentiary of a state or territory,—that is to say, in a state or territorial institution,—and does not, in terms, or by fair interpretation of language, apply to a United States prisoner confined in a county jail. *U. S. v. Schroeder*, 14 Blatchf. 344, Fed. Cas. No. 16,233; *In re Terry*, 13 Sawy. 601, 37 Fed. 649; *U. S. v. Goujon*, 39 Fed. 773. The distinction is found in the fact that punishment for the higher crimes is generally executed in the state institution, where labor and a system of discipline is required, and a commutation of sentence is provided as a reward for service and good conduct. The question whether the prisoner is entitled to a deduction of one month provided in section 5543 of the Revised Statutes is not, I understand, pressed for a decision at this time; but, to save the trouble and expense of further proceedings, I am prepared to say that, in my opinion, he is entitled to such deduction. *U. S. v. Schroeder*, supra. There are no credits provided for the good behavior of prisoners confined in the county jails of this state, and hence it follows that the provisions of section 5543 of the Revised Statutes are applicable to a United States prisoner so confined. That part of this section relating to prisoners in a state penitentiary is undoubtedly superseded by the act of March 3, 1875; but it does not follow that the provision of the section relating to prisoners confined in jails is repealed or modified by that act, and in my opinion it is not.

In re WETHERELL.

(Circuit Court, D. Massachusetts. March 10, 1894.)

No. 3,602.

1. CUSTOMS DUTIES—"STEEL STRIPS."

Steel in the form of strips, 3 to 3½ inches wide, less than 25-1000 of an inch thick, and more than 100 feet long, which were cold rolled to a

surface finish, and not cut from wider pieces, is not "sheet steel in strips," within the meaning of Tariff Act Oct. 1, 1890, par. 148, cl. 2; for "sheet steel," as commercially understood, is always hot rolled.

SAME—RODS AND BARS.

Such strips of steel come within paragraph 146 of such act, which imposes a duty of two cents a pound on "steel in all forms and shapes not specially provided for;" but they are neither bars nor rods, and hence are not subject to the additional duty imposed by paragraph 152 on "steel bars or rods, of whatever shape or section, which are cold rolled."

At Law. Petition by Frank J. Wetherell for a review of the decision of the board of general appraisers assessing merchandise for duty.

Sherman Hoar, U. S. Atty.

Joseph H. Robinson and Selwyn Z. Bowman, for petitioner.

COLT, Circuit Judge. This is a petition praying for a review of a decision of the board of general appraisers, assessing, on several lots of steel imported into the port of Boston by the petitioner, a duty of 50 per centum ad valorem, under the second proviso of paragraph 148 of the tariff act of October 1, 1890, (26 Stat. 577.) The steel imported was in the form of strips from 3 to 3½ inches wide, more than 100 feet in length, less than 25-1000 of an inch in thickness, and valued at 6½ cents per pound. It was cold rolled to a surface finish, and was not cut or sheared from wider pieces. The collector levied a duty on the steel at the rate of two cents per pound, under the following clause in paragraph 146 of said act: "Steel in all forms and shapes, not specially provided for in this act;" and also an additional duty of one-fourth of one cent a pound, under paragraph 152, which provides for such additional duty "on all iron or steel bars or rods, of whatever shape or section, which are cold rolled, cold hammered, or polished in any way." The petitioner duly protested against this additional duty, and contended that the steel was only dutiable at the rate of two cents per pound, under paragraph 146. The board of general appraisers decided that the collector was in error, and held that the article is specially provided for; that it is sheet steel in strips, and subject to a duty of 50 per centum ad valorem under the second proviso of paragraph 148, which is as follows:

"That flat steel wire, or sheet steel in strips, whether drawn through dies or rolls, untempered or tempered, of whatsoever width, twenty-five one thousandths of an inch thick or thinner (ready for use or otherwise), shall pay a duty of fifty per centum ad valorem."

Upon the present petition, the United States contend that the board of general appraisers was right, while the petitioner insists that the import in question was only subject to a duty at the rate of two cents per pound, under paragraph 146. It is admitted that the steel is neither bars nor rods, and that, therefore, the collector was wrong in assessing the additional duty of one-fourth of one cent per pound, under paragraph 152. The whole question now in controversy turns upon the proper construction of the words "sheet steel in strips" in the second proviso of paragraph 148. There appeared before the board of general appraisers three witnesses, who

testified generally as to the commercial designation, and process of manufacture, of cold-rolled steel, sheet steel, and sheet steel in strips. The board of general appraisers, pursuant to an order of the court, made a return of the record and evidence, together with a statement of the facts involved and of their decision; whereupon the court made another order, referring the case to one of the appraisers to take and return such further evidence as might be offered by the petitioner or the collector. In pursuance of this order, the testimony of several additional witnesses was taken and returned to the court. I think the following conclusions of fact may be fairly drawn from the evidence: First. The steel in controversy had no fixed commercial designation on October 1, 1890. Various terms are employed by witnesses in describing it. It is called "cold-rolled strips," "strip steel," "cold-rolled clock-spring steel," "cold-rolled steel," "a strip," "common cold-rolled cast steel," "cold-rolled steel in strips," "sheet steel in strips," and "sheet steel." Second. Among merchants and importers there was, on October 1, 1890, no steel product which was specially denominated as "sheet steel in strips." Strips cut or sheared from sheet steel were dealt in by the trade to a limited extent, but they do not seem to have been imported in the form of strips, nor to have had any settled commercial designation. Third. The term "sheet steel" was known among merchants and importers on October 1, 1890, as designating a well-understood article in commerce, namely, a form of steel not less than 8 inches in width, not exceeding 12 feet in length, hot rolled, and produced in a sheet mill. Fourth. All the witnesses testified that the steel in question would not be known among traders and importers as "sheet steel in strips," because it is cold rolled, and from 100 to 250 feet in length. The only witness who qualifies in any way this statement is Mr. Moen, who says it was spoken of by himself and the men in his employ as "sheet steel" or "sheet steel in strips;" but he at the same time declares that it was sold to his company as "cold-rolled spring steel," and that it was known "in common usage" as "strip steel."

It is contended on behalf of the United States that, as the steel in controversy had no clearly established commercial designation on October 1, 1890, and the term "sheet steel in strips," in paragraph 148, had no specific commercial meaning at that time, congress must have intended to have used the words "sheet steel in strips" in their ordinary sense, and that, as so interpreted, the words aptly describe the steel in question. The word "sheet," it is said, signifies, in ordinary usage—First, thinness; secondly, breadth; and, if the qualifying words "in strips" be added, there is eliminated the characteristic of width, leaving unaffected the characteristic of thinness, and that, as thus construed, the whole expression means a thin, narrow piece of steel of any length. On the other hand, it is urged by the importer that the steel in question could not have been intended by congress to be classified as "sheet steel in strips," because it was never recognized among traders and importers as sheet steel in any form, but always as a steel product which was cold rolled in a strip form, whereas sheet steel, whether in strips or

not, was always hot rolled, produced in a sheet mill, and never more than 12 feet in length; and because congress, in the prior tariff act of 1883, (22 Stat. 499,) uses the word "strips" in the steel clause without the qualifying word "sheet;" that to construe the term "sheet steel in strips" in the present act to include the import in controversy is to entirely ignore the well-known and recognized commercial meaning of "sheet steel;" that it is, in effect, to eliminate the word "sheet" from the statute, and to construe the sentence as if it read "steel in strips, of whatsoever width, twenty-five one-thousandths of an inch thick, or thinner." The addition of the word "sheet" before "steel" makes the meaning of the expression "sheet steel in strips" doubtful, and I do not think the connecting words in the paragraph, "whether drawn through dies or rolls, untempered or tempered, of whatsoever width, twenty-five one-thousandths of an inch thick or thinner," help the contention of either side in the present controversy, or assist the court as to the proper construction of this paragraph. When the question of a tariff law is one of doubt, that doubt must be resolved in favor of the importer. The intention of congress to impose a higher rate of duty should be expressed in clear and unambiguous language. *Twine Co. v. Worthington*, 141 U. S. 468, 474, 12 Sup. Ct. 55; *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *Gurr v. Scudds*, 11 Exch. 190.

It seems to me that this case comes clearly within this rule. The decision of the board of general appraisers is reversed, and it is determined by this court that the several lots of steel covered by said decision should be classified under paragraph 146 of the tariff act of October 1, 1890, as steel in forms and shapes not specially provided for in said act, valued above four cents, and not above seven cents, per pound, and subject to a duty of two cents per pound, and not subject to an additional duty under paragraph 152 of said act.

SOCIAL REGISTER ASS'N v. HOWARD.

(Circuit Court, D. New Jersey. February 16, 1894.)

TRADE-MARK—INFRINGEMENT—SOCIAL REGISTER.

The words "Social Register," as applied to a list of persons resident in a certain locality, compiled by its publisher with reference to the personal and social standing of such persons, constitute a valid trade-mark, and their use by the publisher of a competing list will be restrained.

In Equity. On motion for injunction pendente lite. Bill by the Social Register Association against Frank Howard. Motion granted.

G. G. Frelinghuysen, for complainant.

John Albert McGown, for defendant.

GREEN, District Judge. The complainant has for a number of years published in the city of New York, under the distinctive name and title of "Social Register," a list of the names and resi-

dences of certain persons living in, and in the immediate vicinity of, New York City, including the town of Orange, N. J. These publications were at first monthly, but soon became, and are now published, quarterly. They are prepared with great care, not only as to the facts contained, but as well as regards the personal social standing of those whose names are "selected" for publication. The publication was evidently one of value to those who desired a list of this character, and speedily became pecuniarily remunerative to its projector. The Social Register was thoroughly well known, and to some extent might be regarded as authority upon the matter it concerned itself with. It coming to the knowledge of the complainant that the defendant, Frank Howard, had published a similar list of persons residing in Orange, N. J., which he called "Howard's Social Register," and which publication bore some resemblance to the complainant's publication, it caused notice to be served upon him, forbidding him to use the title "Social Register," which it claimed had become its property by virtue of its prior and distinctive use of those words, as a trade-mark. The defendant not heeding this notice, the complainant has filed its bill of complaint against him, for injunction and relief, and now moves for an injunction pendente lite, forbidding the defendant from using, as a title to his publication, the words "Social Register."

These words "Social Register" are clearly selected arbitrarily to designate the publication of the complainant, and cannot be properly called descriptive, in any sense. Hence, the words, when chosen, associated together, and applied to a list of persons selected at will by the compiler, as in the case at bar, become a trade-mark, and are entitled to protection as such. It is not necessary to cite authorities to sustain this statement. If this be so, undoubtedly the complainant is entitled to protection from any encroachment upon its acquired rights to the sole use of the terms so employed. Now, it can scarcely be doubted that to permit the defendant to use the same words to designate a similar publication, which is admittedly a rival, so far, at least, as the town of Orange may be concerned, would be to give to the defendant the advantage of the prestige which has already crowned the complainant's publication, and, while thus benefited, the defendant would, in equal degree, inflict damage, pecuniary in character, upon the complainant. This a court of equity should refuse to do. It should be its purpose and object, in matters of this sort, to prevent one from stealing away, unfairly, the business and good will which have been acquired by another. While fair competition promotes the public good, and is to be encouraged, unfair competition, based upon unlawful tactics, should be enjoined. The motion for injunction pendente lite is granted.

KERRY et al. v. TOUPIN.

(Circuit Court, D. Massachusetts. March 1, 1894.)

No. 3,179.

1. TRADE-MARKS—RIGHT TO—ALIENS.

Citizens of Canada, who are engaged in the manufacture of trade-marked articles, and who have a place of business in the state of New York, where they make and ship such articles for sale in the United States, are within the international convention of March 20, 1883, for the protection of industrial property; and they may sue in the United States courts for the infringement of their trade-marks by its citizens.

2. SAME—WHAT CONSTITUTES—INFRINGEMENT.

Complainants manufactured a medicinal compound under the name of "Syrup of Red Spruce Gum;" and for some 20 years or more that name was placed conspicuously on the package in which the compound was sold, and in connection therewith appeared a cut of an Indian against a background of spruce trees and a waterfall. *Held*, that the adoption and continuous use of this distinctive name and device entitle complainants to claim it as a trade-mark, and to be protected against its infringement by persons making similar goods.

In Equity. On final hearing. Bill by John Kerry and others against Hercule A. Toupin to restrain the infringement of complainants' trade-mark. Decree for complainants.

Edward S. Beach, for complainants.

John J. Hogan and William A. Hogan, for defendant.

ALDRICH, District Judge. This cause came on for hearing upon bill, answer, and proofs. In 1860 Henry R. Gray originated a medicinal preparation, to which he gave the fanciful name of "Syrup of Red Spruce Gum." The compound composed several ingredients, but the oleo-resin of the spruce was the leading medicinal feature. It is not necessary to consider the character of the preparation, further than to find that it was an original and artificial composition of several natural products, and a useful remedy in throat and lung troubles. The originator proceeded at once to manufacture and place such preparation before the public. It was put up in four-sided, oblong bottles, wrapped in blue wrappers, on which appeared, in conspicuous type, the trade-name, "Syrup of Red Spruce Gum," and in connection therewith the figure of an Indian, with a background of spruce trees and a waterfall. There was proper registration of such name and mark at Ottawa in 1872, and at Washington in 1874. Between 1860 and 1875, the originator used this name and mark continuously, and expended several thousand dollars in advertising and establishing the name and a trade. In 1875 he assigned all his rights to Kerry, Watson & Co., of Montreal, to which the complainants have succeeded. Since 1875 the complainants have used the name, mark, and wrapper continuously, and have expended, as the evidence shows, something like \$7,000 annually in advertising. They have a manufactory and place of business in Montreal, and for about 15 years have had a place of business at Rouse's Point, N. Y., where they manufacture and ship to various points in the United States. The complainants' annual

output is something like 1,000 gross in Canada, and 500 gross in the United States; and the evidence shows that the preparation has merit, and an established reputation in the markets.

The complainants, in this proceeding, do not now rely on the registration for relief, but urge the certificates as evidence of the adoption of the name, mark, and wrapper. Neither do they ask to be protected in a monopoly of their product, but against the use by the defendant of their trade name and mark under circumstances which shall induce the public to buy another preparation, supposing it to be the "Syrup of Red Spruce Gum" placed in the market by the complainants; and to this extent, I think, they are entitled to protection. The complainants, citizens of Canada, having an industrial or commercial establishment in the state of New York, would seem to be within the third and eighth articles of the international convention of March 20, 1883, in which Great Britain joined, for the protection of industrial property. As translated, (*La Republique Francaise v. Schultz*, 57 Fed. 37, 40,) the treaty covers trade-marks, commercial marks, and commercial names, as well. The complainants' name, "Syrup of Red Spruce Gum," adopted and continued in the manner shown, is a trade-name, and the device embodying the name and the cut, as printed on the blue wrapper, has become a distinctive mark in the trade, as applied to their cough mixture, and as such is entitled to protection. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A. 264, 54 Fed. 175, 7 U. S. App. 588.

The defendant has adopted a bottle so similar in shape, and a wrapper so similar in color, with a combination of words, including the name, "Syrup of Red Spruce Gum," conspicuously displayed, with a border and cut so like the complainants' in general appearance, as to compel the conclusion that the purpose was to trade on the complainants' reputation, and the notoriety created by a long and continuous use of their distinctive marks and name. That the defendant has changed the wrapper somewhat in detail does not relieve him. He has studiously preserved a catching general appearance, well calculated to deceive the trade, and induce the public to buy his preparation, supposing it to be the preparation known as the "Syrup of Red Spruce Gum" which the complainants and their grantor have continued in the markets for 30 years or more. The complainants are entitled to an injunction in accordance with these views, and to an accounting, and it is so ordered.

RICHARDSON et al. v. SHEPARD et al.
(Circuit Court, D. Massachusetts. March 9, 1894.)

No. 3,100.

1. PATENTS FOR INVENTIONS—ANTICIPATION—HOOKS AND EYES.

Letters patent No. 411,857, granted October 1, 1889, to Frank E. De Long, were for an improvement in the ordinary hook for garments, consisting in the addition of a spring tongue placed intermediate between the side bars of the hook, its free end forming a loop coincident

with the bend of the hook; the tongue itself being bowed out towards the forward part of the hook, so that it will engage the eye, when fastened, and hold it in place. *Held*, that this was not anticipated by patent No. 195,825, granted October 2, 1877, to Joel Jenkins, for a safety pin whose guard has an "obstruction" to prevent the point of the pin being withdrawn from the guard by accident; for such obstruction has no spring, and is not displaced by inserting and removing the pin, as the tongue in De Long's patent is, where the hook engages the eye.

2. SAME.

Nor is De Long's device anticipated by English patent No. 8,068, granted in 1839 to John H. Rodgers, for a hook with a spring-bowed tongue to perform the same function as De Long's; for the Rodgers tongue does not form a loop coincident with the bend of the hook, and, in operation, its free end tends to abrade the garment, and to become so much displaced as to prevent the eye being withdrawn from the hook at all.

In Equity. On final hearing. Bill by Thomas De Q. Richardson and others against John Shepard and others for the infringement of complainants' patent. Decree for complainants.

Fish, Richardson & Storrow, Strawbridge & Taylor, and Bradbury Bedell, for complainants.

Thomas Ewing, Jr., for defendants.

COLT, Circuit Judge. This is a bill in equity brought for infringement of letters patent No. 411,857, granted October 1, 1889, to Frank E. De Long, for an improvement in hooks or fastenings for garments. The improvement of De Long over the ordinary hook consists in the addition of a spring-bowed tongue, placed intermediate between the side bars of the hook, and which forms a loop coincident with the bend of the hook. The specification says:

"Between the front and rear portions of the hook, and secured to a proper part thereof, is a spring tongue, B, which occupies part of the space between said portions, and is bowed or swelled outwardly so as to approach the front portion. * * * It will be seen that when an eye, loop, or ring is presented to the hook, and drawn between the front and rear portions thereof, it bears against the tongue, and rides over the same, forcing it backward so that said eye, etc., or ring is permitted to pass to the bend, D, the tongue then closing or returning to its normal position, and serving to retain the eye, etc., on the hook; it being noticed that the tongue prevents the return or displacement of the eye, etc., from the hook."

The single claim of the patent is as follows:

"A hook comprised of a hook proper and a shank formed of substantially parallel bars, and a tongue having its free end forming a loop coincident with the bend of the hook; said tongue and loop being intermediate of said side bars, substantially as described."

The only defense urged at the hearing was the invalidity of the patent, in the light of the prior state of the art. Of the many patents introduced in evidence as anticipating the De Long invention, I deem it necessary to consider only two,—the English patent No. 8,068, granted to John H. Rodgers, in 1839, and patent No. 195,825, granted to Joel Jenkins October 2, 1877. The Rodgers hook has a yielding resilient, humped tongue, and to this extent is similar to the De Long structure; but the end of the tongue, in this hook, is not carried around the bend of the hook. There are

two defects in the Rodgers hook: First, the end of the tongue, when the eye is inserted in the hook, is pressed down below the plane of the shank of the hook, and, coming in contact with the fabric, tends to abrade it; and, second, in inserting the eye in the hook, the spring tongue may become bent or displaced, in which case the eye, in attempting to unhook it, may pass behind or under the end of the tongue, and so prevent the disengagement of the eye from the hook. This hook was not a commercial success. The Jenkins patent is for a safety pin. The guard, which is integral with the wire of the pin, is composed of a series of convolutions lying close together, and forming a flat surface or bearing. This surface is then bent over, making a recess with two parallel, flat sides, within which the point of the pin is received, and protected by the upper and lower surface of the guard. The specification then declares:

"To prevent the point of the pin from being withdrawn from the guard, a, by accident, a small obstruction, c, is formed in the under surface of the guard, by bending one or more of the convolutions."

This obstruction offers no obstacle to the free insertion of the pin within the guard, but affords just enough resistance to its being withdrawn therefrom to hinder accidental displacement. The language of the Jenkins patent, and an inspection of the pin made in accordance therewith, show that the "small obstruction" in the guard of the pin does not perform the same function, and is in no proper sense the resilient, spring tongue of the De Long hook. It has no appreciable spring movement. It is not depressed when the point of the pin is inserted, and it does not spring back, thereby holding the point of the pin within the recess. The change in structure from Rodgers to De Long may seem slight, and, now that we see it, simple; but this is no sufficient reason for denying invention or patentability, where a beneficial change, embodying a new and better mode of operation, has been produced. It must also be remembered that numerous patents on hooks were taken out between the invention of Rodgers, in 1839, and of De Long, in 1889, and that it did not occur to any one engaged in developing this branch of the art to make the change which is found in the De Long device. This circumstance strongly tends to prove that such a modification of the Rodgers pin would not be obvious to one skilled in the art, and that, therefore, it called for the exercise of the inventive faculty. If we add to this the further circumstance that most of these prior efforts were failures, and that none of them met with more than moderate success, and contrast this with the great utility, extensive public use, and marked commercial success of the De Long hook, I think these considerations are sufficient to resolve any doubt on the question of patentability in favor of the patentee. *Washburn & Moen Manuf'g Co. v. Grinnell Wire Co.*, 24 Fed. 23; *Manufacturing Co. v. Haish*, 4 Fed. 900; *Reiter v. Jones & Laughlin*, 35 Fed. 421; *Wilcox v. Bookwalter*, 31 Fed. 224; *Hitchcock v. Tremaine*, 9 Blatchf. 550, Fed. Cas. No. 6,540; *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757; *Loom Co. v. Higgins*, 105 U. S. 580; *Consolidated Safety-Valve Co. v. Crosby, etc., Valve Co.*, 113

U. S. 158, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450.

Decree for complainants.

DAVIS ELECTRICAL WORKS et al. v. EDISON ELECTRIC LIGHT CO. et. al.

(Circuit Court of Appeals, First Circuit. February 9, 1894.)

No. 83.

PATENTS—INFRINGEMENT—REPAIR AND RECONSTRUCTION—ELECTRIC LAMPS.

It is reconstruction, and not merely repairing, to make a hole in the bulb of an Edison incandescent electric lamp, (patent No. 223,898,) in which the carbon filament has been destroyed by use, and put in a new filament having its ends inserted in platinum sleeves, close the hole by fusing a piece of glass over it, and then exhaust the air. 58 Fed. 878, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity brought by the Edison Electric Light Company and the Edison General Electric Company to enjoin the Davis Electrical Works, Leonard L. Davis, and Charles F. Wittemore from infringing the Edison incandescent electric lamp patent No. 223,898, issued January 27, 1880. A preliminary injunction was granted below, (58 Fed. 878,) and defendants appeal to this court under the seventh section of the judiciary act of March 3, 1891. The matter complained of was that defendants were engaged in replacing the carbon filament of Edison lamps, after the original filament had been destroyed by use. This, complainants alleged, was a reconstruction of the lamp, amounting to infringement of the patent; while defendants claimed that it was mere repairing, which they were entitled to perform. The process, as described by the court below, was as follows: "The defendants first break off the tip of the glass bulb of the lamp, and ream out a hole about one-half inch in diameter. The broken filament is then removed. The new filament, having its ends cemented into platinum sleeves, is then inserted into the glass chamber, the sleeves being pushed down over the two platinum leading-in wires, and compressed upon them. A tube of glass, made into the shape of a tunnel, is heated, and placed over the hole in the lamp chamber. This tube is fused into the open end of the bulb, which brings it into the condition of the ordinary lamp bulb just prior to exhaustion. The air is then exhausted, and the bulb sealed."

John L. S. Roberts and John Lowell, for appellants.

F. P. Fish, Richard N. Dyer, and W. K. Richardson, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. In this case the circuit court, on the 13th day of December, 1893, entered an order for a preliminary injunction, and for a writ of injunction to issue accordingly. From that order the defendants below, in accordance with the seventh section of the act establishing this court, took an appeal, which came on to be heard on the 18th day of January, 1894. It does not appear that a supersedeas was obtained or asked for.

A preliminary question was made at the bar touching the nature

of the adjudication to be made by this court on an appeal of this character. The appellees have brought the attention of the court to the ruling of the circuit court of appeals in the sixth circuit, found in *Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 3 C. C. A. 455, 53 Fed. 98, the pith of which is in the closing words of a sentence on page 458, 3 C. C. A., and page 102, 53 Fed.:

"This court, under the present appeal, is not called upon to make any final decision as to the validity of the patent or the infringement thereof, nor is the consideration of those questions either necessary or proper, further than to ascertain whether the order complained of was an improvident exercise of a legal discretion on the part of the circuit court."

It is claimed that the same rule has been reached in the second circuit in *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229; in the third circuit in *Consolidated Electric Storage Co. v. Accumulator Co.*, 5 C. C. A. 202, 55 Fed. 485; and in the fifth circuit in *Hart v. Buckner*, 5 C. C. A. 1, 54 Fed. 925, and in *Workingmen's Amalgamated Council of New Orleans v. U. S.*, 6 C. C. A. 258, 57 Fed. 85. The appellees also refer to *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, and especially to a proposition found on page 24, and to the alleged practice in England and elsewhere, as stated in *Daniell*, Ch. Pr. (4th Ed.) p. 1462, and in *High, Inj.* (3d Ed.) § 1696.

We do not find it necessary to comment on these citations, except to suggest that that from the second circuit, especially in view of *Curtis v. Wheel Co.*, 58 Fed. 784,¹ may be found to lean against the appellees. If their position is correct, the result is that parties aggrieved by orders of circuit courts, under circumstances like these at bar, are disenabled from having "the case" tried on appeal, and are cut down to a question whether or not the court below has acted within the limits of its discretion. This court has regarded the purposes of the section in question as highly remedial, and has not been disposed to clip its wings in any particular; but whether it will limit the exercise of its judicial powers as claimed by the appellees need not now be determined, because, in either view of the question, we should reach the same result. We are satisfied that the order of the circuit court was within the limits of its judicial discretion, and also, on examining the case *de novo*, that that discretion was correctly exercised.

The case was heard in the court below on affidavits, and before any answer was filed. It is conceded that the second claim of the patent in controversy, which is the only claim of which we are requested to take cognizance, is valid, at least for the purposes of this hearing; and, for the same purposes, it is proper to accept the conclusions of the United States circuit court of appeals for the second circuit, which will hereafter be cited, as to the construction of the claim and the advance from the prior state of the art which it represents. Therefore our conclusions will be without prejudice to any question touching the validity of the patent or its construction, or the advance from the prior state of the art which it repre-

¹7 C. C. A. 498

sents. The only matter really in question before us is that of infringement; and even touching this, inasmuch as the case is now heard without answer and on affidavits, whatever conclusion we now reach would not necessarily preclude a different one, if the case should hereafter come to us on an appeal from a decree entered after a hearing on bill, answer, and proofs. The claim in controversy is in the following language:

"2. The combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth."

While there may be some matters of detail in construction described in the specifications which are novel, but as to which the court is not now called upon to determine whether, if claimed, they would have been patentable, it appears, on the case presented, that, of the elements in the combination set out in claim two, the carbon filament, in use in a vacuum, represents the entire advance from the state of the art, so far as this claim is concerned. Such appears to have been the substantial finding in the opinion of the United States circuit court of appeals in the second circuit in *Edison Electric Light Co. v. United States Electric Lighting Co.*, 3 C. C. A. 83, 52 Fed. 300. The judgment following this opinion was filed in the court below on the hearing of the motion for the injunction appealed from, and the opinion was probably laid before that court, though the record does not show it. It is, however, submitted for our consideration without objection, and is certainly to be considered on a question of an ad interim injunction. It contains the following:

"Edison's invention was practically made when he ascertained the therefore unknown fact that carbon would stand high temperature, even when very attenuated, if operated in a high vacuum, without the phenomenon of disintegration. This fact he utilized by the means which he has described,—a lamp having a filamentary carbon burner in a nearly perfect vacuum."

As strong an expression as any of the rule from which flows the right to repair a patented device which has been put on the market is found in *Chaffee v. Belting Co.*, 22 How. 217, 223, as follows:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated. Hence it is obvious that, if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind."

This, and other expressions of like character in the decisions of the supreme court, as in *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, are, however, of a general nature, and were made with reference to the interests of the

purchaser of a patented device as against an extension of the patent, or with reference to territorial rights. Out of this rule, however, flows the right of repair, on which the appellants rely; yet in no case has the supreme court held that this right is absolute and universal, or that it may not be limited by express or implied restrictions entering into the transaction of the sale of the patented machine or device. Expressions the other way may be found in *Wilson v. Simpson*, 9 How. 109, 125; *Adams v. Burke*, 17 Wall. 453, 457; and *Hobbie v. Jennison*, 149 U. S. 355, 363, 364, 13 Sup. Ct. 879. We prefer, however, not to rest the case on any implied reservation arising from the nature of the device now in question, although leaning to an agreement with the circuit court in that particular, as we are clear that the work done by defendants is not reparation, but reconstruction.

In considering this proposition, it must be conceded that we can draw no direct assistance from *Wilson v. Simpson*, *ubi supra*, where merely replacing the cutters in a large patented combination, constituting a planing machine, was all that was done. The only other decision of the supreme court brought to our attention which bears directly on what constitutes reparation is *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52, which, while the facts in no two cases can be strictly analogous in all respects, is very persuasive in favor of the complainants below. In that case, the third claim of the Brodie patent, the combination which made up the cotton tie, included a band and a link or buckle. The court said, (page 93, 106 U. S., and page 52, 1 Sup. Ct.):

"The band in a condition fit for use with the buckle is an element in the third claim of the Brodie reissue."

And the court continued on page 94, 106 U. S., and page 52, 1 Sup. Ct.:

"The band was voluntarily severed by the consumer at the cotton mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation, or the press, to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that. The case is not like putting new cutters into a planing machine in place of those worn out by use, as in *Wilson v. Simpson*, 9 How. 108."

The court held that Brodie's third claim was thus infringed.

To paraphrase the above citation, it might be said that the capacity of the filament in the case at bar for use as such was voluntarily destroyed, not, to be sure, by breakage, but by continuous voluntary use, and that, after it was taken out by the respondents, it could not be used again as a filament. This, however, standing alone, may be misleading. Therefore, it is necessary to look further.

We need to be careful not to be deceived by the form of things. In the planing machine every part might be renewed in succession, or every joint might be temporarily taken apart, and every element laid in disorder, without necessarily involving reconstruction. On the other hand, in certain stages of use the essence of a device,

though in appearance only a small portion of it, may be lost, and its renewal amount to reconstruction. Whether the result is this or reparation depends less on the determination of rules of law, or of successive propositions in a logical series, than on the direct apprehension of questions of fact by the sound mind, trained in the common experience of mankind, and guided by the evidence laid before it. The conclusions which for the major part satisfy that apprehension must be accepted, although they may be very far from infallibility. In the absence of a crucial test to which all must yield, the only aid comes from various minor or incidental considerations, and their combined effect.

We are dealing in this case, not with a lamp, nor even with a so-called electric lamp, but with the particular so-called electric lamp covered by the claim in question here. In determining between reparation and reconstruction, we must deal with the essence of that, and of that only. It may be that for many patented combinations each element is, for some purposes, of equal value, as claimed by the appellants; but this rule is limited mainly to the question of the construction to be put by the court on the patent, when that is in doubt. It cannot control the apprehension of courts or juries, when seeking out the substance of things, with reference to the particular determination whether what is in form reconstruction is in truth reparation, or vice versa. The latter question is, as already said, one largely of fact, appropriate in suits at law for a jury, under proper instructions from the court; while the rule that, *prima facie*, all elements of a particular combination are of equal value, or at least essential, is presumably one of law, arising sometimes on the face of the patent, and at other times to be determined by the court in view of whatever extrinsic facts may be applicable.

The proposition of the appellants that, if the injunction stands, it gives the complainants below the same benefit as though the patent contained a claim for the filament alone, serves properly to caution us, but cannot operate as a definitive limitation on our conclusions. For the latter purpose the argument goes too far. In the Telephone Cases, 126 U. S., the court said (page 533, and 8 Sup. Ct. 778) that other inventors might compete with Bell for the ways of giving effect to his discovery, yet in the state of the art as it was then the conclusions of the supreme court gave Bell a practical monopoly of that discovery. So, ordinarily, if the new element in a combination is associated in the claim with additional elements which, in the state of the art, there is no practical method of replacing by others, the patentee obtains the same practical advantages as though this new element had been claimed alone,—at least until the art makes new discoveries. Neither in such instances, nor in the case at bar, is the course of the law to be turned aside because the practical result may be to give a patentee for the time being more than the patent office contemplated, nor is the patentee to be deprived of his just rights because under some circumstances he gets incidental advantages beyond what he expressly bargained for. We do not in terms give the patentee the benefit of a claim for the filament alone, nor prohibit its use in some other combination than

that set out in the second claim, if some ingenious way of making such other combination is ever discovered.

The appellants do not bring themselves within the expression in *Wilson v. Simpson*, 9 How. 125, renewed in substance in *Cotton-Tie Co. v. Simmons*, 106 U. S. 94, and page 52, 1 Sup. Ct., to the effect that temporary parts may be replaced "in accordance with the intention of the vendor." While the supreme court has not expressly given this as a limitation, it may be made effectual as a permit where the facts authorize it. In this case the plan of construction, which permits no severance of the parts by any ordinary method of detachment, the sale price of the entire device, about 30 cents, the comparatively large cost of the so-called reparation, the special skill required to make it, the fact proven that the device is made so cheaply that it can be thrown away without substantial loss when the filament is worn out, and the experience that, though the patent had run about 13 years, and some 13,000,000 lamps had been made before respondents below commenced the so-called reparations, destruction of the lamp after the filament was worn out had been the rule, distinguish this device in this respect from those which preceded it, exclude the suggestion of either express or implied assent by the patentees to a renewal of the filament, and compel the appellants to meet directly the issue of reparation as against reconstruction.

In the view of the court, the attempted analogy by which the appellants seek to maintain their position shows the futility of their efforts to do so, and guides the mind to the proper solution of this case. Their affidavits contain the following expressions:

"It seems to me that the replacing of a carbon filament in a burned-out electric lamp does not in any manner change the lamp itself, or its constituent parts, any more than replacing the wick in a kerosene lamp; and the opening of the glass bulb and exhausting the air, and resealing it, in order to replace the filament, does not change the construction of the lamp any more, nor to any greater extent, than the removal of the glass chimney from a kerosene lamp, in order to replace a burned-out wick, and then to replace the chimney where it was before."

"The only thing added to the extinguished lamp is a carbon filament, the same as replacing the old burnt-out wick of a lamp by a new one."

They also use the following:

"In the above-described operation of repairing said incandescent electric lamp, every part thereof which existed in it when it was a new lamp, excepting the filament thereof, exists in the repaired lamp, and it is still the same old lamp, excepting the filament."

The suggestion that the worn-out filament in the Edison device stands for the old burnt-out wick of an ordinary lamp is not sustainable. So far from the filament being the mere wick, it is itself essentially the lamp; that is, the electric lamp of Edison. Everything else, the globe and the conductors, are, for this case, only the chimney, the stand, and the opening for inserting the oil or other fluid, found in the ordinary domestic lamp. To make our proposition clear, we refer to the fact that the witnesses use with perfect naturalness the expression "arc lamp," although this has no receiver of glass, no vacuum, and no other detailed incidents of the device in

controversy, nor anything which stands for them. In the first claim of the patent in suit an electric lamp is described, with entire correctness, as "consisting of a filament of high resistance, made as described, and secured to metallic wires as set forth." The analogy fails in essential particulars, and, in failing, suggests a distinction, as already said, which is fatal to the case the analogy was intended to support.

In essence, the filament, duly charged, is the light-giving thing. It can give light without the glass receiver or the vacuum, though it does it better and longer with them. The glass receiver was old and common; the vacuum and the knowledge of its uses were old, though carried forward by Edison's perfected mechanical details; the conductors and all the other elements, named and not named, are subject to the same observation, except only the filament and its use in the relations described. If offered without a filament, the device would be in essence only a manufacturer's blank, from which an electric lamp could be set up, but not the lamp itself. When deprived of its filament, it becomes again a manufacturer's blank. In this respect the device is essentially unlike Woodworth's planing machine, which would commonly and properly be designated as such even without the cutters, although, as the supreme court said, they formed "an essential and distinct constituent of the principle or combination of the invention." We are speaking now, as said before, not of what is the substance in view of the patent law in preparing or construing a claim, but in view of things as things, and of a practical understanding of reparation and reconstruction. There was no express or implied consent that the filament might be renewed, and to renew it, with or without that consent, was as a matter of fact and, in a practical sense, reconstruction. We therefore adopt the language of the court below as follows:

"From the very nature of the Edison invention, I do not see how the glass bulb can be opened and a new filament inserted without making essentially a new lamp."

The business under the patent has been long established, manufacturing about 1,000,000 lamps annually. The fundamental basis of jurisdiction in equity in relation to patent rights and trade-marks is the necessity of protecting established enterprises from the great uncertainty caused by infringements, and by the difficulty of measuring the direct and indirect losses if infringements continue. The business of the defendants below was recently commenced under such circumstances that they must, or ought to, have understood that they would be subjected to the hazards of this litigation. The essential facts, and the validity and construction of the patent in question, are not now in dispute. The inferences to be drawn from those facts appear to the court to be clear. The case, therefore, seems particularly appropriate for an ad interim injunction.

Whatever order may be made on an appeal of this character ought not ordinarily to exclude the court below from its control over an ad interim injunction, and must not ordinarily be construed to have that effect. In the present case, the injunction order does not seem to have been superseded by the appeal. With this explanation,

we adopt for the present the form of order which we find in other circuits.

Order appealed from affirmed, with costs.

WEBB, District Judge, concurs in the result.

WOODWARD et al. v. BOSTON LASTING MACH. CO.¹

(Circuit Court of Appeals, First Circuit. March 5, 1894.)

No. 61.

1. PATENTS—INFRINGEMENT—ESTOPPEL OF ASSIGNOR.

The assignment of a patent by the patentee estops him, when sued for infringement thereof by the assignee, from denying patentable invention.

2. SAME.

The fact that certain persons construct, use experimentally, and offer for sale, machines designed by an inventor who has previously assigned a patent for machines to do the same work, raises a presumption of privity between him and them, sufficient to render applicable to them the same estoppel which prevents him from denying patentable invention in the assigned patent.

3. SAME—DIFFERENCES IN CONSTRUCTIONAL DETAILS.

Differences in constructional details, constituting a possible improvement on the invention of the patent, do not avoid infringement, when all the essential elements of the best form of that invention are retained.

4. SAME—LASTING MACHINES.

The Woodward patent, No. 248,544, for a lasting and tacking machine, held to have been infringed by defendants. 53 Fed. 481, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Boston Lasting Machine Company against Erastus Woodward, James Barrett, and Thomas Barrett, for infringement of the Woodward patent, No. 248,544, for a lasting and tacking machine. The court below adjudged infringement of the second, third, and fourth claims of the patent, but declared the first and fifth claims to be void. 53 Fed. 481. From this decree the defendants appeal.

George O. G. Coale, for appellants.

James E. Maynadier, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. This suit was brought against Erastus Woodward and others for infringement of a patent (No. 248,544) granted to said Woodward October 18, 1881, and duly assigned to the plaintiff, the Boston Lasting Machine Company. The invention is for a tacking machine which will drive only one nail, and then stop, and which is actuated by the pressure of a jack. The machine covers the combination of three elements: (1) Fastening-driving mechanism; (2) start and stop motions, whereby the machine is automatically started and stopped after one tack is driven; and (3) a jack for presenting the work to be operated upon to the nozzle

¹ Rehearing pending.

of the tacker, and provided with contrivances adapted to press the work against the nozzle,—these parts being so organized that the act of placing the work in proper position for receiving the fastening by means of the jack starts the driver, drives the fastening, and stops the machine. The specification says:

"The act of placing the work in proper position for receiving the fastening starts the fastening-driving mechanism, drives the fastening, and stops the mechanism; and, as the work is presented to the nozzle of the fastening-driving machine by means of a foot treadle, it will also be observed that the act of depressing the treadle not only places the work in proper position to receive the fastening, but also causes the fastening-driving machine to be actuated."

The defenses relied upon are the invalidity of the patent, and noninfringement.

As to the first defense, it is contended that the patent is void for want of patentable novelty, in view of the state of the art at the time, and especially by reason of a prior patent granted to said Woodward August 30, 1881, or about three weeks before the date of his application for the patent in suit. In this prior patent, it is said, Woodward describes the real improvement which he made over tacking machines which then existed, such as the Holt and Williams and Woodward & Brock machines, which improvement consisted in the automatic start movement in a tacking machine, which drives only one nail, and then stops. It is said that the only improvement found in his patent in suit which is not contained in his earlier patent is the addition of a jack, which was old and well known, and, further, that Woodward suggests in his earlier patent the use of such jack, in the following language, found in the specification:

"I herein describe my invention as being operated by means of the work held by the operator, or by a jack which is moved by the operator, although, of course, I do not confine myself to this especial manner of operation, as the machine may be started by hand or by foot, or in any other desirable way."

Whatever force there may be in these suggestions, it does not seem to us that Woodward is at liberty to urge them as a defense in a suit upon his own patent against a party who derives title to that patent through him. It is clearly inequitable for a patentee to sell or assign his patent, and then, in a suit against him for infringement by his assignee, to set up that the patent is void for want of invention. The assignor of a patentable invention is estopped from denying the validity of the patent, or his own title to the interest transferred. He cannot practice the invention contrary to the provisions of his assignment; and, when sued for infringement, he is not permitted to set up in his defense the invalidity of the patent, or his own inability to convey it. 2 Rob. Pat. p. 555, § 787; Walk. Pat. § 469; Underwood v. Warren, 21 Fed. 573; Telegraph Co. v. Carey, 22 Blatchf. 34, 19 Fed. 322; Parker v. McKee, 24 Fed. 808; Many v. Jagger, 1 Blatchf. 372, Fed. Cas. No. 9,055; Curran v. Burdsall, 20 Fed. 835; Burdsall v. Curran, 31 Fed. 918; Rumsey v. Buck, 20 Fed. 697.

The two parties, besides Woodward, named as defendants, are James and Thomas Barrett. It appears by a stipulation in the

record that the two alleged infringing machines were designed by Woodward, and constructed according to his designs, and that they were made, used experimentally, and offered for sale by the defendants Barrett. In the absence of any further evidence, we think this creates such a presumption of privity between the parties that all are estopped from disputing the validity of the patent. *Telegraph Co. v. Carey*, 22 Blatchf. 34, 19 Fed. 322.

On the question of infringement, we entertain no doubt. In the two machines constructed by Woodward and which the plaintiff says infringe the patent, the driver is continuously in operation, or, in other words, the automatic starting and stopping mechanism controls the tack feed only, while, in the machine covered by the patent, both the tack driver and tack feed are controlled by the automatic starting and stopping mechanism. There are also other differences in constructional details, having special reference to the starting and stopping mechanism. It may be that these alleged infringing machines are an improvement upon the invention covered by the Woodward patent in suit, but they still have all the essential elements of the best form of that invention, and therefore must be held to infringe it.

Decree of the circuit court affirmed.

OVAL WOOD DISH CO. et al. v. SANDY CREEK, N. Y., WOOD MANUF'G CO.

(Circuit Court, N. D. New York. March 5, 1894.)

No. 5,959.

1. PATENTS—PRIOR USE.

The defense of prior use must be established beyond a reasonable doubt.

2. SAME—TWO PATENTS FOR SAME INVENTION.

After an inventor has secured a patent for a concavo-convex dish cut or scooped from a block of wood by a revolving curved knife working alternately with a flat facing-off knife, and another patent for a machine for thus making the dish, he cannot secure a third valid patent for the process of making the dish, as it would be, practically, a new patent for matter covered by the prior ones. *Plummer v. Sargent*, 7 Sup. Ct. 640, 120 U. S. 442, followed.

3. SAME—INVENTION—LIMITATION—WOODEN DISHES.

The Smith patent, No. 273,773, for a wooden dish, is restricted by the specification to a dish cut or scooped from a block of wood by a revolving curved cutting knife or its equivalent, and as thus construed shows invention and is valid.

4. SAME—INVENTION—WOODEN DISH MACHINES.

The Smith patent, No. 273,198, for a machine for scooping out wooden dishes from a block of wood, and consisting of a revolving curved cutting knife and a flat facing knife, shows invention of a high order, and is entitled to a reasonable application of the doctrine of equivalents.

5. SAME—INFRINGEMENT—EQUIVALENTS.

Infringement of a patent for a machine for scooping out wooden dishes is not avoided by making the cutting knife oscillate instead of revolve, and the flat facing knife reciprocate vertically instead of revolve around a shaft, for in each case the devices are mechanical equivalents.

In Equity. Suit by the Oval Wood Dish Company and Seth H. Smith against the Sandy Creek, N. Y., Wood Manufacturing Company for infringement of certain patents relating to wooden dishes.

Almon Hall, Matteson & De Angelis, Arthur Stem, and Lysander Hill, for complainants.

James P. Foster and Andrew Wilson, for defendant.

COXE, District Judge. This is an equity action, based upon three letters patent, granted to Seth H. Smith and now owned by the complainants. A fourth patent, No. 322,017, granted July 14, 1885, to Smith for a knife for cutting dish blanks, is included in the bill, but the court decided at the argument that it was not infringed. The action is, therefore, upon the other three.

The first of these, No. 273,773, was granted March 13, 1883, for a wooden plate. The application was filed November 22, 1882. The second, No. 276,198, was granted April 24, 1883, for a machine for cutting wooden plates. The application was filed January 27, 1883. The third, No. 278,828, was granted June 5, 1883, for the process of cutting articles from wood. The application was filed January 31, 1883. In brief, then, the patents are first, for a machine, second for the process of the machine, and third, for the product of the machine.

No. 273,773.

The specification of this patent, which is first in order of time, says:

"This invention relates to plates or dishes for butter, berries, and for other purposes; and it consists of a concavo-convex shell segmental in cross-section, and with a level or horizontal upper edge, the same being cut or scooped in a single piece from the face of a block of wood, as will be hereinafter fully described and particularly pointed out in the claims. * * * My improved plates are made of wood in a single piece by cutting them from the face of a block, across the grain of the latter. This is done by means of a machine which I have made the subject of a separate application for letters patent, and which comprises a revolving curved-knife for scooping or cutting the shells from the face of the block, and a flat facing-knife for facing off the block after each stroke of the cutting knife. By this facing-off process, which takes place intermittently with the operation of the cutting-knife, the upper edge of each shell is leveled off smoothly, thus preventing splitting or slivering, and causing all the dishes or shells cut by the same machine to be of exactly the same size and shape, so that they may be nested together in the smallest possible space for transportation."

All the claims are involved. They are:

"1. A plate or dish cut or scooped from a block of wood in concavo-convex form, as an article of manufacture.

"2. A plate or dish cut or scooped from the face of a block of wood in concavo-convex form and segmentally in cross-section, as an article of manufacture.

"3. A plate or dish consisting of a shell cut or scooped from the face of a block of wood in concavo-convex form and with horizontal upper edges, as an article of manufacture.

"4. A plate or dish consisting of a shell cut or scooped from the face of a block of wood in concavo-convex form, segmentally in cross-section, and with horizontal upper edges as an article of manufacture."

The defense is that the claims are too broad and the patent void for that reason.

No. 276,198.

The invention of this patent, as stated in the specification, relates to a machine for cutting continuously from a block of wood concavo-convex shells, plates or dishes, serving as packages for butter, berries and for other purposes. The invention consists in certain improvements in the construction of the said machine. The specification describes minutely the construction of the machine and proceeds:

"After moving the follower back, a block of wood of the proper size is placed in the trough and clamped by the dogs. When the machine is started the block is fed to the knives or cutters, which are to be so arranged in relation to each other and to the feed that the feed shall take place after the curved knife completes its passage across the face of the block and before the facing knife reaches the edge of the same, while the latter must nearly or quite complete its throw before the cutting knife comes into action. The function of the latter is to cut from the face of the block shells or concavo-convex dishes, while the facing-knife before each throw of the cutting-knife faces off the block, thus causing the cutting-knife to cut always from the face of the block, and make all the shells cut of exactly the same size and shape."

The claims involved are the first and second. They are as follows:

"1. A machine for cutting concavo-convex shells continuously from a block of wood, the same comprising in its construction a revolving curved knife having both its ends attached to the driving-shaft, and a facing-knife attached radially to a shaft located at an angle to the driving-shaft, substantially as set forth.

"2. In a machine for cutting concavo-convex shells continuously from a block of wood, the combination of a revolving curved knife having both its ends attached to the driving-shaft, a facing-knife attached radially to a shaft located at an angle to the driving-shaft, and mechanism for feeding a block intermittently to said knives after the throw of the cutting-knife and before the throw of the facing-knife, substantially as set forth."

The defenses are that, with the claims limited as the defendant insists they must be by reason of the prior art, they are not infringed.

No. 278,828.

The specification of this patent states:

"This invention relates to an improved art or method of cutting continuously from a block of wood concavo-convex or curved articles, such as thin plates or dishes suitable for grocer's packages and for other purposes; and my invention consists in the improved method of cutting the said articles continuously in such a manner that they shall be of exactly the same size and shape and with smooth level edges so that no finishing process shall be necessary in order to make them ready for the market, this being accomplished by first cutting a properly-shaped shell from the face of a block of wood by a single pass of a rapidly-revolving knife having both ends secured to the shaft or axis on which it revolves in front of the face of the block, and next facing off the block by means of a straight knife or cutter, which is secured at an angle to and revolves with a shaft located in a line with the line of feed. * * * In carrying out my invention it is my purpose to avail myself of a machine embodying in its construction a bent or curved knife mounted upon a revolving shaft, by means of which the article is cut or sliced from the end of the block, and a straight knife mounted upon a revolving shaft at an angle to the first one, for facing off the block. It will be understood from this that the plates, dishes or other articles cut from the block will be true segmental in cross section, segments of a circle the center of which is the center of the shaft carrying the cutting-

knife, while in longitudinal section their shape will be regulated by that of the cutting-knife. Now, if a block of wood were fed continuously to a revolving cutting-knife arranged as described, without intermittingly facing off the block, the knife would eventually begin cutting at the edge of the block, thus being likely to split or sliver the edges of the articles, and under all circumstances cutting the edges so thin and uneven that each plate, dish, or other article would require to be faced or finished off before it would be marketable. By my invention these objections are overcome. * * * By the process herein described wooden plates, dishes, and other like articles may be manufactured in a most excellent manner and at a trifling cost."

The claims are as follows:

"1. The herein-described art or method of cutting concavo-convex wooden articles or shells continuously from a block, which consists in cutting said shells from the face of the block by a single pass of a rapidly-revolving knife having both ends secured to the shaft or axis on which it revolves in front of the face of the block, as set forth.

"2. In the art of cutting concavo-convex wooden articles or shells continuously from a block, the herein-described process of facing off the said block by means of a straight knife or cutter which is secured at an angle to and revolves with a shaft located in a line with the line of feed, substantially as set forth.

"3. The herein-described art or process of cutting concavo-convex wooden articles or shells continuously from a block, which consists in alternately cutting a shell from the face of said block and facing off the block by means substantially as described, as herein set forth."

The defenses are first, that the patent is void for the reason that the patentee could not have a patent for the machine and the product and also for the process, within the doctrine of *Miller v. Eagle Co.*, 66 O. G. 845, 14 Sup. Ct. 310, and *Mosler, etc., Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, and, second, that it is functional, describing merely the action of the machine. Infringement is not disputed. Two defenses, applicable to all of these patents, relate to an alleged prior use by *Dewitt C. Peck* and another by *James and Wilson McConnell*.

Prior Use.

Neither the *Peck* nor the *McConnell* prior use has been established to the satisfaction of the court. It is doubtful if the court could find for the defendant upon this issue if it were only necessary to establish the defense by a preponderance of proof. Surely the defense has not been established beyond a reasonable doubt. Such a doubt will, it is thought, find lodgement in any fair, impartial mind after reading this testimony. There can never be a decree for a defendant in these controversies until such doubt is removed. That it exists here is enough. The *Telephone Case*, 126 U. S. 546, 8 Sup. Ct. 778; *Tatum v. Gregory*, 41 Fed. 142; *The Barbed-Wire Patent*, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450; *Mack v. Spencer, etc., Co.*, 52 Fed. 819. There is a marked contradiction between the witnesses of the defendant and the complainants on this issue, but the latter, from their surroundings, their means of knowledge, and the corroborating data which they produce, are certainly as likely to be correct as the former. The court is not satisfied that what *Peck* did was prior to November, 1882, the date of the *Smith* invention. The letter written by *Peck* in April, 1884, is of itself almost sufficient to raise a reasonable doubt. This letter is as follows:

"Pierson, Mich., April 7, 1884.

"The Smith Manufacturing Co., Delta, O.—Gents: I am thinking quite strongly of engaging in cutting out butter-plates, and therefore would like a machine. We have plenty of timber and I have a steam power, and would like information as to the amount of power used and speed of cutting, also the royalty and sale. Please inform me in full.

"Yours, respectfully,

D. W. C. Peck."

Is it possible that he could have written this letter if he had perfected a machine for cutting butter-plates nearly two years before? Clearly not, unless upon the theory that he had become a pronounced paranoiac during the interim. The attempt to establish the prior use of the McConnell machine was a complete failure. The McConnell structure was not before the Smith invention, but even if it had been it would have been valueless as an anticipation. Putnam v. Hollender, 19 Blatchf. 48, 6 Fed. 882; Adams v. Jones, 1 Fish Pat. Cas. 527.

The Process Patent.

Is the process patent valid? It is contended by the defendant that it is void in view of what is shown in the dish and machine patents, previously granted. The application as originally filed November 22, 1892, embraced claims for the product, process and machine. On the 9th of January, 1883, the examiner wrote as follows:

"As presented the application describes and claims a machine and a product which cannot be prosecuted in a single application. * * * A division of the case will therefore be required before further action can be had upon the merits."

It will be observed that the examiner did not decide that a patent with claims for a process and a product could not issue, but only that a patent with claims for a machine and a product could not issue. However, as a result of this ruling the inventor divided the application, leaving the original specification to stand for the dish only and on the 27th of January, 1883, he filed a new application for the machine and on the 31st of January, 1883, he filed a completed application for the process. The application for the process patent was filed two months after the application for the product patent and four days after the application for the machine patent.

Two patents cannot issue for the same invention. This is rudimentary. Where two such patents issue to the same person the second patent is void. The case of Miller v. Eagle, etc., Co., supra, is the latest and the most pronounced case on this subject. By that decision the following propositions are established: A second patent cannot issue to the same party for an invention actually covered by an earlier patent, although the claims of the two patents may differ, the latter patent protecting certain features of the same invention not protected by the earlier patent. When a process and a product are so identical that the former creates the latter and only so, there are not two distinct and separable inventions. The subject matter of a second patent, in such circumstances, is so inseparably involved in the first as to render the second invalid.

"After a patent is granted for an article described as made by causing it to pass through a certain method of operation to produce it, as in this case, cutting away the metal in a certain manner, and then bending what is left in a certain manner, the inventor cannot afterwards, on an independent application, secure a patent for the method or process of cutting away the metal and then bending it so as to produce the identical article covered by the previous patent, which article was described in that patent as produced by the method or process sought to be covered by taking out of the second patent." Mosler, etc., Co. v. Mosler, supra.

Turning now to the patents in suit it will be seen that the first, or dish, patent is generally for a concavo-convex dish cut or scooped from a block of wood by a revolving curved knife working alternately with a flat facing-off knife, as shown in the patent for the machine. The machine patent describes with great minuteness the details of the mechanism, its mode of operation and the method of making a dish. The process patent, No. 278,828, must, therefore, be declared invalid in view of the prior patents. As was said in Plummer v. Sargent, 120 U. S. 442, 7 Sup. Ct. 640:

"Although there are two patents, one for a process and the other for a product, there is in fact but one invention."

The claims of No. 273,773 might have been included in No. 278,828 and vice versa. A dish made by the process of the latter would, of course, infringe the former and a dish which would infringe the former, when its claims are properly construed, could, upon the proofs, only be made by the process of No. 278,828. If No. 278,828 were a foreign patent No. 273,773 would have to be limited to expire at the same time. Accumulator Co. v. Julien Electric Co., 57 Fed. 605, 614. In short, after the dish and the machine patents there was no room for the process patent.

The other two patents remain to be considered. The fundamental question for the judge to determine in every patent cause is whether or not the patentee has done something to benefit the particular art to which the patent relates. Has that art been progressed by his contributions to it? Is the art better for what he has done? Would the world lose anything if the patented structure or product were obliterated? If this question be answered in the affirmative, if the court be convinced that the patentee has made a discovery which is beneficial to mankind and has materially advanced the art to which it refers, then the effort should be to give the patentee the full benefit of his invention. If the patent office has given him a patent or a claim which fully protects him that patent or claim is the one the court should endeavor to sustain. If two valid patents have been given him and both are necessary for his protection they should receive liberal interpretation. In short, the effort should be to secure protection which is as broad as the actual invention.

The Dish Patent.

The contention regarding the dish patent is that it must be construed so broadly as to invalidate it and regarding the machine patent that it must be construed so narrowly as to negative infringement. Neither position can be maintained. As has been

seen the product patent does not cover every wooden plate or dish. Such a construction would be absurd. The only common sense interpretation of the patent is that it refers to a dish made by the machine of the second patent, or its equivalent, or by a similar method. This is not left to conjecture. The patent expressly refers to the machine and says the plates are made by a revolving cutting knife and a flat facing knife working alternately, by which process thin, tough, flexible dishes are made of the same size and shape which may be nested together in the smallest possible compass. A dish having these characteristics and the features covered by the claims is a new article possessing advantages not existing before. A dish not having these features, but made by hand, for instance, in attempted imitation of the complainants' dish would not infringe. The dish of the patent is not carved, turned, pressed or sawed; it is a scooped dish—a dish scooped from a block of wood by a revolving curved knife, or its equivalent. In no other way can this dish be made.

The Machine Patent.

Regarding the machine patent invention is not disputed; at least the defendant, operating under a similar machine covered by a later patent, is hardly in a position to dispute it. Complainants' machine is most complete and ingenious. Mechanical skill could never have produced it. It required a high order of inventive talent. The problem to be solved was one of unusual difficulty. The dishes must be strong, light, thin and of uniform size, they must be cheap, they must not sliver or split or lose their shape, they must be capable of being packed in a small space so that they can be transported conveniently and without injury. It is idle to assert that one who has constructed a machine which has overcome all these obstacles, a machine which has created a new art and supplied commerce with over a hundred million of such dishes annually, is not entitled to a place among inventors. Moreover, as before stated, he is entitled to liberal treatment at the hands of a court of equity.

All of the elements of the patented combination are concededly old. Indeed, the Lackersteen, English patent, which describes a machine for making match sticks, contains all the elements but the curved knife, and the Manning patent, which covers a machine for making barrel staves, contains all of the elements but the facing-off knife. These are the defendant's best references. Neither singly nor united would they suggest the combinations of the claims involved. The same assertion can be maintained if to the Lackersteen and Manning machines are added all the bread cutters, the peach stoners, the straw cutters and the vegetable slicers with which the record abounds. So far are these removed from the complainants' machine that it is thought they are entitled to a reasonable application of the doctrine of equivalents. No machine ever did before what the Smith machine does and the complainants are entitled to hold as an infringement a machine which does the same thing and accomplishes the same result, even though

the parts are ingeniously changed for the purpose of avoiding infringement. The claims might have been broader. Nothing in the state of the art required the limitations upon which the defendant relies, and it should be the endeavor of the court not to permit these limitations to deprive the inventor of the fruits of his invention if it can be done without violence to the well-known canons of construction.

Infringement.

The first machine used by the defendant concededly did not infringe the machine patent for the reason that it employed no facing knife and the dishes made by this machine did not infringe the third and fourth claims of the product patent for the reason that they did not have horizontal upper edges. Subsequently a machine was used by the defendant which possessed every element of complainants' combination. The only material differences are that defendant's cutting knife was made to oscillate instead of revolve and the facing knife to reciprocate vertically instead of revolve around a shaft. Both move in the same plane and do identically the same work. That this construction was adopted for the purposes of evasion is very apparent. It is thought that the changes adopted by the defendant were equivalents for the parts which performed the identical functions in the combinations of the claims and this is true of both the machines used by the defendant which contained facing-off knives. The fact that the facing-off was done in the second machine by two knives, each cutting half way across the face of the block is immaterial.

The complainants are entitled to a decree for an injunction and an accounting upon the claims of No. 273,773 and the first and second claims of No. 276,198, but without costs.

THE HAYTIAN REPUBLIC.

KODIAK PACKING CO. v. THE HAYTIAN REPUBLIC.

(District Court, D. Oregon. February 26, 1894.)

No. 3,624.

ADMIRALTY—PROCESS—CONSTRUCTIVE LEVY.

Where a vessel is in the custody of the marshal, his receipt of a warrant of arrest in another suit, with intent to levy it, is a constructive levy, notwithstanding that he returns the warrant "withheld," because he was advised that he had no right to make service on a vessel in custody, as it was, at the suit of the United States.

In admiralty. On exceptions to service. Libel by the Kodiak Packing Company against the steamship Haytian Republic. Exceptions overruled.

C. E. S. Wood, for libelant.

W. H. Gorham and O. F. Paxton, for claimant.

BELLINGER, District Judge. On and prior to January 17, 1894, the steamship Haytian Republic was in the custody of the United

States marshal by virtue of process issued in the suit of the United States in a cause of forfeiture wherein the Northwest Loan & Trust Company, through Hartman, its receiver, in the state circuit court for Multnomah county, was claimant. On said date a decree was signed and entered by the judge of this court, dismissing the libel of the United States, and directing the marshal to deliver the vessel to said receiver. Previous to this, and on the 22d day of December, 1893, a warrant for the arrest of the vessel was placed in the hands of the marshal in this suit, but, on the advice of the attorney for the United States that he had no right to make service upon a vessel held in a suit by the United States, he "withheld," according to the expression in his return, such process. Hartman and his attorneys had notice of this suit and process. On January 17th the marshal, acting upon the belief that he was required to make a seizure under such second process, and also to deliver the possession of the vessel to the receiver as the order of the court directed, undertook to deliver the possession of the vessel to Hartman, receiver, in pursuance of the direction in the order, and simultaneously therewith to arrest her on the writ already in his hands for service. Upon these facts the receiver claims that the right and possession of the vessel are in him, and that this court is without jurisdiction in the suit of the Kodiak Packing Company, and upon this ground he excepts to the libel of the latter herein.

The receipt by the marshal of the warrant of arrest in this suit, the first levy being in force, operated as a constructive levy, and an actual levy was unnecessary. In *re Smith*, 2 Ben. 433, Fed. Cas. No. 12,973; *Cresson v. Stout*, 17 Johns, 116; *Van Winkle v. Udall*, 1 Hill, 559. In the case last cited the sheriff had levied on all the property in question in that suit under an execution in favor of one party. Then came the plaintiff's execution, the mere receipt of which by the sheriff, it was held, operated as a constructive levy. The first writ having been subsequently withdrawn, that of the plaintiff took complete effect, the levy under it becoming absolute. This case is not taken out of the operation of this rule by what the marshal thought, or did or did not do, in deciding not to make a seizure while the property was held under the process already levied by him. The warrant was received by him for service, and with the intention on his part that it should be served. Nothing further was necessary or legally possible to be done. He could not seize or arrest what was already in his possession under arrest. That he thought something of that kind necessary does not alter the effect of what was already done. Nor does it make any difference that he undertook to go through the ceremony of restoring the vessel to the claimant, and simultaneously therewith seizing her. There was nothing in this jugglery to affect the rights of parties or the jurisdiction of the court. There was no intention on the part of the marshal to lose possession of the ship. Hartman and his attorney, standing by, both knew perfectly well that the marshal had a second warrant of arrest, and that he held it for service. The fact that both the marshal and the receiver seem to have been laboring under the mistake that some further ceremony was necessary to constitute

a levy of the second warrant does not make the receipt by the marshal of such warrant any the less effective to constitute a levy. The proctors for the claimant, in a brief filed herein, say:

"Where the officer has the property in custody under a prior writ, he may make a second levy by making a return to that effect, thereby showing his intention to be to hold the property under the second writ, subject to the first. This he did not do in the case at bar. It will be contended by counsel for libellant that there has been a constructive levy, but the record shows an intention not to make even a constructive levy."

The marshal does not make a second levy by making his return to that effect. The return is no part of the levy. It is merely evidence of it, and may be made at any time, and is subject to amendment or correction to conform to the fact. The fact in this case is, as already stated, that the marshal did intend that there should be a levy made under the second process, and he held such process for that purpose. The law gives to these facts the consequences of a levy. It makes them operate as a levy, which became absolute on the dismissal of the suit of the government; and this consequence is not affected by the marshal's belief that something more was necessary, or by his intention that something more should be done, or by his failure to make a return, which, for that matter, may yet be made, showing a levy by a simple holding under a second writ subject to the first, instead of the return which he did make. The exceptions are overruled.

THE NEW IDEA.

MARK v. THE NEW IDEA et al.

(District Court, S. D. Mississippi, W. D. February 5, 1892.)

MARITIME LIENS—WAGES—ASSIGNMENT.

A claim for maritime wages is assignable, and the lien also passes by the assignment, so that the assignee is entitled to enforce such lien in his own name.

In Admiralty. Intervention of Harvey Rockwood in suit by Robert Mark against the steamboat New Idea and barges. Decree for intervenor.

A. M. Lea, for intervenor.

M. F. Smith, for claimant.

NILES, District Judge. In the matter of the proceeds of the steamboat New Idea and barges, heard on the intervention of Harvey Rockwood, who sues as the assignee of certain claims for maritime wages, I hold that these claims are assignable. I do not think the assignment divests the lien. In *Cobb v. Howard*, 3 Blatchf. 525, Judge Nelson says, "It is every day's practice, in the admiralty, to allow suit to be brought in the name of an assignee of a chose in action." In *The Hull of a New Ship*, 2 Ware, 203, Fed. Cas. No. 6,859, Judge Ware examined the point on principle and authority, and held that the debt due a material man could be assigned, and that the hypothecation went with it. The general rule of equity

is clear, that what a man has he may assign, excepting for wrongs of a personal nature, such as slander and assault. The convincing reason is that given by Judge Ware in the case cited, that "the debtor cannot be injured by the assignment, while the creditor would lose part of the benefit of his security if he cannot assign." In this state (Mississippi) it is settled law that the lien of a mechanic, material man, or laborer may be assigned. In the case of *Kerr v. Moore*, 54 Miss. 288, the court say:

"The decided weight of authority and reasoning, according to our view, is in favor of the assignability of the lien of the mechanic, and the right of the assignee to assert his claim and enforce the lien in the same manner and to the same extent that the mechanic could. We hold that the lien of a laborer for wages is assignable, and that the assignee can enforce it, just as the laborer could. This view better accords with the general policy of our law, and the spirit and purpose of the act which gives the laborer a lien, than the contrary view."

In the last edition of *Jones, Liens*, § 1788, the law is thus stated:

"The assignment of a debt secured by a maritime lien carries with it the lien security, where the parties so intended, and if the assignment be absolute the assignee should proceed in the admiralty in his own name;" citing numerous cases.

Judge Blodgett, in the case of *The American Eagle*, 19 Fed. 879, says:

"There is no doubt some seeming authority in support of the exception, but I think the more reliable and better-considered cases are in favor of supporting the lien in behalf of the assignee, or giving him all the security which the original creditor had."

The debtor cannot, certainly, be injured by an assignment. The creditor might lose, if he cannot assign. As far as I have been able to ascertain, I think it has been accepted doctrine in this district that maritime lien claims were assignable. Let a decree be entered in accord with the views herein expressed.

THE JOURNEYMAN.

SHARP v. THE JOURNEYMAN.

(District Court, N. D. New York. March 8, 1894.)

SEAMEN—WAGES—LIBEL AGAINST VESSEL—SET-OFF.

Upon proceedings in rem against a barge for wages due a mariner, the claimant cannot set off a debt due by the libellant to a third person, who has assigned such debt to the master personally.

In Admiralty. Libel by John Sharp against the Journeyman for wages. Decree for libellant.

Bovingdon & Brown, for libellant.

Cook & Fitzgerald, for claimant.

COXE, District Judge. John Sharp, the libellant, during the summer of 1893, at Cleveland, Ohio, shipped as mate upon the barge Journeyman and worked in that capacity for 19½ days. He has not been paid, and the question is what shall be his per diem compensa-

tion. No written contract was signed and he seeks to recover the highest wages paid at Cleveland for a similar voyage within the three months prior to his shipping, pursuant to section 4521 of the Revised Statutes of the United States. The libelant insists that the highest price paid during this period was \$1.50 per day, the claimant that it was but \$1 per day. I am inclined to think that the weight of evidence shows that \$40 per month was the highest price paid at Cleveland for similar voyages, in barges of the size and carrying capacity of the Journeyman, during the months of May, June, and July, 1893. This would make the sum due the libelant for wages \$26. He also seeks to recover \$9.62, which he alleges the master agreed to pay for extra labor. This agreement is positively denied by the master. The burden is upon the libelant to satisfy the court by a preponderance of evidence that this inherently improbable agreement was entered into. He has not done so. It is unnecessary, therefore, to decide whether such an agreement could lawfully be entered into between master and mate. 2 Pars. Shipp. & Adm. 42, 43. The libelant also alleges that he paid \$7.35 for the benefit of the barge, and this claim appears to be undisputed. There is therefore due him \$33.35, less \$5 paid him on account, or \$28.35 in all. The evidence regarding the alleged tender need not be considered, for even though the court should find upon this issue with the claimant it would not aid him, for the reason that it is clear that if made at all the tender was inadequate in amount and insufficient in law. *Boulton v. Moore*, 14 Fed. 922; *The Cornelia Amsden*, 5 Ben. 315, Fed. Cas. No. 3,234; *The Sovereign*, Lush. 85.

The claimant seeks to recover \$25 as a counterclaim. It is alleged that Ella Penny, the cook on the barge, lent the libelant that sum and assigned her claim to the master of the barge prior to the filing of the libel. It is thought that this sum cannot be recovered in this action. It is a claim against the libelant held and owned by D. Finlayson personally. This is a proceeding in rem against the barge to recover wages due a mariner. Finlayson cannot set off the libelant's personal debt to him against the debt of the barge to the libelant. I am not familiar with any case where claims so highly favored as mariners' wages have been defeated by such assignments. *Willard v. Dorr*, 3 Mason, 161, 171, Fed. Cas. No. 17,680; *Dexter v. Munroe*, 2 Spr. 39, Fed. Cas. No. 3,863; Pars. Shipp. & Adm. 433. The libelant is entitled to a decree for \$28.35 and costs.

THE VIOLA.

HAWKINS v. THE VIOLA.

(District Court, S. D. New York. March 5, 1894.)

SHIPPING—DAMAGES—ACT FEB. 13, 1893 — VESSELS MUTUALLY AT FAULT—LIABILITY FOR CARGO DAMAGE.

Section 3 of the act of February 13, 1893, was not designed to relieve one vessel, at the expense of the other, in cases of collision by mutual fault. The prior rules of apportionment are to be adhered to

as closely as possible. Hence, when damage has occurred by reason of the mutual fault of two vessels, the damages of the two vessels, including personal effects, (which are to be treated as part of the vessel,) are first to be made even. The *North Star*, 1 Sup. Ct. 41, 106 U. S. 17. Either vessel whose cargo has been damaged cannot be charged, directly or indirectly, with any part of the loss suffered by her own cargo, nor can any offset against the carrying vessel's claim for her own damage be made by the other vessel on account of what the latter must pay for the carrying vessel's cargo damage; but the claim of the cargo of the carrying vessel must be reduced by the amount which would, before the passage of the above act, have been charged against such carrying vessel, or against the moneys payable to her.

Owen, Gray & Sturges, for libellant.

Wing, Shoudy & Putnam, for respondent.

BROWN, District Judge. As stated in the previous decision in this case, (59 Fed. 632,) it seems to me beyond doubt, that congress, by the act of February 13, 1893, (27 Stat. 445,) did not intend to legislate generally concerning the rights or liabilities growing out of collisions, but designed only to deal with the carrying vessel and her own cargo. Upon that view, all the principles and rules of decision previously applicable as to the apportionment of damages in cases of mutual fault should be still followed as closely as possible, and no more changes admitted than the evident intent of the above-named act necessitates. The two fundamental principles, now fully established by the supreme court, (1) that each vessel in fault shall bear an equal portion of the whole loss; and (2) that the innocent cargo owner may recover in full from either vessel, (*The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302,) must still be applied so far as is compatible with the new act; but as these rules have in the past been subject to modifications in particular cases, through the operation of the limited liability acts, so the act of February 13, 1893, imposes further modifications upon both these rules as applied in particular instances. The owner of the carrier vessel being no longer liable for the losses sustained by her own cargo through faults in her navigation, is not bound to admit, in case of her total loss, of any offset in favor of the other vessel for the half of what the latter may be bound to pay on account of the cargo of the former; and this introduces an important modification of the moiety rule as heretofore administered.

On the other hand, there is not the least indication in the act above named that it was the intention of congress to relieve the carrier vessel at the expense of the other vessel in collision cases; that is, to increase the liability of the latter beyond her former liability under like circumstances. Such a result is not only plainly outside the scope of the act, but would be in itself so unjust that the third section of the act ought not to be so construed or applied as to work that result. This will be avoided by the simple and natural construction of section 3 as meaning that the cargo loss, i. e. so much of it as would previously have been charged against the carrier vessel, shall now be borne by the cargo owner. This will leave the liability of the other vessel in collision in every case

precisely as before the act; and such is the construction which, it seems to me, ought to be adopted.

This construction is further recommended by the nature of the different provisions of the act of February 13, 1893, which seem to aim at a sort of adjustment or compromise of opposing interests. The first two sections disable the ship from freeing herself from certain liabilities to her cargo by numerous restrictions which have been heretofore very widely inserted in bills of lading; and in return for these beneficial provisions in favor of the cargo, the cargo seems designed to bear the losses from faulty navigation that would have previously been charged upon the ship. If that is the design of the act, it would be incompatible with it to permit the cargo owner to turn upon the other vessel to recover what the act disables him from recovering from his own, to the increased detriment of the other vessel.

Again, the third section of the act is broad enough literally to exempt the other vessel entirely. It is by construction alone that this result is avoided, i. e. on the view that the act was not designed to affect the relations between the cargo and other vessels. Consistency, therefore, requires that the extent of the liability of the other vessel as fixed by the previous law, should remain unchanged. Until further advised, therefore, the adjustment of the various demands in cases of collision by mutual fault, will be made upon the principle that neither vessel is to be charged with any greater aggregate since this act than she would have been charged before, under like circumstances; that the losses to the two vessels themselves should be first made even, (*The North Star*, 106 U. S. 17, 1 Sup. Ct. 41,) including personal effects, which are to be treated as part of the vessel; that the carrying vessel cannot be charged for any part of the loss suffered by her own cargo directly, or indirectly, nor can any offset against her claim to damages be made by the other vessel on account of what the latter vessel must pay for that cargo damage; but that the same offset which would have been formerly allowed against the carrying vessel, or against the moneys payable to her, should now be deducted from the claim of her cargo.

This construction, while closely adhering to the apparent intent of the act of 1893, works the least possible change in the fundamental equitable principles of division in cases of mutual fault, as previously applied. Under this construction the cargo owner, whenever the surviving vessel is of sufficient value, will always be paid at least one-half his loss, and sometimes in full; as where the damages to the cargoes on both vessels are equal.

If vessels A. and B. are each damaged \$10,000, and only A.'s cargo damaged—say \$5,000—B. should pay \$2,500 for half the cargo damage; for B. thus bears one-half the whole loss as before. If A.'s loss was \$2,000, and her cargo's \$4,000; B.'s \$8,000, and her cargo's \$6,000; then B., after receiving \$3,000 from A., should pay A.'s cargo in full, since that would not exceed half the aggregate loss; while A. should pay B.'s cargo but \$5,000, as this would reach A.'s limit of half the entire loss; and A. could not offset against B.'s

claim any further payment to B.'s cargo. If the cargo losses had been \$5,000 each, each would be paid in full.

If A. and her cargo were each damaged \$10,000, while B. and her cargo sustained no damage, A.'s cargo loss might be required to be paid in full by B. before equalizing the losses between the two vessels alone, if such payment could be lawfully offset by B. against A.'s loss of \$10,000. But as A. is in no way responsible for any part of her own cargo loss, I do not see how such payment by B. could be availed of as an offset against A.'s claim for half her damage; and since B.'s aggregate liability should not be increased under the act of 1893, the mode indicated in the case of *The North Star*, supra, must, I think, be followed in all such cases.

The present case is, in principle, like the last illustration. The loss of the libellant's vessel, including freight and personal effects, was about \$5,930, and that of her cargo about \$1,300; the damage to the *Viola* about \$260, and to her cargo, nothing. The libellant's vessel and cargo were a total loss. The *Viola* has been sold, and her proceeds, in the registry of the court, less the marshal's expenses, amount to about \$3,440. Upon the adjustment of the costs and marshal's fees, virtually paid by the defendant, a balance of \$111.74 against the libellant reduces his claim on his vessel's account with interest to about \$2,723, against the *Viola* to equalize the loss between the two vessels. As no part of the cargo loss can be offset against the libellant, the cargo must bear one-half of that loss itself, and the defendants pay the other half, which will make up the amount which the defendants would previously have been called on to pay. After paying those amounts, the surplus of the proceeds of sale will be about \$70, which will, therefore, belong to the defendant.

Decree accordingly.

LA CHAMPAGNE.

SEWALL et al. v. LA CHAMPAGNE.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 58.

1. COLLISION—LIGHTS—EVIDENCE.

Testimony of the officers and lookouts of a steamer that no green light was seen on a schooner until just before collision, and that the light was afterwards examined and found to be dim and insufficient, held to overbalance the evidence of the schooner's witnesses that the light was properly set, sufficient, and burning brightly. 43 Fed. 444, affirmed.

2. SAME—SCHOONER MISTAKEN FOR PILOT BOAT—SPEED.

A steamship approaching New York harbor saw a torch burned ahead or a little on her port bow, slightly above which appeared, at intervals, a white light like the masthead light of a pilot boat. Supposing it to be such, the steamer burned a torch as a signal for a pilot, and thereafter another torch was burned on the stranger, which was taken for an assent. Being misled as to distance by the small space between the torch and the supposed masthead light, the steamer, after changing her course a point to starboard, continued at 13½ knots, until she came suddenly upon the stranger, which proved to be a schooner with an insuffi-

cient green light, and a collision ensued. *Held*, that the steamer was not in fault for mistaking the schooner for a pilot boat, or for maintaining her speed under the belief that the latter would maneuver to bring to on her lee side. 43 Fed. 444, reversed.

Appeal from the District Court of the United States for the Southern District of New York.

These are cross appeals from a decree of the district court, southern district of New York, made on February 14, 1893, awarding libelants one-half the damages sustained by their schooner through a collision with the steamship *La Champagne*, which occurred about 5:30 a. m., February 25, 1890, on the Atlantic ocean, 25 miles to the southward of Shinnecock light. Both vessels sustained damage, and the district judge held them both in fault. 43 Fed. 444.

Jones & Govin (Edward K. Jones, of counsel), for appellants.

Owen, Gray & Sturges (F. D. Sturges and E. L. Owen, of counsel), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The schooner was bound from Darien, Ga., to Bath, Me.; the steamer, into the port of New York, from Havre. According to the libelants' contention, the schooner was sailing under reefed sails on a course about N. N. E. by her compass, making from three to four knots an hour. The weather had been foggy, and at the time of the collision had partially cleared, so that lights and objects could be seen at a considerable distance. It was the mate's watch, and he was on deck, with a man at the wheel and another on lookout. The masthead light of the steamer was discovered four or five miles distant, bearing, as the libel says, "off the schooner's starboard bow," and subsequently the steamer's red light came into view about two miles distant, and bearing abaft the schooner's starboard beam. The mate watched the red light for a while, and, believing the schooner was not seen, burned a torch to the leeward of the mainsail. Subsequently, by directions of the captain, he burned a second torch, and, while it was burning, the captain came on deck. After this second torch, as the schooner's witnesses testify, the steamer burned one. When about a mile and a quarter off, both colored lights of the steamer appeared, heading directly for the schooner. The steamer's hull shortly appeared, heading towards the schooner, whereupon a gun was fired on the latter. The steamer then ported her helm, shutting out her green light, and, coming on with little, if any, diminution of speed, struck the schooner forward of her fore rigging on the starboard side.

The district court held the schooner in fault for having an "insufficient green light." The witnesses for the schooner testified that both lights were properly set, sufficient, and burning brightly. All the officers and lookouts from the steamer testified that no green light was seen on the schooner while the vessels were approaching, except that the steamer's captain thought at one time that he could make one out. The steamer's witnesses also testify that

immediately after the collision the green light was examined, and found to be burning so dimly that it could hardly be seen. We do not find in the case anything which will warrant our disregarding the conclusion of the district judge upon that disputed question of fact, especially as an examination of the evidence has failed to convince us that the steamer approached the schooner astern of the range of her lights. "All agree," says the district judge, "that the steamer was first seen forward of abeam. The pleadings say, '[off] the starboard bow.' With that simple fact, and with the steamer's speed of $13\frac{1}{2}$ knots, and a course such as to expose her red light only, I find it impossible for the steamer to have got two points astern of the schooner's beam, so as to be out of the range of the schooner's green light, as the witnesses of the latter testify she was." To this argument we find no satisfactory answer in the pleadings or the proof. The libel makes no suggestion that the steamer's masthead light, when first seen, was abeam, and the testimony from the schooner to that effect has all the appearance of an afterthought. The decision of the district judge holding the Belle Higgins in fault for having an insufficient green light is therefore sustained.

The evidence from the steamer shows that she was going at a speed of $13\frac{1}{2}$ knots, her full speed being $17\frac{1}{2}$, on a course S. 59 W. magnetic. Competent and efficient officers were on her bridge, competent and attentive seamen on the lookout. The first seen of the schooner was a torch light, either ahead or a little on the port bow. It was inferred that it was that of a pilot boat, and, as La Champagne was in search of a pilot, she burned a torch herself on her port side to indicate that she wished to take one. All the witnesses from the steamer who gave evidence as to the burning of her torch, save one, testify that it was burned prior to the schooner's second torch. The master and mate of the schooner testify that the steamer's torch was not burned until after the schooner had burned two; but the wheelsman on the schooner corroborates the statement of those on the steamer that her torch was burned after the schooner's first, and before her second, one. The district judge has expressed no opinion as to the order in which these torches were burned. The weight of evidence seems to us strongly to support the contention of the steamer, and, in the absence of any expression of opinion upon that point by the judge, who saw the witnesses, we have reached the conclusion that, subsequently to the burning of the steamer's torch, one was burned by the schooner. With the exception of the captain, who, very shortly before collision, thought he saw a green light, and asked the second captain, a man of excellent eyesight, if he saw it, all the witnesses from the steamer testify that they saw no colored lights on the schooner before collision. The officers of La Champagne, moreover, testify that they saw a white light, not visible continuously, but which "disappeared from time to time, exactly like the lights on pilot boats which are hidden by masts and by the sails, the same as if a vessel were heaved by a swell or a wave." They further testify that, when the torches were burned on the schooner,

this white light appeared but a little distance above them, whereupon, supposing it to be the masthead light of a pilot boat on station, they inferred that the vessel displaying it was a long way off. The steamer's course on first sighting was changed one point to starboard, and, having signaled with their torch for a pilot, and received, as they supposed, an assent by the second torch burned on the schooner, the commandant telegraphed "Attention" to the engine, and gave directions to prepare the ladder and the lantern to take the pilot on board. La Champagne continued on her changed course at the same speed until the explosion of the gun on the Belle Higgins disclosed her sails, and that she was "cutting off the steamer's course perpendicularly." Thereupon her course was changed hard to starboard, engines reversed, and put full speed astern. Nevertheless, the vessels came in collision.

The district judge held the steamer in fault because (1) she mistook the schooner for a pilot boat, and (2) did not sooner reduce her speed.

There was evidence from some of the witnesses called by the steamer that at or immediately prior to the collision they saw a lighted lantern on the schooner's after house. Another of them (who went on board the schooner with the steamer's captain) saw a lantern there after the collision, and was instructed to put it out, as well as the side lights, when the schooner was abandoned. The captain of the schooner admitted that there was a lighted lantern on board, but said it was in the oil room until, after collision, it was brought out to read the steamer's name by. Whether or not there was such a light on the after house while the vessels were approaching each other is an issue the district judge does not express any opinion upon. He does hold that "there was no light on the schooner that could possibly present the appearance of the white masthead light required of pilot boats by the rules of navigation." The weight of evidence seems to indicate that there was a lantern on the after house. Certainly, unless the testimony of the steamer's officers is to be wholly discredited (and the district judge did not discredit them), they saw something luminous on or about the schooner, other than the torches or the invisible green light. The district judge reached the conclusion that, whatever it was which was thus visible to them, it "cannot be deemed to have been justifiably confounded with a pilot's masthead light." In this part of the case we are dealing, not with a fault of the schooner, but with the question whether the navigators of the steamer had sufficient grounds for their mistaken belief as to the character of the schooner. There is nothing to indicate that they have deliberately fabricated the statement that they saw an intermittent white light. The district judge credited their evidence generally. That they were competent and experienced mariners is practically conceded. That they were watchful and vigilant, scrutinizing the approaching vessel carefully, is hardly disputed. That they believed what they saw to be the masthead light of a pilot boat on station is abundantly established. Not only do they testify to such belief, but their entire conduct in making preparations for receiving a pilot aboard con-

firms such testimony. When several competent mariners, who, in the course of a long experience in ocean navigation, have become accustomed to see probably hundreds of masthead lights on pilot boats, in all conditions of wind and weather, reach concurrently the conclusion that a light which they see and carefully observe is such a light, a court is reluctant to substitute its judgment, upon appearances it has not seen, for theirs. Moreover, we must assume that the mistake which the officers of the steamer made as to the character of the schooner would have been corrected before the former had advanced beyond the safety limit between the two, had the schooner displayed a sufficient green light to be observed by those who were watching her. Thus the schooner's fault induced the continued belief that she was a pilot boat, even if, as her witnesses say, the lighted lantern was in the oil room. But, as stated above, we think the weight of testimony is that it was on the after house. The burning of a torch by the schooner after the steamer had burned one naturally confirmed the belief as to her character, such signal being the recognized one agreeing to send a pilot aboard in compliance with the steamer's request. It would not be expected that an overtaken vessel, whose first torch had evidently been observed, since the steamer herself had signaled, would immediately burn another. We are of opinion, therefore, that the error of judgment by the officers of the steamer touching the character of the schooner was not a fault for which respondent should be held liable.

This conclusion practically disposes of the other fault attributed to the steamer, viz. that she did not check her headway sooner. She did stop and reverse at full speed, immediately upon discovering, by the illumination which accompanied the firing of the schooner's gun, that the latter was not maneuvering to come alongside and put a pilot aboard, but was crossing the steamer's course from port to starboard. But it is claimed that she should have slackened speed sooner, even though she supposed the schooner was a pilot boat which had assented to her request to send aboard. The officers of the steamer who saw the intermittent white light say that it appeared such a short distance above even the second torch that, supposing it to be at the masthead, they inferred the schooner was a long distance off. They changed direction a point to starboard in order to put the schooner a little more on the port hand, and thus make it more easy for the pilot to come up to the steamer. They continued on at the reduced speed of $13\frac{1}{2}$ knots, postponing further maneuvers till the vessels should be nearer to each other, and supposing they were approaching a vessel which had a common purpose with themselves, viz. to approach near enough to the proper side of the steamer to send a pilot aboard in a small boat. Before condemning the steamer for thus keeping on, when the circumstances justified a belief that the other vessel was not a sailing vessel, bound, under the rules, to keep her course in presence of a steamer, but was one which had agreed to co-operate in maneuvers appropriate to accomplish the common purpose, the court should be satisfied that the failure to diminish speed was a maneuver dan-

gerous even had the schooner been really what she seemed. Of this we are not satisfied. Because she collided with a schooner required by the twenty-second rule to hold her course, it by no means follows that she would have collided with a pilot boat not so required by rule, and which had agreed to a maneuver that did not contemplate her crossing the steamer's course. In this connection the direction of the wind is a material circumstance to be considered. The district judge makes no finding as to its direction. "The wind, as [the schooner] claims, being light from the S. W.," is the only statement on that subject in the opinion. Two witnesses from the deck of the schooner testified before the answer of the steamer had indicated its theory of the collision. One of these, the steward, "couldn't tell the direction of the wind;" the other, the helmsman, testified that he "couldn't tell the direction, but that it was on the port side and more aft," "on the quarter," and that the schooner's sheets were not off. The mate of the schooner, who testified on the trial, was not asked as to the direction of the wind. Her captain, who also testified on the trial, had left the deck at 4 a. m., before which time, as he said, the wind had been "southeast, foggy and thick," but was then "hauling away," and he expected a strong northwester. He was not asked as to the direction of the wind when, on the mate's report of the approaching steamer, he again came on deck. The captain of the steamer, however, puts the wind at W. N. W., insisting that his recollection is perfectly clear that he had the wind continuously, even after he had changed his course one point to starboard, on the starboard hand. The second captain says that before the change of course the "wind came from about four points from the starboard hand." The other witnesses on both sides were not questioned on this point, which seems not to have been especially contested on the trial. From such evidence as there is we have reached the conclusion that the port side of the steamer was her lee side. As it is the custom of pilots to come aboard on the lee side, and as the schooner was already on the lee side, it was to be anticipated that, if she were a pilot boat, she would run on until a little on the lee bow, and there come to. That she would keep on across the bows of the steamer was not to be anticipated. Under all the circumstances of this case, we do not think the steamer is chargeable with fault for not sooner reducing speed. The case is materially different from *The City of Washington*, 6 Ben. 146, Fed. Cas. No. 2,770; *Id.*, 11 Blatchf. 487, Fed. Cas. No. 2,771.

We are not satisfied that by coming to port, instead of to starboard, when the explosion of the gun disclosed the character and course of the schooner, the collision would, as libelants claim, have been avoided.

The decree of the district court is therefore reversed, with costs of appeal, and cause remanded to that court with directions to dismiss the libel, with costs.

RUBY CANYON GOLD MIN. CO. et al. v. HUNTER et al.

ELDER et al. v. WHITE et al.

(Circuit Court, W. D. South Dakota. March 1, 1894.)

REMOVAL OF CAUSES—TIME OF REMOVAL.

A case is not removable under the act of March 3, 1887, § 3, after the time fixed by the state statute or the rules of the state court for the defendant to answer or plead, even though the time has been extended by stipulation and by order of court.

These were two suits brought in a court of South Dakota, one by the Ruby Canyon Gold Mining Company et al. against David Hunter et al., and the other by William S. Elder, as administrator, et al., against Thomas White et al. The defendants removed the suits into this court, and a motion is now made to remand them.

Martin & Mason, for complainants.

Edwin Van Cise, for defendants.

SANBORN, Circuit Judge. Motions to remand these cases are made because, while the petitions and bonds for removal were filed in a state court within the time fixed by stipulations of the parties and orders of the court extending the time beyond that fixed by statute for the defendants to answer (as the parties and the court might lawfully do under the statutes of South Dakota), they were not filed within the 30 days within which the defendants were required by those statutes to answer or plead to the complaints in the absence of such stipulations or orders. Comp. St. S. D. §§ 4908, 4939.

The provision of section 3 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433, Supp. Rev. St. p. 613, § 3), which requires the petition for removal to be filed in the state court "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," is imperative, and requires the petition to be filed within the time fixed by the statute (where the statute fixes it), or within the time fixed by the rule of court (where the rule of court fixes it), and not within any time that a defendant may obtain by stipulation with the plaintiff, or by order of court. This construction secures uniformity in the practice, prevents delays, and I think is in accord with the evident intention of congress. It was not within any time that a defendant might procure to be given him by the court or his opponent, but within the time fixed by the statute, that congress intended the petition should be filed. *Spangler v. Railroad Co.*, 42 Fed. 305; *Velie v. Indemnity Co.*, 40 Fed. 545; *Austin v. Gagan*, 39 Fed. 626; *Dixon v. Telegraph Co.*, 38 Fed. 377; *Hurd v. Gere*, Id. 537; *Delbanco v. Singletary*, 40 Fed. 177; *Rock Island Nat. Bank v. J. S. Keator Lumber Co.*, 52 Fed. 897; *Railroad Co. v. Daughtry*, 138 U. S. 298, 303, 11 Sup. Ct. 306. The petitions for removal in this case were not filed before the de-

fendants were required by the laws of South Dakota to answer or plead to the complaint. They were too late.

The motions to remand must be granted.

UNITED STATES v. E. C. KNIGHT CO. et al.

(Circuit Court, E. D. Pennsylvania. January 30, 1894.)

MONOPOLIES—INTERSTATE COMMERCE—SUGAR TRUST.

Act Cong. July 2, 1890, declares "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations" illegal; prohibits any person from attempting to monopolize, or combining or conspiring with any other person to monopolize, any part of the trade or commerce among the several states, or with foreign nations; and invests the circuit courts with jurisdiction to restrain violations of the act. *Held*, that a combination whose object is to enable a single company to monopolize and control the business of refining and selling sugar, by buying up all competing concerns in the United States, is not in violation of this statute; for it constitutes no restriction upon, or monopoly of, commerce between the states, but, at most, only makes it possible for the promoters of the combination to restrict or monopolize such commerce, should they so desire.

Ellery P. Ingham, U. S. Atty., and Robert Ralston, Asst. U. S. Atty. John G. Johnson and R. C. McMurtrie, for defendants.

BUTLER, District Judge. The bill charges, in substance, as follows:

E. C. Knight Company, Spreckels' Sugar Refining Company, Franklin Sugar Refining Company and the Delaware Sugar House, were, until on or about March 4, 1892, independently engaged in the manufacture and sale of refined sugar. That they were competitors with the American Sugar Refining Company and with one another; and that they were engaged in trade with the several states and with foreign nations. That the American Sugar Refining Company had, prior to March 4, 1892, obtained the control of all the sugar refineries in the United States, with the exception of the Revere, of Boston, and the refineries of the said four defendants. That the Revere produced annually about 2 per cent., and the said four defendants about 33 per cent. of the total amount of sugar refined in the United States. That in order that the American Sugar Refining Company might obtain complete control of the production and price of refined sugar in the United States, it and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, etc., of the said four defendants by which they attempted to obtain control of all the sugar refineries in this district for the purpose of restraining the trade thereof among the other states. That in pursuance of this scheme, on or about March 4, 1892, John E. Searles, Jr., entered into a contract with the defendant Knight Company and individual stockholders named for the purchase of all the stock of the said company, and subsequently delivered to the said defendants in exchange therefor shares of the American Sugar Refining Company. That on or about the same

time the said Searles entered into a similar contract with the Spreckels Company and individual stockholders and made a similar contract with the Franklin Company and stockholders and with the Delaware Sugar House and stockholders.

The bill further avers that the American Sugar Refining Company monopolizes the manufacture and sale of refined sugar in the United States and controls the price of sugar. That in making the said contracts the said Searles and the American Sugar Refining Company combined and conspired with the other defendants named to restrain trade and commerce in refined sugar among the several states and foreign nations. That the said contracts were made with intent to enable the said American Sugar Refining Company to monopolize the manufacture and sale of refined sugar among the several states.

The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Company, the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about 33 per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Company and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Company in Boston, the latter producing about 2 per cent. of the amount refined in this country; that in March, 1892, the American Sugar Refining Company entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Company thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Company obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase, the Delaware Sugar House Refinery

has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about 10 per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country.

Are the defendants' acts, as above shown, prohibited by the statute of 1890, relating to trade and commerce? The provisions involved are as follows:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or, by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violation of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The principal questions raised are:

First, do the facts show a contract, combination or conspiracy to restrain trade or commerce, or a monopoly within the legal significance of these terms?

Second, do they show such contract, combination or conspiracy to restrain or monopolize trade or commerce "among the several states or with foreign nations?"

Third, can the relief sought be had in this proceeding?

In the view I entertain the first and third need not be considered. The second must receive a negative answer, and this will dispose of the controversy.

The federal government possesses no jurisdiction over the contracts, business or property of individuals within the states—except to collect revenue for its support. Its powers are derived exclusively from the constitution. It has none other than such as are directly or impliedly conferred by that instrument; and the latter contains no suggestion of authority to intermeddle with such property rights. By the eighth section of article first, congress is empowered “to regulate commerce with foreign nations and among the several states, and with the Indian tribes.” In pursuance of this power the statute of 1890 was enacted; and as the terms employed show, congress was duly careful to keep within the limits of its authority. It is “trade and commerce among the several states and with foreign nations” that the statutes seek to guard against restraint or monopoly.

The contracts and acts of the defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining, in Pennsylvania. They have no reference and bear no relation to commerce between the states or with foreign nations. Granting therefore that a monopoly exists in the ownership of such refineries and business, (with which the laws and courts of the state may deal,) it does not constitute a restriction or monopoly of interstate or international commerce. The latter is untouched, unrestrained and open to all who choose to engage in it. The plaintiff contends, however, that such monopoly in refineries and refining incidentally secures a monopoly of commerce among the states. This position, however, is unsound; the deduction is unwarranted. The alleged control of refining does not of itself secure such commercial monopoly; and at present none exists. The most that can be said is that it tends to such a result; that it might possibly enable the defendants to secure it, should they desire to do so. Whether it would or not depends on their ability with this advantage to control such commerce. They have not tested this ability by attempting to control it, nor shown a disposition to do so. They sell their product, and purchasers may use it in such commerce, or otherwise as they choose. At present the defendants neither have, nor have attempted to secure, such commercial monopoly. As before stated, if they have a monopoly it is in refineries and refining, alone—over which the plaintiff has no jurisdiction. If they should retire from business, close their refineries or devote them to other purposes, the plaintiff could not object. This might and doubtless would indirectly produce some disturbance of or interference with such commerce, but it would not bring the defendants or their property within the jurisdiction of congress. Numerous instances might be cited, where contracts, business arrangements and combinations indirectly affect interstate and international commerce without bringing the parties to them or their property within this jurisdiction. It is the stream of commerce flowing across the states, and between them and foreign nations, that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has therefore no authority over articles of merchandise or their owners, or contracts or combi-

nations respecting them, which have not entered into this stream, or having entered, have passed out. It may prohibit and punish all acts which are intended and directed to restrain or otherwise interfere with or disturb such commerce, but it can go no further. To extend its authority to business transactions which have no direct relation to this commerce, but which may incidentally affect it, and to ownership and rights in property not involved in such commerce, because it may possibly become so involved, would be unwarranted by the terms of the constitutional provision, or the statute,—would draw within the jurisdiction of congress most of the business transactions and property of individuals within the states, and would oust the jurisdiction of the states accordingly. A large proportion of the contracts which men enter into, and of the changes which they make in their business and business relations, may and probably do affect such commerce. The diminution or increase of production in agriculture or manufactures, changes from one branch of business or trade to another, all incidentally tend to this result. State legislation prohibiting or restraining the manufacture or sale of certain articles of merchandise, or increasing their cost by exacting license fees, have the same indirect tendency. Such legislative restraint of the manufacture or sale of poisons and alcoholic liquors, and even the increase in the cost or price of property by taxation, could only be sustained by favor of the federal government, in a different view of its power.

The discussion need not be extended; the question is not new. It was fully considered in a case which arose under the statute—*In re Greene*, 52 Fed. 104—and the opinion of Jackson, J., (now of the supreme court), is so clear and satisfactory that I am restrained from quoting what he says only by the desire to be brief. *Veazie v. Moor*, 14 How. 568, 574; *Coe v. Errol*, 116 U. S. 517 [6 Sup. Ct. 475]; *Kidd v. Pearson*, 128 U. S. 1 [9 Sup. Ct. 6],—are to the same effect. The cases of *U. S. v. Greenhut*, 50 Fed. 469, and *In re Corning*, 51 Fed. 213, cited by the plaintiff, are in affirmance of this view, rather than against it. Every element of combination and monopoly shown here was averred in the indictments under consideration there. It was held, however, that no offense against the statute was set out, no interference with interstate or international commerce being charged. The cases did not fail through matter of form or technically, but because the facts averred did not constitute an offense against the United States.

In the cases of *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. 432; *Manufacturing Co. v. Klotz*, 44 Fed. 721; *Dueber Watch Case Manuf'g Co. v. E. Howard Watch & Clock Co.*, 55 Fed. 851, cited by the plaintiff, this question was not considered or raised.

People v. American Sugar Refining Co., 7 Rey & Corp. (Cal.) 83, and *People v. North River Sugar Refining Co.*, 16 N. Y. Civ. Proc. 1 & 6, [3 N. Y. Supp. 401]; *Id.*, 54 Hun, 354 [7 N. Y. Supp. 406],—were suits in state courts and involved questions of state law, only.

The bill must be dismissed, with costs.

SANDERS v. DEVEREUX et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 331.

1. PARTITION—POSSESSION—JURISDICTION.

The circuit court of the United States cannot entertain a bill to partition lands where the complainant has been disseised, and the lands are held adversely by the defendants, and the purpose is to recover possession of the premises in dispute as well as to partition them, even though such a proceeding may be maintained in the courts of the state.

2. SAME—BILL—DEMURRER.

Where a bill for partition does not state that the complainant is seised or possessed of the land, and shows that the land is within a city, and has been subdivided into numerous lots, claimed by different persons, it will be construed, on demurrer, as showing that the complainant has been disseised.

3. EQUITY PRACTICE—DISMISSAL WITHOUT PREJUDICE.

A dismissal of a suit in equity on the ground that there is an adequate remedy at law should be without prejudice to the right to sue at law.

Appeal from the Circuit Court of the United States for the District of Kansas.

Suit by Antoinette C. Sanders against Thomas Devereux and others for partition. The suit was dismissed on demurrer. Complainant appeals.

This was a bill filed by the appellant, a citizen of the state of Illinois, against more than 100 defendants named in the complaint, who were, for the most part, citizens of the state of Kansas, to obtain a partition of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 23, in township 27, range 1 E., in Sedgwick county, Kan., which tract of land appears to be within the corporate limits of the city of Wichita. The bill contained the following averments, in substance: That on December 11, 1873, Lindley Lee and wife conveyed the property in question to George A. Sanders, the husband of the appellant, as trustee for their three minor children, to wit, Walter L., Alice B., and Fannie A. Sanders. That such deed had the effect, under the statutes of Kansas, of conveying directly to the three children aforesaid an estate in fee simple in said lands, which they held as joint tenants, and not as tenants in common. That Alice B. Sanders died on February 19, 1876; that Fannie A. Sanders died on February 22, 1876; and that the title to said property thereupon became vested in Walter L. Sanders, the surviving joint tenant. That Walter L. Sanders subsequently died, intestate, on July 20, 1888, leaving no wife or children, and that by virtue of his death his mother, the present appellant, became entitled to an undivided one-half of the above-described property, under and by virtue of the laws of descent of the state of Kansas. The bill of complaint further disclosed that on the 3d day of March, 1883, subsequent to the death of her two children, Alice B. and Fannie A. Sanders, the appellant, Antoinette C. Sanders, had joined with her husband, George A. Sanders, in a deed to Thomas Devereux, which on its face purported to convey the whole property above described, and the entire title thereto, to said Devereux, with full covenants of warranty. It was further disclosed by the bill that on March 7, 1883, George A. Sanders had executed a further conveyance of the same property to said Devereux, which was signed by the grantor as trustee for his children, Walter L., Alice B., and Fannie A. Sanders, two of whom were then dead. The appellant averred that she joined her husband in executing the deed of March 3, 1883, in the belief that her husband was thereby conveying some interest which he then had in the property, and that her signature was necessary to relinquish her inchoate right, under the laws of Kansas, in and to the real estate of her said husband, which he was then conveying. She further averred that she did not intend to join, and did not in fact join, in the covenant of general warranty which that deed contained.

The bill also averred in substance, that Thomas Devereux conveyed the property in controversy to John M. Steele on March 17, 1883, by a warranty deed which purported to convey the whole property and the entire title; that on November 5, 1883, Steele, in like manner, conveyed the land to A. C. Payne; that on September 30, 1884, Payne platted the property, laying it off into blocks, with streets and alleys, and caused the plat to be duly filed and recorded under the name of College Hill addition to the city of Wichita; that Payne thereafter sold and conveyed by warranty deed various portions of the property which had been thus platted, to several different grantees, and in such deeds described the property sold by subdivisions and lots, according to the recorded plat. The bill further showed that thereafter certain portions of said property had been subdivided into smaller lots, and had again been platted as "Hillside Subdivision of College Hill Addition," and as "Lenore Addition to the City of Wichita." The appellant averred that the platting of the property last aforesaid was done without her knowledge or consent, and that the aforesaid deeds, purporting to convey the whole title to the property therein described, were each made and delivered without her knowledge or consent. She also averred that all of the persons named as defendants in the bill were severally claiming some interest in the property, the precise nature of which she was unable to state, under the two deeds executed by herself and husband on March 3 and March 7, 1883. The bill contained no averment that at the time the suit was instituted the complainant was seised or possessed of any portion of the property in dispute, or that she had ever been in possession of the same or of any part or portion thereof. The circuit court sustained a general demurrer to the complaint, for want of equity, and thereupon entered a final decree dismissing the same. To reverse that decree the complainant has prosecuted an appeal to this court.

Almerin Gillett (L. B. Kellogg, on the brief), for appellant.

David Smyth (George L. Douglass, C. H. Brooks, Edwin W. Moore, W. E. Stanley, and J. E. Hume, on the brief), for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The first question which deserves consideration on this appeal is whether, under the averments of the complaint, a federal court sitting in Kansas has any jurisdiction to administer equitable relief. The bill may be searched in vain for any allegation that is tantamount to a direct averment that the appellant is now seised and possessed of any part or parcel of the lands which form the subject-matter of the controversy, while the strongest inference arises from several allegations, and from the whole scope and tenor of the complaint, that she has been actually disseised, and that the property is now occupied in severalty by numerous persons, who are holding the same adversely to the appellant. The bill shows that she is a nonresident of the state of Kansas; that more than 10 years ago, being then a nonresident, she joined with her husband in a deed containing a covenant of general warranty, which purported to convey the whole property and the entire title; that many deeds of a like character, affecting certain portions of the land, have since been made by divers and sundry persons claiming under the conveyance executed by the appellant and her husband; that the entire property has been platted as an addition to the city of Wichita; and that portions thereof have been subdivided into smaller additions

to the same city. We are no doubt authorized to infer from what is alleged in this respect that for eight or ten years, at least, the property has been situated within the corporate limits of a large city, and has frequently changed hands, and been to some extent improved; and this fact, taken in connection with the number of persons who have been made parties to the bill, justifies us in further assuming that some of the defendants are now in the actual possession of their several holdings, and are claiming the same adversely to the appellant, and disputing the validity of her alleged title. Under other circumstances, for example, if the bill fairly showed that the tract sought to be partitioned was country property or wild land, we might hold, even in the absence of any allegation as to possession, that enough facts are alleged to enable the complainant, at common law, to maintain an action for partition, upon the theory that a legal title to land carries with it a constructive possession; but as the case stands, on the averments of the present complaint, no presumption can be indulged in that the property is vacant and unoccupied. On the contrary, we cannot shut our eyes to the fact that the present proceeding is evidently a declaration in ejectment stalking in the guise of a bill for partition. The allegations of the complaint must be construed most strongly against the pleader, and whatever doubts are raised by the bill as to the appellant being seised and possessed of the property must be resolved against her. Acting in accordance with these views, we must hold that the bill shows, by the most persuasive inference, that the appellant has been disseised, and that the property in controversy is occupied in separate tracts by the numerous defendants named in the bill, who are now holding the same adversely to the complainant.

The question then arises, which we stated at the outset, whether the United States circuit court for the district of Kansas had any jurisdiction to enter a decree of partition which was prayed for in the bill. It is not denied, as we understand,—and the authorities to this effect are numerous and uniform,—that at common law a bill for partition would only lie in favor of one who had the seisin, and immediate right of entry. At common law, if a party entitled to bring a suit for partition became disseised, he could not maintain the action until he had established his right of possession by an action in ejectment, or other equivalent proceeding at law. In other words, a suit in partition could not be maintained on a mere right of possession, if the property was in fact held adversely, and it was not recognized as a proper action by which to recover the possession of real property where the plaintiff had been disseised. These principles are fundamental. *Co. Litt.* 167a; 16 *Vin. Abr.* 225; *Adams v. Iron Co.*, 24 *Conn.* 230; *Clapp v. Bromagham*, 9 *Cow.* 530, 560, 561; *Lambert v. Blumenthal*, 26 *Mo.* 471; *Burhans v. Burhans*, 2 *Barb. Ch.* 398, 408; *Shaw v. Gregoire*, 41 *Mo.* 407; 1 *Washb. Real Prop.* p. 715. It is claimed, however, by the appellant,—and this is the point on which the question of equitable jurisdiction finally turns,—that under the practice which prevails in Kansas a bill for partition may be maintained by a tenant in common, though he is

out of possession, and has been disseised by his cotenant. Hence, it is argued that under like circumstances a bill for partition may be entertained by the federal circuit court for the district of Kansas. We shall not dispute the first proposition, touching the practice which now prevails in Kansas. In an early case decided in that state (*Squires v. Clark*, 17 Kan. 84), Mr. Justice Brewer, then a member of the supreme court of Kansas, intimated a doubt whether a tenant in common, who had been disseised, could maintain a suit for partition until he had established his right of possession by a suit at law. He further called attention to a fact, which is still noteworthy, that the statutes of Kansas do not undertake to determine or to define the circumstances under which a suit for partition may be maintained. Unlike the laws of many other states, the statutes of Kansas simply regulate the mode of procedure in suits for partition. It may be conceded, however, that since the decision in *Squires v. Clark*, supra, the practice has become established, apparently without debate or controversy, of entertaining suits for partition at the instance of a suitor who has been disseised. *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Ott v. Sprague*, 27 Kan. 620. It by no means follows, however, because a practice of that nature prevails in the state courts, that a bill for partition can also be entertained by the federal courts sitting in that state, when it appears that the complainant has been disseised, and that his right of possession is disputed, and that the property sought to be partitioned is actually occupied by an adverse claimant. The federal courts cannot properly entertain a bill in chancery to partition lands unless a state of facts exists which would warrant such an action according to the general rules of equity jurisprudence and practice. In the courts of the United States a bill for partition certainly cannot be used as a mere substitute for an action in ejectment, or interchangeably with a suit at law of that nature, to establish a plaintiff's right of possession. A practice of that kind, if tolerated, would be in clear violation of section 723, Rev. St. U. S., which provides that "suits in equity shall not be sustained in either of the courts of the United States where a plain, adequate and complete remedy may be had at law." *Hipp v. Babin*, 19 How. 271, 277. Moreover, if a suitor was allowed to file a bill for partition to establish his title and right of possession after a disseisin, the adverse claimant and occupant would, in effect, be deprived of his right to a trial by jury, on a strictly legal issue, contrary to the seventh amendment of the constitution of the United States, as was pointed out by Mr. Justice Field in *Whitehead v. Shattuck*, 138 U. S. 146, 151, 11 Sup. Ct. 276. This question has been frequently discussed, and, so far as we are aware, it has always been held that, where a bill shows on its face that the purpose of the plaintiff is to recover the possession of real property that is occupied by an adverse claimant, the bill must be dismissed, unless it is further shown by the complaint that the aid of a court of equity is necessary to remove obstacles which stand in the way of a successful resort to an action of ejectment, or unless it appears that the plaintiff's title has been established at law, and that equitable aid is necessary to prevent a

multiplicity of suits, or that equitable aid is necessary for some other good and sufficient reason stated in the bill. In the case of *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, the government, having a title to certain lands acquired under the internal revenue laws, filed a complaint against certain persons, who were in possession of the premises, to remove a cloud upon its title, consisting of an alleged fraudulent deed. It was held by the court (citing numerous cases in support of the proposition) that as, under the averments of the bill, the United States had a legal title, which was paramount to the alleged fraudulent deed, and as the defendants were in possession, the case was not one of equitable cognizance, and that the bill should have been dismissed on that ground. In *Whitehead v. Shattuck*, *supra*, it was held that a person out of possession, but claiming to have the legal title to certain lands, could not maintain in the federal courts a bill to quiet title, against defendants who were in possession, although a statute of the state permitted an equitable proceeding to be brought in the state courts to establish the title and to recover the possession. The court said, in substance, that a statute of a state could not be allowed to override the federal statute, heretofore quoted, which declares that the courts of the United States shall not assume equitable jurisdiction where there is a plain, adequate, and complete remedy at law. And, in an opinion recently delivered by this court, Judge Caldwell remarked, in a case where for special reasons, disclosed by the opinion, the equitable jurisdiction was upheld, that, "if the defendant was in possession of the property, the plaintiff had an adequate remedy at law, and could not resort to equity, although the state statute conferred equitable jurisdiction on the state courts in such a case." *Bigelow v. Chatterton*, 10 U. S. App. 267, 280, 2 C. C. A. 402, 404, 51 Fed. 614.

It is hardly necessary to pursue the subject at any greater length. The cases of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, and *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, on which much reliance seems to be placed, as explained and perhaps qualified in the later case of *Whitehead v. Shattuck*, *supra*, contain nothing in opposition to the foregoing views. In the first of these cases, which was a proceeding in equity authorized by a statute of Nebraska to quiet title, both the complainant and the defendant were out of possession, the premises in dispute being wild and unoccupied land. *Vide* 110 U. S. 21, 3 Sup. Ct. 495. An action in ejectment, under such circumstances, would not lie; and it was held that as there was no adequate remedy at law a federal court sitting in Nebraska might lawfully enforce the provisions of the state statute. The second case above referred to enunciates the same doctrine,—that, where equitable rights have simply been enlarged by a state statute, they may be enforced by the federal courts, substantially as directed, if the common law affords no adequate means by which to redress the wrong which the statute was intended to remedy. It follows from what has been said that this court is of the opinion that the bill in the present instance did not state a case within the equitable jurisdiction of the circuit court, and that it was properly dismissed

for that reason. We observe, however, that the decree dismissing the bill is general, and does not preserve to the appellant her right to sue at law, if she so elects. The case is therefore remanded to the circuit court with directions to add to the existing decree a clause that the dismissal ordered is without prejudice to the complainant's right to sue at law; and, as thus modified, the decree below is affirmed, at the cost of the appellant.

FOLTZ et al. v. ST. LOUIS & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 293.

1. JUDGMENT—COLLATERAL ATTACK—EMINENT DOMAIN—JURISDICTION.

A judgment of condemnation of land rendered by a court having jurisdiction over the parties and power to condemn land in proper cases is not subject to collateral attack on the ground that it was rendered in favor of a party who had not the legal capacity to condemn land, since that is a matter to be determined by the court rendering the judgment.

2. INJUNCTION—DEFENSES—REMEDY AT LAW.

It is no objection, to a suit brought to enjoin an action of ejectment on the ground that the defendant has acquired title by condemnation proceedings; and to quiet the defendant's title, that such title constitutes a perfect defense to the action at law, since the remedy at law is not as efficient as a decree in such suit.

3. SAME—APPEAL—WAIVER.

The objection to an injunction suit, that the plaintiff has an adequate remedy at law, comes too late when raised for the first time on appeal.

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

Suit for injunction brought by the St. Louis & San Francisco Railway Company against Mary A. Foltz, and revived, after her death, against Jacob K. Foltz, her husband, and Joseph R. Foltz, Genevieve O. Foltz, Frances A. Foltz, James A. Foltz, and Jacob K. Foltz, her children. Plaintiff obtained a decree. Defendants appeal.

This is an appeal from a decree enjoining the appellant, Mary A. Foltz, who is a married woman, from prosecuting an action of ejectment against the St. Louis & San Francisco Railway Company, the appellee, to recover possession of certain lands in Ft. Smith, Ark., occupied by it for railroad purposes. The above-named appellant, Mary A. Foltz, died during the pendency of the appeal in this court, and by consent an order was entered in this court reviving the cause, as to her heirs at law, in the name of the above appellants. Section 11, art. 12, of the constitution of Arkansas, declares that no foreign corporation shall have power to condemn or appropriate private property. Section 5530 of Mansfield's Digest of the Laws of Arkansas provides that a foreign railroad corporation may, under certain circumstances, purchase or lease the property and franchise of any railroad company organized under the laws of that state, and that such lease or purchase "shall carry with it the right of eminent domain, held and acquired by said company at the time of such lease or sale." The appellee is a corporation foreign to the state of Arkansas, but in 1882, in accordance with the provisions of section 5530, supra, it had purchased all the property and franchises of a railroad corporation organized under the laws of Arkansas, including its right of eminent domain. In May, 1883, the appellee presented its petition to the circuit court of Sebastian county, Ark., for the condemnation of the lands in question, after having served due notice of its intended

application on the appellant, and she appeared in the proceeding. This proceeding was removed at the May term, 1883, on the petition of the appellee, to the circuit court of the United States, on the ground that the appellee was a corporation of the state of Missouri, and the appellant a citizen of Arkansas. At the November term, 1883, a contested trial by jury was had in that court to determine the amount of damages sustained by the appellant through the appropriation of the land by the appellee for railroad purposes, and a verdict was rendered, fixing the amount at \$4,180.84. March 28, 1884, a judgment was rendered that the appellant should recover this amount of the appellee, and that, upon the payment thereof, the right of way—the use and possession of the land in question—should vest in the appellee forever. On the same day the appellee paid, and the defendant received, the amount of this judgment. The land condemned by this judgment comprised 31 7-100 acres. On August 20, 1890, the appellant brought an action in ejectment against the appellee in the circuit court of Sebastian county, Ark., for 24 7-100 acres of this land. November 15, 1890, that action was removed to the court below. December 31, 1891, the appellee brought its bill in equity in that court to enjoin the prosecution of the action at law, and to quiet its title to the land in dispute. The appellant answered. The case was heard on bill and answer, and a decree rendered in favor of the appellee for the relief prayed in its bill. The appeal is from this decree.

Britton H. Tabor, for appellants.

Edward D. Kenna (B. R. Davidson and H. S. Abbott, on the brief), for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge (after stating the facts). The power of eminent domain—the right to take the property of the citizen for public use—is an attribute of sovereignty. It lies dormant in the state until the right to exercise it is granted by the state to some public or quasi public corporation, or until it is exercised by the state itself. It follows that no corporation has the right to exercise this power unless the state has granted to it that right; and it is conceded that, under the constitution of the state of Arkansas, a foreign corporation, as such, cannot have this right. *Holbert v. Railroad Co.*, 45 Iowa, 23, 26; *State v. Scott* (Neb.) 36 N. W. 121, 127; *Trester v. Railway Co.*, Id. 502, 505. The questions presented by this case, and pressed upon our attention in the brief and argument of counsel, are: First. Is the judgment of condemnation of March 28, 1884, void,—a nullity,—so that it may be disregarded on a collateral attack? Second. Did the appellee, though unauthorized, as a foreign corporation, to exercise the power of eminent domain, obtain the right, under the constitution and laws of Arkansas, to exercise that power, by its purchase of the property and franchise of the domestic railroad corporation of that state which had that right? Third. Is the appellant, who has been a married woman during all these proceedings, estopped to recover this land by her acceptance of the money awarded her for it by the judgment of condemnation?

Regarding the first question, the contention of counsel for appellant is that, since the appellee was a foreign corporation, and was not one of the parties to whom the right to exercise the power of eminent domain was granted by the state, the circuit court was without jurisdiction to render a judgment of condemnation in its

favor, and that judgment is a nullity. Conceding, but not deciding, that the appellee had no right to condemn land for public use, let us examine this question. The appellant was properly served with the statutory notice in the condemnation proceedings, and she appeared and participated in the jury trial to determine the amount of compensation she should receive. In that proceeding a controversy arose between a citizen of Missouri and a citizen of Arkansas, and the amount in controversy was such as to give the circuit court jurisdiction. That court, therefore, had jurisdiction of the parties. It goes without saying that the circuit court had the right and the power to render a judgment of condemnation in a proper case in favor of a railroad corporation which had the right to exercise the power of eminent domain. *Kohl v. U. S.*, 91 U. S. 367, 375; *U. S. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 61, 16 Fed. 524. The state of Arkansas had granted to many corporations the right to exercise this power, and, if the circuit court had rendered a judgment of condemnation in a proper case in favor of any one of these corporations, its judgment would unquestionably have been valid. The contention is that it is an absolute nullity in this case, because the court entered such a judgment in favor of a corporation which had not that right. Stripped of argument and verbiage, the position is that this judgment is void because the appellee had not legal capacity to sue for it, although there were many parties that had such capacity, in whose favor the circuit court had ample power to enter such a judgment. But the question of the legal capacity of the plaintiff to prosecute condemnation proceedings, like that of the necessity for the condemnation, and that of the public or private purpose of it, is a question that the trial court must necessarily hear and determine in every condemnation proceeding. Is every judgment in which the court committed an error in the decision of one of these questions, without the jurisdiction of the court, a nullity, and only those in which it has made no mistake valid? Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud. *Insley v. U. S.*, 14 Sup. Ct. 158; *Cornett v. Williams*, 20 Wall. 226; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217; *In re Sawyer*, 124 U. S. 200, 221, 8 Sup. Ct. 482; *Skillerns v. May's Ex'rs*, 6 Cranch, 267; *McCormick v. Sullivant*, 10 Wheat. 192; *Hunt v. Hunt*, 72 N. Y. 217; *Colton v. Beardsley*, 38 Barb. 30, 52; *Otis v. The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Hamilton v.*

Railroad Co., 1 Md. Ch. 107; *Evans v. Haefner*, 29 Mo. 141, 147; *State v. Weatherby*, 45 Mo. 17; *Rosenheim v. Hartsock*, 90 Mo. 357, 365, 2 S. W. 473; *State v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595; *Musick v. Railway Co.*, 114 Mo. 309, 315, 21 S. W. 491. Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud. In *Colton v. Beardsley*, 38 Barb. 30, 51, 52, the New York court said:

"When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine, such decision is final until reversed in a direct proceeding for that purpose. The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the course of it is right or wrong."

In *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, supra, a judgment of the United States circuit court was collaterally attacked because it appeared on its face that the plaintiff and some of the defendants were citizens of Iowa, and hence that that court appeared to have no jurisdiction of the action. But Chief Justice Waite, delivering the opinion of the supreme court, said:

"Whether, in such a case, the suit could be removed, was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa when it ought to have confined itself to those between citizens of Iowa and citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part, or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause."

In *Evans v. Haefner and Hamilton v. Railroad Co.*, supra, judgments of condemnation were collaterally attacked on the ground that the uses for which the lands were condemned were private and not public uses. It goes without saying that private property cannot be condemned for private use; but the courts of Maryland and Missouri held that the judgments were conclusive of this question on a collateral attack.

There are three questions that the trial court must determine in every condemnation proceeding, viz.: First. Has the plaintiff corporation legal capacity to exercise the power of eminent domain? Second. Is it necessary for the plaintiff to take the land it seeks to condemn? Third. Does it seek it for a public use? Every judgment of condemnation is necessarily an affirmative decision of each of these questions. If either of them is erroneously decided, the judgment may be reversed by a writ of error for that purpose; but to hold that either of these questions can be tried de novo in an action of trespass or of ejectment, or in any other collateral proceeding, would be counter to our views of justice, of the reason of the case, and of the uniform decisions of the courts. It is just and reasonable that one who contests the right of a railroad company to take his land should carry his contest to an end before he takes his award,

and before the railroad company incurs the expense of improving the property for railroad purposes. It would work great injustice and produce much confusion of rights to permit these judgments of the courts to be disregarded, and the questions they decide to be retried in collateral actions, in which judges and juries might have very different views from those which resulted in the original judgments. The decisions of the courts, to some of which we have referred, leave no doubt that it was the right and the duty of the circuit court to hear and determine the very question whether or not the appellee had the right to exercise the power of eminent domain before it entered its judgment in the condemnation proceeding, and that judgment is conclusive evidence that it did determine that question in favor of the appellee. The judgment was strictly within the powers conferred upon that court by the law of its organization. It had authority to condemn lands for public use in a proper case presented to it. If that judgment was erroneous, it might have been reversed by a writ of error; but the decision of the question that is now admitted to be presented anew was the exercise of jurisdiction, and the rightful exercise of that jurisdiction, and, whether right or wrong, it cannot be successfully attacked in a collateral proceeding. We have not failed to examine carefully the authorities cited by the counsel for the appellant. They are not in conflict with the views we have expressed. The line of demarcation which separates the case before us from those cited by appellant's counsel is that which marks the limits of the powers of the courts to hear and determine. Judgments within the scope of the power to hear and determine vested in a court by the law of its organization are not void in the face of a collateral attack, whether right or wrong, and such is the judgment before us; but judgments rendered in cases which are not within the scope of this power are nullities. The following cases, cited by appellant's counsel, are illustrations of this rule: In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, in which the police judge of the city of Lincoln, Neb., brought suit against the mayor and councilmen of that city, in the federal court, to enjoin them from enforcing a judgment against him for misfeasance in office. It was not within the power of the federal court, sitting in equity in any case, or under any circumstances, to determine such a controversy and to grant the injunction there sought, and its decree to that effect was therefore held to be a nullity. *Whitehead v. Railroad Co.*, 28 Ark. 460, in which a judgment of condemnation of land was rendered under an unconstitutional law. As the law which vested the court with the only power it had to render the judgment was void, the judgment itself was so. The stream could not rise higher than its source. *Lessee of Hickey v. Stewart*, 3 How. 751, in which a decree by a state court of chancery establishing the validity of a Spanish grant, over which no power had ever been conferred upon that court, was held void, and its exercise of jurisdiction declared to be a mere usurpation of judicial power. Again, a judgment or decree of a court in excess of the power to hear and determine granted to it by the law of its organization may be void for such excess, although the court may have jurisdiction of the parties and of the subject-matter. Illustrations

tions of this rule are *Bigelow v. Forrest*, 9 Wall. 339, 351, in which a judgment of condemnation and sale of the fee to land, when the court was expressly prohibited by act of congress from condemning any rights outlasting the life of Forrest, was held void for the excess above the life estate; *Ex parte Lange*, 18 Wall. 163, 176, in which the statute authorized the punishment of a criminal by fine or imprisonment, and after the court had imposed a sentence of fine and imprisonment, and the criminal had paid the fine, the trial court vacated its judgment and sentenced him to imprisonment, and the supreme court declared the latter judgment void, because it was not within the power of the court, in any case, to punish the criminal twice for the same offense; *Day v. Micon*, 18 Wall. 156; and *U. S. v. Walker*, 109 U. S. 258, 266, 3 Sup. Ct. 277. In all these cases, which are cited by appellant's counsel, the judgments or decrees were beyond the powers conferred on the courts by the laws of their organization. In the other cases cited, viz. *Holbert v. Railroad Co.*, 45 Iowa, 23, 26, *State v. Scott* (Neb.) 36 N. W. 121, 127, 128, and *Trester v. Railway Co.*, Id. 505, the question of the validity of a judgment when attacked collaterally was not considered. No case has been called to our attention in which it is held that a judgment of condemnation of land, in favor of a party who had not the legal capacity to exercise the power of eminent domain, was a nullity. In the opinion of the supreme court of Nebraska in *Trester v. Railway Co.*, supra, which was an appeal from an order of removal of a condemnation proceeding to the federal court, on the ground that the railroad company was a foreign corporation, is found the only declaration to that effect that we have seen. That court, in speaking of the order of removal made by the court below, did say:

"Its order of removal was therefore a nullity, and no jurisdiction could be thereby conferred on the federal court. Any action that might be taken by that court would be equally void; and although the parties might appear before it, and invoke its powers to the fullest extent, yet they could give it no jurisdiction to take any action whatever."

This declaration was not necessary to the decision of the case before it, but that court reversed the order of removal, and remanded the case with directions to dismiss it on the ground that the court below had no jurisdiction because the railroad company had no power to condemn lands. Upon a rehearing, however, this decision was overruled and the case remanded for trial. No opinion was filed on the rehearing, but in *Trester v. Railway Co.* (Neb.) 49 N. W. 1110, that court says of the decision on the rehearing:

"The legal effect of the decision, however, was to overrule the former opinion, in so far as it held that the condemnation was void, and that neither the county judge nor the district court had jurisdiction to take any action in the matter."

In other words, the supreme court of Nebraska finally came to the same conclusion at which we have arrived,—that the trial court had jurisdiction to hear and determine the question whether or not the railroad company had the legal capacity to sue for the condemnation of private property for public use. The result is that the judgment of condemnation of March 28, 1884, was final and conclusive

between the parties to it, and could not be successfully attacked in an action of ejectment. This conclusion renders it unnecessary to consider the other two questions discussed in the argument, and stated in the early part of this opinion.

A single objection to the decree below remains to be considered. It is that, as the judgment of condemnation is valid, the appellee had a perfect remedy at law, and this bill in equity should have been dismissed. In *Preteca v. Land Grant Co.*, 4 U. S. App. 327, 330, 1 C. C. A. 607, 50 Fed. 674; Judge Caldwell, in delivering the opinion of this court, said:

"It may be true that the plaintiff had a remedy at law, but it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215; *Oelrichs v. Spain*, 15 Wall. 211, 228."

The appellant is claiming the land here in dispute, and is prosecuting her action of ejectment to recover it. The decree below enjoins that and like actions, and quiets the title in the appellee. It is true that the latter has a perfect defense to the action of ejectment; but is that defense as practical and as efficient to the ends of justice as the remedy by this decree? What is to prevent the appellant from dismissing her action in ejectment, and bringing trespass or another action of ejectment? And is it as efficient a remedy to hold the shield of this judgment against successive actions at law as is a final decree that forever ends all controversy? Moreover, this objection was not made in the court below. The appellant interposed no demurrer. She answered to the merits, and went to a hearing on bill and answer without objection that this suit could not be maintained, because the remedy of the appellee at law was complete. The objection she now makes is one of those that may be waived if not made at the threshold. It is too late to make it for the first time in the appellate court. *Preteca v. Land Grant Co.*, supra; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; *Tyler v. Savage*, 143 U. S. 79, 97, 12 Sup. Ct. 340; *Hollins v. Iron Co.*, 14 Sup. Ct. 127, 128; *Insley v. U. S.*, 14 Sup. Ct. 158, 159. For these reasons, the decree below must be affirmed, with costs, and it is so ordered.

MEEK v. SKEEN.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1894.)

No. 181.

1. EXECUTION—BONA FIDE PURCHASERS—UNRECORDED DEED.

On a bill to quiet title, complainants were purchasers at execution sale made under a judgment owned by them, while respondent claimed under a prior deed from the judgment debtor, which was not recorded. The only evidence as to notice of this deed was that the debtor told complainants, before the execution sale, that he had sold all his property, and endeavored to settle the judgment for a small amount. But he did not tell them to whom he had sold, nor did complainants ever hear respondent's name mentioned in connection with the land in controversy. Held, that they were purchasers without notice of respondent's deed.

2. SAME—SHERIFF'S DEED—DESCRIPTION.

Where, upon the record, a judgment debtor had the unqualified fee simple in the land, the levy upon and sale of "all the estate, right, title, and interest" which he had in the land, and the execution of a deed in the same terms, vest the same unqualified fee in the purchaser, without regard to a prior unrecorded deed made by the debtor, of which he had no notice.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a bill to quiet title, filed by Virgil Skeen against James G. Meek. There was a decree for complainant, and respondent appeals.

D. T. Bomar and J. E. Bomar, for appellant.
Seth W. Stewart, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PAR-LANGE, District Judge.

McCORMICK, Circuit Judge. The appellant, James G. Meek, brought against appellee an action of trespass to try title to 320 acres of land in the possession of appellee, in Wichita county, Tex. The appellee then exhibited his bill, setting up his title, praying that the appellant be enjoined from proceeding with said action at law until the appellee's rights and equities could be considered and determined; that appellant be required to show cause why a deed he held to appellee's land should not be canceled, and the cloud removed from appellee's title, caused by the record of said deed. The suit proceeded to hearing. On 10th March, 1893, the circuit court rendered its decree in these words:

"This cause this day coming on to be heard, came the complainant and respondents, by their respective attorneys, and announced 'Ready for trial,' and the court, having heard the evidence, and argument of counsel, and being sufficiently advised, finds that the land in controversy, to wit: The south half of section No. 39, H. & G. N. R. R. Co., situated in Wichita county, Tex., described by metes and bounds as follows: Beginning at the S. W. corner of section No. 39, H. & G. N. R. R. Co. surveys; thence north 950 varas to a stake in the west boundary line of said survey; thence east 1,900 varas to a stake in the east boundary line of said survey; thence south 950 varas to the southeast corner of said section No. 39; thence west 1,900 varas, with the south line thereof, to the place of beginning,—was by the state of Texas, on the 14th day of August, 1873, patented to W. W. Purinton; that on the 4th day of October, 1877, a valid judgment was rendered in the district court of Grayson county, Tex., against said W. W. Purinton, in favor of S. D. Cook, for the sum of \$1,460, besides interest and cost; that a valid execution issued on said judgment, and was levied upon the above-described land, as the property of said W. W. Purinton, by the sheriff of Clay county, Tex., to which said county Wichita county was then attached for judicial purposes (said Wichita county, in which the land was situated, then being an unorganized county); that said land, in pursuance of said execution and levy, was by said sheriff sold, as provided by law, at the courthouse door of said Clay county, Tex., on the first Tuesday in February, 1878, the same being the 5th day of said month, and at which said sale Gunter & Munson, a firm composed of Jot Gunter and W. B. Munson, became the purchasers of said land, and received a deed from the sheriff therefor; that the judgment, execution, levy, sale thereunder, and sheriff's deed, were all valid, and in due and legal form. The court further finds that complainant, Virgil Skeen, holds, claims,

and is in the actual possession of, said land, under a regular consecutive chain of transfers from said Gunter & Munson, and he and those under whom he holds have made permanent and valuable improvements on said land. The court further finds that on the 27th day of October, 1873, said W. W. Purinton, by deed in writing, conveyed said land to Jas. G. Meek, one of the respondents herein, but that said deed was not recorded until the 10th day of September, 1878, after said land had been sold under execution on the 5th day of February, 1878, as hereinbefore stated. The court further finds that the said Gunter & Munson, purchasers of said land at sheriff's sale as aforesaid, were the owners of said judgment against said Purinton, upon which said execution issued, at the date of said levy and sale, and that neither they, nor either of them, had notice or knowledge of said unrecorded deed from said Purinton to said Meek at the date of the levy of said writ, or at the date of the sale thereunder. It is therefore ordered, adjudged, and decreed by the court that complainant's bill be, and the same is hereby, sustained, and that complainant, Virgil Skeen, do have and recover judgment against said defendant, James G. Meek, annulling, canceling, and setting at naught the said deed executed by said W. W. Purinton to said Meek on the 27th day of October, 1877, for the land in controversy, as aforesaid, and that the cloud thereby cast upon complainant's title to said land be, and the same is hereby, removed, and that said complainant be, and he is hereby, forever quieted in his title to, and possession and enjoyment of, said land and premises herein described and set out. It is further ordered, adjudged, and decreed by the court that the law action heretofore commenced and now pending on the law docket of this court, wherein said Jas. G. Meek is plaintiff, and the said complainant, Virgil Skeen, is defendant, and wherein said plaintiff seeks to recover from the defendant the possession of said land and premises, be, and the same is hereby, perpetually enjoined, and said Jas. G. Meek and D. T. Bomar and Ed. Bomar, his attorneys of record in said law action, be, and they and each of them are hereby, forever prohibited, restrained, and enjoined from the further prosecution of said suit. It is further ordered that said complainant do have and recover of and from said defendants all costs by them in this behalf incurred, for which execution may issue as at law. To which said judgment the respondent Jas. G. Meek excepts."

To reverse which decree this appeal is taken.

The appellant assigns error as follows:

"The court erred in rendering judgment for the complainant herein against this respondent, for the following reasons: (1) Because the respondent was shown by the record, and was admitted, to have the legal title to the land in controversy; and the proof failed to show that Gunter & Munson, or any one claiming under them, were innocent purchasers for value, in good faith. (2) Because the record failed to show that Gunter & Munson were innocent purchasers for value, in good faith, of the land in controversy, and that they bought at their own sale, and credited the amount of their bid on the judgment, and because it showed that neither Gunter nor Munson attended said sale, or caused said levy to be made, and it was not shown that the agent or servant of Gunter & Munson who did cause said levy to be made, and did attend said sale, had no notice of the fact that W. W. Purinton had sold and conveyed the land in controversy, and because the testimony of W. W. Purinton showed that Gunter & Munson had notice that he had sold and conveyed the land prior to the levy of said execution. (3) Because the amount bid by the said Gunter & Munson at said sale for said land was grossly inadequate, as compared with the value of the land, to constitute them innocent purchasers for value, in good faith, as against the unrecorded deed made by said Purinton to the respondent. (4) Because it is shown by the evidence that the execution under which Gunter & Munson bought was levied upon the right, title, and interest of W. W. Purinton in and to the land in controversy, and not on the land itself; and that said Gunter & Munson could not be innocent purchasers of the land when the sheriff only levied on and sold the right, title, and interest of said Purinton."

Gunter & Munson took as creditors of W. W. Purinton, and, if their execution was levied on the land granted to him by the state before his deed to Meek was recorded, they acquired by their subsequent purchase the fee in the land granted to him by the state, unless it be shown that they, or one of them, had actual notice of the sale to Meek, or had notice of facts that would have caused a prudent man to make such inquiries as would have resulted in obtaining the knowledge that Purinton had sold the land to Meek; and it would seem that, in the case of creditors, the burden of proving this notice is on the party claiming under this unrecorded deed. *Grace v. Wade*, 45 Tex. 522; *Grimes v. Hobson*, 46 Tex. 416; *Parker v. Coop*, 60 Tex. 111. Grant that appellee, by the allegations of his bill, assumed the burden of showing that Gunter & Munson did not have such notice. The circuit court, on the evidence, has found that, at the date of the levy and sale, Gunter & Munson, nor either of them, had notice or knowledge of the unrecorded deed. We consider the proof sustains this finding. The bill does not waive an answer under oath. The answer of the respondents D. T. Bomar and J. E. Bomar is not under oath. The answer of the appellant, James G. Meek, is sworn to by his solicitor. It does charge "that the said Gunter & Munson had actual notice of the claim of this defendant upon said land, or such notice as to put them on inquiry that would have led to such discovery." This is clearly only the statement of a conclusion from some facts not stated. The testimony of Purinton gives the facts of which the solicitor evidently had information when he prepared the answer, and verified it by his own oath.

The judgment against Purinton was rendered 4th October, 1877. The witness Purinton says:

"I saw Jot Gunter, and had a conversation with him, shortly after the judgment was obtained, within thirty or sixty days, and prior to the 14th January, 1878 [the date of the levy of the execution], and told him that I had no property at all, and that I had sold and conveyed all the property I had owned."

Being asked what led to this conversation, he says:

"I met him, and spoke to him about the unjustness of the judgment, and told him that I would like to settle it, as I had no property, but would give a small amount to have the thing settled."

He says that Gunter did not ask him about any lands in Wichita county; that he told Gunter he had sold and conveyed all the land he had owned; that Gunter knew there were other judgments against him; that witness did not mention any particular tract, or mention James G. Meek's name. The witness Jot Gunter testifies that he never had any actual notice of the unrecorded deed, that he never heard Mr. Meek's name mentioned until the interrogatories were propounded in this case. The appellant agrees that Mr. Munson testifies to the same facts as testified to by Jot Gunter. Here is no proof that either Gunter or Munson had actual notice of Meek's deed. Here is full, uncontradicted proof that neither of them had ever heard Meek's name mentioned till after issue joined in this suit. The proof shows Purinton, as a debtor claiming to be insol-

vent, trying to induce his judgment creditor to settle with him at a small figure. What inquiry would his statement to Gunter cause a prudent man to make, under such circumstances? What inquiry could he make that would lead to any more definite information? We must hold with the circuit court that neither Gunter & Munson, nor either of them, had notice of Meek's unrecorded deed at the date of the levy of their execution. Did they levy on the land, or only on Purinton's interest in the land? The land was shown by the records to be Purinton's land,—an unqualified estate in fee granted to him by the state. Why should the sheriff not levy on the land? And why is it contended that he only levied on the interest of Purinton in the land? Because the sheriff recites in the deed he gave the purchasers that "I, T. W. Gee, sheriff as aforesaid, did, upon the fourteenth day of January, A. D. 1878, levy on and seize all the estate, right, title, and interest which the said defendant so had in and to the premises hereinafter described;" said premises being the land in controversy. The words recited above, indicating the levy, are the very words which the statute uses in declaring what a sheriff's deed to land sold under execution shall convey. The deed, in this particular, is in the form in universal use in Texas in 1878, and now, in conveying land sold by sheriffs under execution. The land appearing on the record to be the property of the defendant in the execution, it was the duty of the sheriff to levy on and seize the land. The execution, with the sheriff's return thereon, is either destroyed or lost, so that it cannot now be found. It is admitted that the sheriff had a valid execution, and that he levied it, executed it, and returned it to the court out of which it issued. The presumption is that he levied it properly. There is nothing in the recitations of his deed to rebut that presumption, or to show in what words he indorsed on the execution his levy on the land. If it is assumed that he used the same words in indorsing his levy on the execution that are used in the recital in the deed, in our view, he levied on the land as fully as he could have done by any other form of words. Against the execution creditor, the unrecorded deed to Meek was void. The whole estate, right, title, and interest in the land was Purinton's, and subject to the levy. We find no error in the decree. It is affirmed.

WICKHAM v. HULL et al.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. March 24, 1894.)

1. NATIONAL BANKS—ASSESSMENT ON STOCK—LIABILITY OF ESTATES.

The estate of a deceased owner of national bank stock is liable (Rev. St. § 5152) to an assessment levied against his executors in consequence of the failure of the bank after his death.

2. SAME—FEDERAL JURISDICTION—ESTATES IN POSSESSION OF PROBATE COURTS.

A federal court is not deprived of jurisdiction—otherwise vested in it—of a suit against the executors of an estate by the fact that the estate is in the possession of a state probate court for purposes of administration; and the federal court has jurisdiction to adjudge whether a liability exists, but cannot issue execution to enforce the same.

8. SAME—LIMITATION OF ACTIONS.

An action was brought against the executors of an estate to establish its liability for an assessment on certain shares of national bank stock. The estate was at the time in possession of an Iowa probate court for purposes of administration, for which reason the federal court could not enforce the liability, if adjudged to exist. Defendants set up the limitation contained in the Iowa statute (Code, § 2421) regulating the settlement of estates. *Held*, that the federal court would not pass upon the question whether this provision debarred complainant from sharing in the estate, for, as the claim established in the federal court must be presented for allowance in the probate proceedings, the better practice was to remit the question to the probate court.

This is a bill filed by A. W. Wickham, as receiver of the First National Bank of Ellsworth, Kan., against Nelson Hull and John T. Liddle, executors of the last will of O. N. Hull, deceased, to enforce collection of an assessment upon certain shares of capital stock of the bank, belonging to the estate. The cause is submitted on bill and answer.

Mills & Keeler, for complainant.
C. J. Deacon, for defendants.

SHIRAS, District Judge. This cause is submitted to the court upon the bill and answer, from which the following facts are gathered: On the 11th day of September, 1884, the First National Bank of Ellsworth, Kan., was organized under the provisions of the national banking act, having a capital stock of \$50,000, and it continued in business until January 26, 1891, when it closed its doors. On the 11th day of February, 1891, the complainant was duly appointed receiver of said bank by the comptroller of the currency, and on the 11th day of December, 1891, the said comptroller made an assessment of 70 per cent. upon the capital stock of said bank, and authorized the receiver to enforce the payment of such assessment against the stockholders of the bank. Previous to December, 1889, O. N. Hull, then a resident of Cedar Rapids, Iowa, had become the owner of 40 shares of the capital stock of said bank. On the 16th day of December, 1889, said O. N. Hull died, leaving a will, which was, on the 14th of January, 1890, duly admitted to probate in the district court of Linn county, Iowa, and the defendants, Nelson Hull and John T. Liddle, were duly confirmed as executors, and notice of their appointment was given by publication for three successive weeks, as required by the statute of Iowa, the first publication being made on the 19th of January, 1890. At the time of the death of O. N. Hull, 20 shares of the capital stock of the named bank were held by certain creditors of said Hull, having been previously pledged to them, and the executors, shortly after the probate of the will, redeemed said shares of stock by paying the indebtedness for which the same had been pledged, and on February 26, 1890, they surrendered the certificates to the bank, and procured the issuance of a new certificate for said 20 shares, the same being issued to them as executors of said O. N. Hull, deceased.

The present suit was commenced on the 12th day of June, 1893; it being averred in the bill that on the 26th day of January, 1891,

when the bank ceased to do business, the defendants, as executors of said O. N. Hull, deceased, owned and held 20 shares of the capital stock of said bank, and had failed to pay the assessment thereon, as well as the assessment upon such other shares of stock as belonged to the estate. The bill prays for a disclosure of the total number of shares of said stock belonging to said estate, and for a decree ordering payment by defendants of the amount found to be due upon the assessment made upon the capital stock. In view of the express declaration, found in section 5152, Rev. St., that executors holding stock in a national bank shall not be personally liable as stockholders, it cannot be and is not claimed that a decree should go against the defendants personally, but only in their representative capacity, and to be satisfied out of the assets of the estate.

The first position taken by the defendants is that no claim exists against the estate; that when O. N. Hull died the bank was then a going concern, and his liability to be assessed upon the shares of stock owned by him was merely a contingency; and that his estate in the hands of his executors can only be subject to the payment of such demands as were existing claims at the time of the death of the testator. The liability to respond to assessments made upon the capital stock is purely statutory in its origin, and the extent and nature of the obligation is determined by the provisions of the statute creating the same. Section 5151 of the Revised Statutes enacts that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Under the provisions of this section there existed a personal liability against O. N. Hull for all contracts, debts, and engagements of the bank in force at the date of his death. After his death no additional liability could be created against O. N. Hull personally by the creation of new debts or obligations on part of the bank. Provision for such cases is made in section 5152, Rev. St., in which it is enacted that "persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds, would be if living, and competent to act and hold the stock in his own name." Upon the death of a stockholder the legal title of the shares may pass to his executor or administrator, but the liability for the debts of the bank does not follow the transfer of the title to the executor or administrator, but the statute declares that the liability for the debts shall attach to the estate of the deceased. In other words, the estate is put in the place of the deceased owner, and the statutory liability will exist against the estate, and not against the executor individually.

In *Richmond v. Irons*, 121 U. S. 27-55, 7 Sup. Ct. 788, it was contended that the personal liability of the intestate for assess-

ments upon the capital stock did not survive as against an administrator, nor as against the funds of the estate in his hands; but this contention was overruled, it being held that under the provisions of the national bank act "the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises shall not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives." Under the ruling of the supreme court in that case, if at the time of the death of O. N. Hull there existed a personal liability against him under the provisions of section 5151, Rev. St., such liability would survive against his executors; and, if the liability was created after his death, and while the shares of stock formed part of his estate, then, under the provisions of section 5152, the estate became responsible for such liability, and under either state of facts a claim would exist against the estate.

It is further contended on part of the defendants that, granting the existence of a claim against the estate, there is a lack of jurisdiction in this court to grant any relief in the premises, on the ground that the property of the estate is in the possession of the district court of Linn county, Iowa. From the admitted allegations of fact in the bill and answer contained it appears that the complainant was, when the suit was brought, and continues to be, a citizen of the state of Kansas, and sues in the capacity of a receiver of a national bank; and the defendants were, when the suit was brought, and continue to be, citizens of the state of Iowa, and residents of the northern district thereof. If no relief can be granted in the case except a decree interfering with the possession of the property of the estate now held by the district court of Linn county acting as a probate court, then the objection to the exercise of jurisdiction would be well taken, notwithstanding the fact that the complainant and defendant are citizens of different states. Thus, in *Byers v. McAuley*, 149 U. S. 608, 614, 615, 13 Sup. Ct. 906, a case in which the authorities are fully cited, it is held that "it is a rule of general application that where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court;" and, further, that: "An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court."

It appearing in this case that the will of O. N. Hull was filed for probate in the district court of Linn county, and that the estate

is being administered by that court, it follows, as is held in *Byers v. McAuley*, that the executors cannot be compelled to submit to the orders of two courts of different jurisdiction, touching the distribution of the property in their hands belonging to the estate; and, as the jurisdiction of the state court had attached before this suit was brought, this court is debarred from interfering with the possession and control of the property forming the estate which is being administered in the state court. But it is also expressly held in *Byers v. McAuley* that the fact that the possession of the property of an estate belongs to the court which has undertaken to administer the same under the laws of the state does not prevent the courts of the United States from taking jurisdiction over suits brought by citizens of a state other than that whereof the executor or administrator is a citizen for the purpose of establishing a debt or claim against the estate, or for the purpose of settling the share in the estate belonging to the plaintiff, or other like purposes; and in support of this principle the cases of *Payne v. Hook*, 7 Wall. 425; *Yonley v. Lavender*, 21 Wall. 276; *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; and *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342,—are cited. These authorities clearly establish the rule that the principle of noninterference with the possession and control of a court of probate over the property of an estate being administered by it does not defeat the right of other courts to hear and adjudge the question of the existence of the debts due from the deceased testator or intestate. Therefore, in the case now before this court, the fact that the estate of O. N. Hull is now in process of administration before the district court of Linn county, Iowa, does not defeat the jurisdiction of this court over the question whether, under the statutes of the United States, a liability on part of that estate was or was not created by the assessment ordered by the comptroller on the shares of the capital stock of the First National Bank of Ellsworth. That question can be heard and determined without interfering with the possession of the property by the state court.

The limitations on such a judgment, however, are clearly stated in *Yonley v. Lavender*, *supra*, and *Byers v. McAuley*, *supra*, in which it is held that the judgment creates no lien upon the property of the estate, nor does it authorize the levy of an execution for its enforcement. The judgment simply determines the existence of a claim against the estate, and adjudges the amount thereof, "but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent." *Byers v. McAuley*, 149 U. S. 620, 13 Sup. Ct. 906. As the bill in this case is so framed as to allow a decree determining solely the question of the existence of liability on part of the estate of O. N. Hull for the assessment made by the comptroller, it follows that the court has jurisdiction to determine that issue.

As a further defense, the answer contains a plea of the statute of limitations, based upon sections 2420 and 2421 of the Code of Iowa, which establish the order in which claims against estates

are to be paid, ranging them in five classes, and which declare that "all claims of the fourth of the above classes not filed and proved within twelve months of the giving of the notice aforesaid, are forever barred, unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the claimant to equitable relief." Counsel for the defendants has submitted a very full brief of the authorities upon the general question of the availability of state statutes of limitation as defenses to suits pending in the courts of the United States, but the record does not present this general question. The answer does not set forth a plea based upon any one of the several clauses of the statute existing in Iowa which limits the time within which the actions named therein may be brought, and therefore the record does not present the mooted question whether these provisions of a state statute can be availed of to defeat a suit in a court of the United States based upon a cause of action created by an act of congress, as in the case of suits for infringements of patents, for the collection of assessments on national bank shares, and other like matters; or whether the right to plead the state statute is restricted to causes of action which come within the legislative jurisdiction of the states.

The limitation actually pleaded in the answer is that contained in section 2421 of the Code, which is part of the chapter regulating the settlement of estates, and the powers and duties of the courts of probate of the state. The question whether the provisions of that section debar the complainant from sharing in the estate will properly come up when application is made to the probate court for leave to file the claim in the court. Even if it be true that this court might pass upon the question, it is certainly true that, unless previously adjudicated, the probate court has full jurisdiction to determine all questions arising under the provisions of section 2421 of the Code of Iowa; and, in my judgment, it is the better practice to leave the decision of the plea based on the state statute to the state court.

As already pointed out, this court cannot award execution to complainant, nor otherwise enforce payment of the claim, and of necessity the complainant must resort to the probate court in order to share in the proceeds of the estate. It is when application is made to the probate court that the question arises whether, by reason of the lapse of time, the creditor is debarred from sharing in the estate; and hence, waiving the question of the jurisdiction of this court, I hold it the better course to remit the decision of the matter to the state court. The decree of this court will therefore be limited to the question whether the assessment made by the comptroller upon the capital stock of the bank perfected a claim against the estate of O. N. Hull, and, if so, for what amount.

It being admitted that the estate held 40 shares of the capital stock at the date of the assessment, 20 of which stood in the names of the executors, and that the call was for 70 cents on the dollar, I hold that when said assessment was made a claim for \$3,040 was thereby perfected against said estate of O. N. Hull. Decree accordingly.

BILLING et al. v. GILMER.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 188.

1. RES JUDICATA—IDENTITY OF CAUSES OF ACTION.

A bill was brought to redeem certain corporate stock, and the pleadings, as finally made up, asserted, on complainant's part, a pledge of the stock in 1871, and a continuing pledge in 1875. Defendant denied the pledge in either case, and claimed to be the owner of the stock from 1871. The material issue involved was the nature of the transaction had in 1875 in relation to the stock. There was a hearing on the pleadings and the testimony as noted, which resulted in a final decree dismissing the bill. This decree was affirmed by the state supreme court. *Held*, that the whole question as to the ownership of the stock was res judicata, and complainant could not thereafter maintain a suit in a federal court to compel a conveyance to him.

2. SAME.

In a suit in a federal court, a decree of an Alabama chancery court, dismissing a bill between the same parties, was set up in bar. This decree was rendered in vacation, and it is well settled in Alabama that a decree in vacation dismissing a bill on demurrer without giving opportunity to amend is erroneous. This decree, however, had been affirmed by the state supreme court. *Held*, that the affirmance necessarily involved an adjudication that the decree was rendered on issues of fact, and therefore its effect as res judicata could not be avoided by claiming that it was rendered on demurrer.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

This was a bill in equity, brought by James N. Gilmer against Josiah Morris and F. M. Billing, to compel a transfer of certain corporate stock, and an accounting for dividends thereon. Morris having died, his executors, B. J. Baldwin, Hulit Baldwin, and F. M. Billing, were substituted as defendants. An opinion was rendered on a plea setting up a prior adjudication (46 Fed. 333), and afterwards there was a decree for complainant (55 Fed. 775), from which this appeal is taken.

Thomas J. Semmes, H. C. Tompkins, and Alex. Troy, for appellants.

W. A. Gunter, E. H. Farrar, and E. B. Kruttschnitt, for appellee.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. This was a bill filed by appellee, J. M. Gilmer, on the 9th day of January, 1890, against Josiah Morris and F. M. Billing, to compel the transfer of 60 shares of the capital stock of the Elyton Land Company, a corporation under the laws of Alabama, which stock appellee alleges he had pledged with Morris; and to compel Morris to account to him for the dividends thereon. The substance of the bill is that in 1870 the appellee, being the owner of certain stock of the Elyton Land Company, and being indebted to appellant Josiah Morris for money paid for him on account of the subscription to said stock, placed the same with Morris, to hold as a pledge for the debt, and transferred by indorsement the certifi-

cate to him. Thus matters stood until March, 1875, when Gilmer became further indebted to Morris for moneys paid for and loaned to him, and when, as the bill avers, Gilmer made an agreement with Morris that the stock should be transferred to him on the books of the company, and thereafter held by him as a pledge for the payment of all his past indebtedness, and for all indebtedness which Gilmer and his firms might incur in the future to Morris, or the banking firm of Josiah Morris & Co., composed of the appellants Josiah Morris and F. M. Billing. The bill prays that Morris be decreed to account for and pay over to appellee (complainant below) all dividends that may have been paid on said stock since the same had been in Morris' hands, after deducting all of the indebtedness due him and his firm by appellee, and that said stock be decreed to be transferred by Morris to him. To the bill a plea is filed, setting up, in substance, that complainant had on the 7th July, 1884, filed in the state chancery court of the state of Alabama a bill against these defendants to redeem the identical shares of stock for the redemption of which the bill in this case is filed. That he alleged in said bill that the stock had been pledged to Morris as security for a debt due by him to Morris and to his firm, and for advances that might thereafter be made to him (complainant), or to any firm of which he might be a member; and praying that Morris might be decreed to account for all dividends received on said stock, and to transfer said stock to him, as is now prayed in this bill. That Morris answered that bill, denying that the stock was the property of complainant, and that he had any right to it, or any part of it. And the plea avers that, upon the issue made by the pleadings, testimony was taken by the respective parties to the cause, and at the April term, 1885, of the said chancery court the cause was submitted on the pleadings and testimony for decree on the merits, and was argued by counsel, and upon consideration thereof it was ordered, adjudged, and decreed that complainant was not entitled to relief in said cause, and the bill was dismissed absolutely out of court. That from this decree the complainant appealed to the supreme court of the state of Alabama, and at the December term, 1885, thereof, the cause was submitted and argued by counsel for the respective parties on its merits, and that the supreme court in all things affirmed the decree of the chancery court. The plea further avers that the stock sued for in the two suits was identically the same, and that the relief prayed in the two suits was for the same matters, and to the same effect. To the plea were attached, and made parts thereof, copies of the record in the chancery court, referred to, and of the opinion and decree of the chancellor; also copies of the opinions and judgment of the supreme court.

There are many assignments of error in this case, but the counsel for appellants, in their argument, insist only on those which involve the ruling of the lower court on the plea of *res adjudicata* filed to the bill, and which the court adjudged and decreed to be insufficient, and to be overruled. The record of the cause in the state court is specially pleaded, and is also offered in evidence in support of the answer. It is conceded that, if the judgment of the state

court determined the questions now litigated in this suit, it would be conclusive on the federal courts, and would be an end of this case. Of the four concurrent elements or conditions necessary to render a matter *res adjudicata*, three of them are admitted to exist in this case. The other—the identity of the cause of action—is controverted. To render the decree in the former suit available as a bar in this suit the cause of action must be the same, and the former decree must have been upon the merits. "The doctrine of *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried, that the parties have had adequate opportunity to say and prove all that they can in relation to it, that the mind of the court has been brought to bear upon it, and so it has been solemnly and finally adjudicated." 2 Black, Judgm. § 614; 1 Freem. Judgm. § 256. "The decree in the former suit is conclusive, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. Sac Co.*, 94 U. S. 351; 1 Freem. Judgm. § 249; *Tankersly v. Pettis*, 71 Ala. 179. In the last case the court says that "a judgment is conclusive of the entire subject-matter of controversy, of all that properly belongs to it, of all that might and ought to have been litigated and decided."

The cause of action is said to be the same when the evidence necessary to sustain a judgment for the plaintiff in the present suit would have authorized a judgment for him in the former. 1 Freem. Judgm. § 259; 2 Black, Judgm. § 726. What is a cause of action? As defined by one of the learned counsel for appellee: "A cause of action is the existence of those facts which give a party a right to judicial interference in his behalf." The facts alleged which give the complainant a right to judicial interference are that he is the owner of certain stock in the Elyton Land Company, which the defendant Morris holds as a pledge from and in trust for him; that he has a right to recover the stock, and that the defendants deny his right and title to it. The facts averred in the suit in the state court were that complainant was the owner of the identical stock which he had a right to recover from defendants; that Morris acquired possession of it under such circumstances as made him a pledgee of the same; that he was to hold it as security for certain indebtedness due him by complainant, and that in the hands of Morris it "became and was a basis of credit for money." The matters directly in issue in that suit, and necessarily involved in it, were the ownership of the stock, and how Morris held it,—whether as pledgee or otherwise. Until it was established that Morris did hold the stock as pledgee, and under such circumstances as gave Gilmer a right to it, no suit to recover it could be maintained.

The original bill in the state court was to redeem the stock from an alleged pledge made in March, 1875, by transfer to Morris, to secure an indebtedness of Gilmer and Donaldson to defendant, and to have an account of the dividends received on it, and, upon payment of the debt, to have the stock transferred to Gilmer. Morris,

answering, denies that the stock was transferred to him for any such purpose, sets out the circumstances under which the stock was transferred to him, and claims that the stock was his own property, and so had been as against Gilmer from December 30, 1871, and as against the whole world since March 30, 1875. The amended bill in the state court set up the original purchase of the stock in Gilmer's name, and the payment of the purchase money for it by Morris, and the transfer of it to Morris as security for its repayment, and that Gilmer allowed the stock to remain with Morris "as a basis of credit for money," and until he should pay to said Morris and to his firm all balances of money due him and them by Gilmer; that, after such transfer, he became liable to Morris and to his firm for various small sums of money, besides the balance due on account of the original purchase of the stock, and Gilmer offers to pay to Morris and to his firm whatever sums of money may be found due them by him, and prays an account for dividends, etc. Morris, in his amended answer, denies that Gilmer was the true owner of the stock, and says, if he ever was the true owner, that he, on March 30, 1875, transferred the same to him (Morris) on the books of the Elyton Land Company, and had the certificate for the stock issued to him in his own name; that Gilmer was indebted to him and to his firm, Josiah Morris & Co., in a large amount, which he was bound to pay before demanding a reconveyance of said stock to him; and that Gilmer had not demanded or claimed said stock until more than nine years after said transfer, but had abandoned and lost all claim thereto, and that the same was barred by the statute of limitations. The complainant, Gilmer, had the right and the opportunity to file any replication, general or special, to this answer; or, if he wished to set up matter in confession and avoidance of the facts averred in the answer, he could have done so by amending his bill. Failing to adopt either the one or the other course, the effect of the statute of Alabama, which provides that "no replication is necessary to an answer," is to make up an issue upon the facts alleged in the answer. Code Ala. § 3444. The cause being at issue, the respective parties took testimony thereon, and subsequently submitted the cause to the court for decree on the pleadings and testimony as noted. There was a note of testimony taken. The particular cause of action or controversy in that suit was the ownership of certain stock, and a pledge of it in 1871, and a continuing pledge of it in 1875, and subsequent to that time. The material, if not the real, issue involved was the transaction between the parties relative to the stock in 1875; what that transaction was, and how the stock was afterwards held by Morris,—whether as pledgee or absolute owner. This issue was presented in the pleadings, and presumably on the testimony, in that action. The particular cause of action or controversy in this suit is the ownership of the same stock, and a pledge of it in 1875, which Gilmer avers Morris held as a security for debts due him and to become due, and which were, from time to time, subsequently incurred. It is clear that this assertion of ownership of the stock by Gilmer, and the averment of a pledge of

it to Morris in 1875, raise the issue as to what was the real transaction between the parties relative to the stock in 1875,—a material issue, which, as we have seen, was necessarily involved in the former suit. We think that the issues in the former suit were broad enough to have comprehended, and did comprehend, all that is involved in this suit. But there is another rule of law, to which we have already adverted in this opinion, by which to determine whether the cause of action is the same in the two suits. That rule is that, "when the evidence necessary to sustain a judgment for the plaintiff in the present suit would have authorized a judgment for him in the former suit, the cause of action is said to be the same." Can it be doubted, if the proof which is necessary to sustain a judgment for plaintiff in this suit had been made in the former suit, that it would have authorized a judgment for plaintiff? The record of the former suit shows that the pledge referred to as of March 30, 1875, was a subject of controversy, and must have been a subject of proof, in that suit. Doubtless it was proven or attempted to be proven as a recognition by Morris of Gilmer's claim. Clearly, it was considered by the court in deciding the case, and was necessarily determined by the court to exist or not to exist as a fact. The court may have found that no such pledge as was claimed ever existed, or it may have found that such pledge did exist, but that the complainant's right to redeem it had been lost by laches, or barred by the statute of limitations. Suffice it to say, the court adjudged and decreed that the complainant was not entitled to relief, and that his bill be dismissed out of court. It was an absolute and unconditional dismissal. This decree was affirmed by the supreme court. Was the decree rendered upon the merits of the case? If it was rendered, as is contended by the appellee, solely on the pleadings,—was rendered on demurrer, and because the bill stated no good cause of action,—the judgment is not conclusive. "The dismissal of a bill in chancery will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court." 1 Freem. Judgm. § 270; 2 Black, Judgm. § 722; *Durant v. Essex Co.*, 7 Wall. 107; *House v. Mullen*, 22 Wall. 42; *Lyon v. Manufacturing Co.*, 125 U. S. 698, 8 Sup. Ct. 1024; *Tankersly v. Pettis*, 71 Ala. 179.

In the last cited case the court says: "When the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties." And in the case of *Lyon v. Manufacturing Co.*, *supra*, the court uses this language: "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal is not, in direct terms, 'without prejudice.'" The contention of appellee is that the dismissal was on demurrer, and that it was because of some defect in the pleadings, or because the averments of the bill did not make a case for relief. It is not apparent in the decree of the court that the dismissal was on demur-

rer. Every presumption is in favor of its correctness, and that it is free from error. It was rendered in vacation. Now, the well-settled law in Alabama is that, if the chancellor renders a decree in vacation dismissing a bill on demurrer, or dismissing it when the proof shows complainant is entitled to relief, but because of defects or insufficiency of averments in his bill he could not get it under the bill without giving him an opportunity to amend, he commits an error, for which the case must be reversed. *Kingsbury v. Milner*, 69 Ala. 502; *Stoudenmire v. De Bardelaben*, 72 Ala. 300; *Yonge v. Hooper*, 73 Ala. 119; *Gilmer v. Wallace*, 75 Ala. 220.

If the contention of the appellee should prevail, then we would find that the supreme court of Alabama itself committed an error when it affirmed the decree of the chancellor. We cannot so hold. It necessarily follows, then, that in affirming the decree of the chancellor the supreme court adjudged that he had decided the case on issues of fact, and not on demurrer. Furthermore, as there was no specific reference made to the demurrer in the submission, or in the decree, the inference is that it was waived. *Walker v. Cuthbert*, 10 Ala. 213; *Corbitt v. Carroll*, 50 Ala. 316; *Daughdrill v. Helms*, 53 Ala. 65.

The contention of appellee's counsel further is that the only issue submitted to the chancery court was in reference to recognitions by defendant Morris of the complainant's (Gilmer's) claim to the stock, and whether it was necessary to aver such recognitions, and that this issue was raised and decided on a demurrer to the bill. We think the counsel are entirely in error as to this. We find no such issue raised by the demurrers. There was no demurrer to the bill for want of equity, or because the complainant had not shown a case entitling him to relief. There was a demurrer on the ground of staleness, and also of the statute of limitations. But it cannot be said that the bill was dismissed for want of equity, as shown on the face of the bill, or because the complainant's averments were not sufficient to entitle him to relief, in that he failed to aver recognition of his right by defendant.

Again, it is contended that the decree of the chancery court rested on the defense of the statute of limitations,—one of the grounds of demurrer. This defense was presented, as is allowable under the practice in Alabama, both by demurrer and by the answer. But the question of limitation involves the question of adverse possession, and the latter could not have been determined on the demurrer to the bill, because it does not appear from the bill that the defendant held the stock adversely. On the contrary, it appears therefrom that he held it permissively by, and in trust for, complainant. The evidence must have been considered by the court in order to determine the question of limitations, as well as that of staleness. The court could not have properly determined these questions from the averments of the bill. If it appears at the hearing of a case that it is liable to the objection of laches on the part of complainant, relief will be refused on that ground. *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437.

We do not think that the opinions of the chancellor and of the supreme court, which are set out and made parts of the plea, are any part of the judgment roll; nor do we deem it necessary to look at the opinions to ascertain the ground or reason for the judgment rendered in the cases in which they were pronounced, even if admissible for such purpose. But the supreme court does, in effect, hold that by the staleness of the complainant's claim, and its complete bar by the statute of limitations, the title to the stock in question vested absolutely in the defendant. *Gilmer v. Morris*, 80 Ala. 78.

Our opinion is that the record discloses that the dismissal of the bill in the state court was not on demurrer, or for any defects in the pleadings, but was upon the merits of the cause; and that the matters now alleged and involved in this litigation were actually presented and determined by the courts of the state of Alabama, and are not now open to appellee. "It is obvious that the good order of society requires that a cause once fairly heard on the merits should be conclusive between the parties; hence the plea of *res adjudicata* finds a place in every jurisprudence."

Decree reversed, and cause remanded to the circuit court, with directions to dismiss the bill, with costs.

DRUMMOND v. ALTEMUS.

(Circuit Court, E. D. Pennsylvania. January 23, 1894.)

No. 25.

LITERARY PROPERTY—LECTURES—INCORRECT PUBLICATION—INJUNCTION.

Complainant, having delivered a series of lectures, caused part of them to be reported in a journal. Defendant copied, partially and incorrectly, the published reports, and sold them in book form under a title importing that the whole series of lectures was there presented in the author's language. *Held*, that on these facts complainant was entitled to a temporary injunction, independently of the copyright law.

This is a bill by Henry Drummond against Henry Altemus to enjoin the publication and sale of a book purporting to contain certain lectures delivered by complainant. Heard on application for a temporary injunction.

Biddle & Ward, for plaintiff.

Josiah R. Sypher, for defendant.

DALLAS, Circuit Judge. From the facts as developed on the hearing of this motion for an interlocutory injunction it appears that the defendant has published, and to a considerable extent has sold, a book purporting to contain certain lectures delivered by the plaintiff, which, in fact, does not present those lectures correctly, but with additions and omissions which essentially alter the productions of the author. This is sought to be justified by the averment that the lectures in question had not been copyrighted, and that their author had dedicated them to the public. The subject of copyright is not directly involved. The complainant does not base his claim to

relief upon the statute, but upon his right, quite distinct from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and, incidentally, to prevent fraud upon purchasers. That such right exists is too well settled, upon reason and authority, to require demonstration; and, although it is equally well established that an author may, by dedication of any product of his pen to the public, irrecoverably abandon his title, yet, in this case, the fact relied on by the defendant to support his assertion of dedication wholly fails to vindicate the publication complained of. The complainant did send to a journal called the "British Weekly," and permit its publishers to print in its columns, reports of eight of the lectures to which this suit relates, but these did not give, and could not be understood as giving, a full and exact presentation of those particular lectures, and of the remaining four lectures of the series no report of any kind was furnished to the press or placed before the public. The defendant's book is founded on the matter which had appeared in the British Weekly, and, if that matter had been literally copied, and so as not to misrepresent its character and extent, the plaintiff would be without remedy; but the fatal weakness in the defendant's position is that, under color of editing the author's work, he has represented a part of it as the whole, and even, as to the portion published, has materially departed from the reports which he sets up in justification. The title of the book is "The Evolution of Man; being the Lowell Lectures Delivered at Boston, Mass., April, 1893, by Professor Drummond." It is true that all the reports, except one, in the British Weekly, appear under a heading in the same words; but the ordinary reader is not likely to rely upon display lines of a public journal to give a precise indication of the contents of an article to which they are prefixed, whereas such a title as we have in this instance, given to a book in permanent form, may reasonably be, and usually is, relied on as truly stating the nature of its contents. A most important circumstance in this connection is that the defendant, while precisely adopting his title from the headlines of the reports, has so altered their text as to make it appear, contrary to the whole tenor of the reports themselves, that what his book contains is the precise language of the author of the lectures, although, as has been said, it contains only some of the lectures, not all of them, and presents none of them fully or correctly. The complainant's right has been fully made out, and the case shown is manifestly one which calls for the interposition of the court at this stage. An order will be made for a temporary injunction.

POTT et al. v. ALTEMUS.

(Circuit Court, E. D. Pennsylvania. January 23, 1894.)

No. 26.

LITERARY PROPERTY—PRELIMINARY INJUNCTION.

An author obtained a temporary injunction against the publication, in garbled form, of certain lectures delivered by him. At the same time a

third person to whom he had transferred the copyright also sued to enjoin the same publication. *Held* that, in view of the privity between the plaintiffs in the two suits, the court was not called upon to determine whether the assignee also had a right to a preliminary injunction, and the same would be denied, without prejudice to a renewal of the application.

This is a bill by James Pott and others to enjoin Henry Altemus from publishing a book containing incorrect and fragmentary copies of certain lectures by Professor Henry Drummond. Complainant based his right on an assignment of the copyright. Heard on application for a temporary injunction.

Biddle & Ward, for plaintiffs.

Josiah R. Sypher, for defendant.

DALLAS, Circuit Judge. This is a motion for a preliminary injunction. The facts are the same as in *Drummond v. Altemus*, 60 Fed. 338, in which an opinion will be filed at the same time as this. In that case the title of the plaintiff to relief is founded upon his authorship of the lectures to which both suits relate. In this one, the allegations upon that subject are:

"(5) That the said Professor Drummond has transferred and assigned to the said plaintiffs all right in the above-mentioned Lowell lectures and book, as well as the copyright thereof, as far as the United States of America is concerned. * * * (10) That by the said deceitful and fraudulent publication of the said fragmentary and imperfect extracts from the *British Weekly* in book form as aforesaid, and by the fraudulent unauthorized additions and variations contained and appearing in the same work by the said defendants, the said Professor Drummond is greatly injured, pecuniarily, and otherwise, in his literary reputation as an author, and the said plaintiffs and the said Professor Drummond are pecuniarily injured through the damage the publication of the said work by the said defendants has caused and continues to cause to the future sale by the said plaintiffs of the genuine book, composed of the genuine Lowell lectures."

I have recently stated, and on several occasions, that, in my opinion, a motion for an interlocutory injunction should not in any case be allowed to operate as a means of obtaining a premature expression, where unnecessary, of opinion by the court upon the merits of the controversy; and that this special relief should not be granted without special reason, but that, except in a clear case and under circumstances requiring the immediate exercise of the restraining power of the court, an alleged right to injunction, as well as all other questions in the cause, should await determination until the coming in of the proofs in the regular way. *Williams v. McNeely*, 56 Fed. 265.

I do not intend to suggest that the present motion has been made for the purpose of anticipating the final hearing, but, in view of the privity of the plaintiffs in this case with the plaintiff in the other, in which the writ has been allowed, it does not seem to be requisite to consider whether these plaintiffs also would, independently of the circumstances referred to, be entitled to a preliminary injunction. Therefore, no order will be made upon their present application, but the plaintiffs have leave to renew this motion at any time, if they shall be so advised.

MORROW SHOE MANUF'G CO. v. NEW ENGLAND SHOE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 9, 1894.)

No. 71.

CREDITOR'S BILL—EQUITY JURISDICTION—CORPORATIONS.

Rev. St. Ill. 1893, c. 32, § 25, which authorizes a suit in the nature of a creditor's bill to be brought against corporations in certain cases by simple contract creditors, does not give federal courts jurisdiction to entertain such a suit where the creditor has not first exhausted his legal remedy, since the equitable jurisdiction of federal courts cannot be enlarged by state legislation.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

On petition for rehearing. For former opinion, see 6 C. C. A. 508, 57 Fed. 685.

Peckham & Brown and Miller & Starr, for appellant.

Flower, Smith & Musgrave, for appellees.

A. B. Jenks and W. A. Foster, for Peabody.

BAKER, District Judge. The appellees have filed petitions for a rehearing, which they have supported by elaborate briefs. We have given their petitions and briefs attentive consideration, and find no error pointed out which would justify the court in granting them a rehearing. The grounds upon which our decision is rested are fully stated in the opinion heretofore filed, to which we still adhere, and no good purpose will be subserved by adding anything to what is there stated. The petitions of the appellees are therefore overruled. The appellant has filed a petition for a rehearing and a modification of the opinion of the court by striking out of the same the following:

"The bill fails to allege that the plaintiff had prosecuted its claim to judgment, and had issued an execution thereon, and had the same returned nulla bona. For this reason the bill is insufficient within the doctrine of *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, and *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977."

The appellant further asks that the order of the court be modified to read as follows:

"That the decrees herein entered respectively on the 28th day of April, 1892, dismissing the bill of complaint as to the defendants Gore, Prouty, and Heimerdinger, and on the 9th day of May, 1892, dismissing the said bill as to Hiram B. Peabody, be reversed at the costs of said appellees, and that said cause be remanded to the court below for further proceedings not inconsistent with this opinion, and with leave to complainant to amend its bill as it may be advised within thirty days after the judgment herein shall be certified to said court."

Counsel for the appellant insist that the suit is brought under Rev. St. Ill. c. 32, § 25, and that under this section it is unnecessary to the maintenance of the suit that the claim should have been reduced into judgment and an execution issued thereon and returned nulla bona. This section provides that:

"If any corporation, or its authorized agents shall do, or refrain from doing any act which shall subject it to forfeiture of its charter or corporated pow-

ers, or shall allow any execution or decree of any court of record, for a payment of money after demand made by the officer to be returned no property found, or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who are stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suits; * * * and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, etc."

It is firmly settled that under this section it is not necessary to the maintenance of a suit in equity in the courts of the state that the claim of the creditor should have been reduced into judgment, and an execution issued thereon and returned nulla bona. A suit in equity may be maintained in a court of the state by a simple contract creditor, who holds neither a general nor a specific lien against a corporation which is insolvent and has ceased to do business, leaving debts unpaid, for the purpose of winding up its affairs. *Mining Co. v. Edwards*, 103 Ill. 472; *St. Louis, etc., Min. Co. v. Sandoval, etc.*, Min. Co., 111 Ill. 32; *Id.*, 116 Ill. 170, 5 N. E. 370; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Hunt v. Rink Co.*, 143 Ill. 118, 32 N. E. 525; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781. As a general rule, where a new right is created by the statute of a state, the federal courts will take cognizance of it, and will enforce it according to their methods of procedure. Whether it will be enforced at law or in equity depends upon its character. When it is remedial in its nature and essentially of an equitable character, it will be enforced on the equity side of the court. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554; *Davis v. Gray*, 16 Wall. 221; *Case of Broderick's Will*, 21 Wall. 503; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129. But every new right of an equitable nature created by the statute of the state is not necessarily enforceable in the federal courts upon the same facts and under the same circumstances as in the courts of the state. If the new right is one not within the recognized equitable jurisdiction of the federal courts, it cannot be enforced by such courts in equity, although the statute of the state has declared that the new right shall be enforced in equity. The jurisdiction of the federal courts as courts of equity cannot be enlarged by state legislation. New equitable rights which fall within their accustomed jurisdiction can alone be enforced by the federal courts in equity. The case of *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, is decisive of this question. The court there say:

"The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims, and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarkation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 383, 977; nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *Tube*

Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165; Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691."

It is further contended by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, while the latter has absolute dominion over his own property, an insolvent corporation is a mere trustee, holding its property for the benefit of its creditors and stockholders, and that a federal court of equity may entertain jurisdiction to wind up its affairs in a suit brought by a simple contract creditor. This contention is declared in the above-cited cases to be at war with the notions which were derived from the English law with regard to the nature of corporate bodies.

"A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, and a court of equity, at the instance of the proper parties, will then make those funds trust funds which, under other circumstances, are as much the absolute property of the corporation as any man's property is his." *Graham v. Railroad Co.*, 102 U. S. 148, p. 160.

Under the settled law applicable to the federal courts, a simple contract creditor is not a proper party to invoke the aid of a court of equity to make the corporate funds trust funds, and to wind up the affairs of an insolvent corporation, unless the ordinary jurisdiction of the court has been enlarged by legislative authority. The jurisdiction of the court below had not been so enlarged, and it cannot be supported by an appeal to the state legislation in question. For these reasons the petition of the appellant for a rehearing is overruled. It was determined by the court, and so announced, that, as the appellant had committed the first material error, the cause would be reversed at its cost. By mistake or oversight, the order as entered adjudged the costs against the appellees. The order of reversal heretofore entered will be so far modified as to adjudge the costs against the appellant, and in all other respects it will stand approved.

HAMNER v. SCOTT.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 336.

WRIT OF ERROR—FINAL JUDGMENT—ATTACHMENT.

An order quashing an attachment, and leaving the action still pending in the trial court, cannot be reviewed by writ of error, since it is not a final decision. *Standley v. Roberts*, 59 Fed. 836, distinguished.

In Error to the United States Court in the Indian Territory.

Attachment by James B. Hamner against J. S. Scott. The attachment was quashed, and plaintiff brings error.

G. B. Denison and N. B. Maxey (Gilbert W. Pasco, W. M. Harrison, and M. M. Edmiston, on the brief), for plaintiff in error.

W. T. Hutchings (R. B. Shepard and H. O. Shepard, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. The plaintiff in error, James B. Hamner, brought suit against J. S. Scott, the defendant in error, in the United States court in the Indian Territory, on certain promissory notes, and sued out an order of attachment in the action. On motion of the defendant, the order of attachment was quashed, and thereupon the plaintiff sued out this writ of error to review the order of the lower court quashing the attachment. The principal action is still pending in the lower court. An order quashing an attachment is not a final decision, within the meaning of the act of congress creating this court (chapter 517, § 6, 26 Stat. 826), and a writ of error will not lie to review such an order (*Robinson v. Belt*, 5 C. C. A. 521, 56 Fed. 328; *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490.) We may add that this is the rule in Arkansas, under the Code of Practice of that state, in force in the Indian Territory, and under which the attachment in this case was sued out. *Didier v. Galloway*, 3 Ark. 501; *Heffner v. Day*, 54 Ark. 79.¹ The adjudged cases in other states are not harmonious, but the weight of authority is that an order sustaining or dissolving an attachment is interlocutory, and not appealable, in the absence of a statute making it so. 1 Black, Judgm. § 36; *Elliott*, App. Proc. §§ 81, 88, and cases cited in note 3. The case at bar is distinguishable from that of *Standley v. Roberts*, 59 Fed. 836, in this: In that case there was a final decree upon all of the issues in the case between the parties to the appeal. As between them, there was a final and complete determination of the action upon issues which did not concern the other parties to the suit. In this case the main action between the parties to the writ of error is pending and undetermined in the lower court. The writ of error is dismissed.

ADKINS v. W. & J. SLOANE.*

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 344.

REVIEW ON APPEAL—SPECIAL FINDING.

Where some of the facts are admitted by stipulation, and others left to be proved, and the court finds the issues for the plaintiff "on all the evidence," the finding is general, and the opinion of the trial court, in which the questions of fact and law are discussed, cannot be considered, in connection with the stipulation, as a special finding of facts, reviewable by the court of appeals.

* 14 S. W. 1090.

* Rehearing pending.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Attachment by W. & J. Sloane, a corporation, against Isaac Wolf. An interplea was filed by James G. Adkins. Plaintiff obtained judgment. The interpleader brings error.

Henry Wollman and Clarence S. Palmer (R. O. Boggess, Scammon & Stubenrauch, Brown, Chapman & Brown, and Garner & Walsh, on the brief), for plaintiff in error.

Nathan Frank, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This was a writ of error to reverse a judgment which was rendered on an interplea in an attachment suit. W. & J. Sloane, a corporation, brought suit by attachment against Isaac Wolf on the 7th of December, 1891, alleging, among other things, for the purpose of obtaining a writ of attachment, that Wolf "had fraudulently conveyed or assigned his property and effects so as to hinder and delay his creditors." The writ of attachment was levied on a stock of carpets, mattings, and store fixtures at the time in the possession of James G. Adkins, the interpleader, and situated in a store at Nos. 1221 and 1223 North Main street, Kansas City, Mo. Under the provisions of section 572, Rev. St. Mo. 1889, Adkins filed an interplea claiming the property under a deed of trust in the nature of a mortgage, which had been executed by Wolf on November 30, 1891. The deed of trust purported to convey to Adkins, as trustee, the stock of merchandise which was attached, and certain real estate, and certain notes and accounts, for the common benefit of certain persons named in the deed, who are admitted to be creditors of Wolf, and his only creditors. The interplea alleged generally that Adkins, as trustee, was the owner of, and was in possession of, the attached property when the same was seized, and that Wolf then had no interest in said property. The answer to the interplea averred, in substance, that the property belonged to Wolf when the writ of attachment was levied thereon, and that Adkins held the property at that time under and by virtue of a pretended deed of trust dated November 30, 1891, which had been made and executed by Wolf for the purpose of hindering, delaying, and defrauding his creditors, as the said interpleader well knew. The issues thus framed were tried before the court, pursuant to a stipulation waiving a jury; and the court rendered a judgment in favor of the attaching creditor, and against the interpleader. Subsequently, a judgment was rendered against Wolf in the sum of \$5,960.98 on the plaintiff's cause of action, and a further order was entered, sustaining the attachment.

The parties to the interpleader suit filed a stipulation admitting certain facts, but the most important issues arising on the interplea, touching the motives which had actuated the parties to the deed of trust in executing that instrument, were left to be determined by the court from such evidence as might be adduced by either party at

the trial. The record contains the opinion of the circuit court, in which several questions of law and fact are discussed and considered. At the conclusion of the opinion there is an ultimate finding in the following language: "On all the evidence, I find, the issues for the plaintiff, and against the interpleader." It is manifest, we think, from an inspection of this record, that we would not be authorized to treat the opinion of the circuit court, together with the admitted facts, as tantamount to a special finding of the facts by the court, such as the act of congress contemplates and authorizes, but must, of necessity, regard them as the equivalent of a general verdict by a jury. *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, and citations. In this view of the case, which we have felt compelled to adopt, the record presents no debatable question which this court is authorized to review, for the reason that no declarations of law were asked, and no exceptions were taken to the admission or exclusion of testimony. The judgment rendered by the trial court was clearly authorized by the pleadings, and this is the only point that we have the right to consider—the finding being general, and no exceptions having been saved either to the admission or exclusion of testimony, or to the giving or refusing of instructions. At the present term this court has had occasion to consider this subject, and to express its views thereon, in three different cases, besides the one at bar. Without repeating what has so recently been said with reference to the proper mode of saving exceptions in law cases which are tried before the court on a stipulation waiving a jury, it will be sufficient to refer to the recent cases, and the authorities therein cited. *Walker v. Miller*, 59 Fed. 869; *Bowden v. Burnham*, Id. 752; *Trust Co. v. Wood*, *infra*. The judgment of the circuit court, for the reasons above explained, must be affirmed, and it is so ordered. Affirmed.

MERCANTILE TRUST CO. v. WOOD et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 339.

1. REVIEW ON APPEAL—EXCEPTIONS.

Under Rev. St. U. S. § 700, which declares that when an issue of fact is tried by the court without a jury "the rulings of the court in the progress of the trial if excepted to at the time" may be reviewed upon appeal and that "when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment," where no requests for any declarations of law are made at the trial, and exceptions to the rulings of the court on the evidence are not taken, the only question for review on appeal is the sufficiency of the findings of fact.

2. FRAUDULENT CONVEYANCES—CHATTEL MORTGAGE—QUESTION OF FACT.

Where a chattel mortgage on a stock of goods in Iowa contains no provision allowing the mortgagor to sell, and he does sell, the goods in the usual course of trade, without accounting therefor to the mortgagee, the question whether or not such mortgage is fraudulent as to creditors is one of fact, under the decisions of the supreme court of Iowa, which the national courts follow in such a case. *Jaffray v. Greenbaum*, 20 N. W. 775, 64 Iowa, 492, followed.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Attachment by Richard Wood, Samuel Brown, Henry Henderson, Henry Harper, and Andrew Crow, composing the firm of Wood, Brown & Co., against the Crescent Coal Company. The Mercantile Trust Company of New York intervened, claiming the attached property under a mortgage. There was judgment against the intervener, and it brings error.

William J. Roberts (John F. Lacey, on the brief), for plaintiff in error.

Carroll Wright, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The controversy in this case was over a stock of goods that was in the possession of the Crescent Coal Company at What Cheer, in the state of Iowa. Wood, Brown & Co., the defendants in error, attached this stock February 13, 1891, on a debt of the coal company due to them. The Mercantile Trust Company, the plaintiff in error, intervened, and claimed the goods under a mortgage made to it by the coal company, dated February 1, 1890. There were two controlling issues tried. They were whether or not the mortgage covered the stock of goods, and, if so, whether or not the mortgage was fraudulent and void as to the attaching creditors. A jury was waived, and the case was tried by the court. The court found that the mortgage did not describe the goods in controversy, and that, if it did, it was fraudulent and void as against the attaching creditors, and ordered judgment in their favor. The judge filed a careful and exhaustive opinion, which covers 17 closely-printed pages of the transcript, in which he states the history of the case, the evidential facts he deems established, his ultimate conclusions from those facts, his reasons for these conclusions, and the judgment that he directs to be rendered in the case.

In their brief, counsel for plaintiff in error specified 26 supposed errors, some of fact, and others of law, based on various statements and conclusions found in this opinion. But, upon looking into the record, we find the questions they attempt to present are not material to the decision of this case. The only exceptions any of these specifications have to rest upon are four that purport to be taken "to the findings and conclusions of the court in the following respects:" First. To so much of finding of fact No. 6 as relates to the defendants' possession of and dealing in the stock of goods after the attachment and the release of the same; second, to the third conclusion of the court that the stock of goods was not included in the mortgage; third, to the fourth conclusion of the court that the mortgage was fraudulent and void as to the attaching creditors; and, fourth, to the final conclusion in favor of the attaching creditors. Section 700 of the Revised Statutes, which governs the practice in this regard in this court, provides that:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court, without the intervention of a jury, according to section 649 (which provides for the waiver of a jury and a trial by the court), the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The special finding referred to in this conclusion is not a report of the evidence, but it must be, like the special verdict of a jury, a finding of the ultimate facts which the evidence establishes. The only question the special finding presents that would not be presented by a general finding is whether or not, in any view, the facts found in it are sufficient to support the judgment. With the single exception of this question, which is presented by the special finding itself, there are only two methods by which questions of law can be so presented to the court that tries the facts that this court can review them by writ of error. These methods are, first, by seasonable objections and exceptions to the rulings of the court upon the admission or rejection of evidence, and, second, by requesting the court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to a jury would be requested, and the rulings of the court giving or refusing them would be excepted to, if the trial was before a jury. The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended. Exceptions to the finding, or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, avail nothing. They are as futile as exceptions to the verdict of a jury. When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review those errors in a case tried by the court it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended, unless they are involved in the single question whether or not the facts found in a special finding are sufficient to support the judgment. It is, in the words of the statute, "the rulings of the court in the progress of the trial of the case," and these only, that we are authorized to review, unless such rulings are involved in the single question we have mentioned. *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; *Walker v. Miller*, 59 Fed. 869; *Bowden v. Burnham*, Id. 752; *Norris v. Jackson*, 9 Wall. 125, 127; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *Cooper v. Omohundro*, 19 Wall. 65, 69; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481.

No requests for any declarations of law were made in this case, and the only question raised by the proceedings at the close of the trial is whether or not the facts found by the special finding contained in the opinion of the court are sufficient to sustain the judgment. This is not a debatable question. The mortgage in ques-

tion contained no provision that the mortgagor might sell the stock of goods in the usual course of trade, or that it would account for or pay over the proceeds of such sales or any part of them to the mortgagee, and yet, for many months before the levy of the attachment, the mortgagor had the exclusive possession and control of the stock, sold from it and replenished it by purchase, in the ordinary course of the business of a merchant, and never accounted for or paid over any part of the proceeds of the sales to the trust company. On this state of facts, the court below found that this mortgage was fraudulent as to the attaching creditors. Under this evidence, this was not a question of law, but, according to the decision of the highest judicial tribunal of the state of Iowa which governed this Iowa mortgage, this was a question of fact. *Torbert v. Hayden*, 11 Iowa, 435; *Hughes v. Cory*, 20 Iowa, 399; *Sperry v. Etheridge*, 63 Iowa, 543, 549, 19 N. W. 657; *Jaffray v. Greenbaum*, 64 Iowa, 492, 20 N. W. 775. Section 1011, Rev. St., which governs this court in this matter, provides that "there shall be no reversal in the supreme court, or in a circuit court upon a writ of error, * * * for any error in fact." We cannot, therefore, review this finding, and it must stand. Moreover, if we could, the result would not be different, for there is ample evidence in the record to sustain it. The conclusion we have reached upon this question renders it unnecessary to consider the question whether or not the stock of goods was included in the mortgage. That is now immaterial. If it was not, the judgment must stand because it was not, and, if it was, the judgment must stand because the mortgage was fraudulent. Our conclusion is that the facts found by the court were sufficient to sustain the judgment.

A single exception was taken to one of the rulings of the court in the progress of the trial, and will now be noticed. The contradicted testimony of the president and general manager of the coal company was that from the beginning of the year 1890 until the attachment was levied the stock of goods in question was in the exclusive possession and control of the coal company. That company during all this time, with the exception of a few months when its business was interrupted by fire, traded with this stock of goods in the usual course of business of a merchant, and never applied any of the proceeds of the sales from it, during this time, to the payment of the mortgage debt, nor in any way accounted to the mortgagee for any of these sales. The attachment on the stock was released shortly after it was levied, and a sum of money was deposited in the court in place of the goods, to abide the result of the trial of this case. In the course of his testimony, this witness testified over the objection of the plaintiff in error that the coal company kept on running the store, after the levy was released, in the same way as before. This testimony was undoubtedly immaterial, and, if it tended to establish or overthrow any material disputed fact in this case, its admission would be a reversible error. But its only tendency to prove any material fact here was to show that during the existence of the mortgage, prior to the levy, the stock of goods was left in the possession of the coal company, and traded with in

the usual course of business, without accounting for or paying over any of its proceeds to the mortgagee. That fact, however, was already established by competent and undisputed evidence, so that we are unable to see how the admission of this testimony could have in any way prejudiced the trust company, and error without prejudice is no ground for reversal. The judgment below is affirmed, with costs.

HALL v. HOUGHTON & UPP MERCANTILE CO.,
(Circuit Court of Appeals, Eighth Circuit. February 26, 1894.)

No. 353.

1. JUDGMENT—DEFAULT—APPLICATION TO SET ASIDE.

Mansf. Dig. Ark. § 5153, which provides that "the application for a new trial must be made within three days after the verdict or decision was rendered unless unavoidably prevented," has no application to a motion to set aside a default.

2. APPEAL—REVIEW—FINDINGS OF FACT.

Rev. St. § 1011, which provides that "there shall be no reversal in a supreme court or in a circuit court upon a writ of error * * * for any error in fact," governs the circuit court of appeals as well; and that court will review errors of law only.

In Error to the United States Court in the Indian Territory.

This was a suit begun by attachment by the Houghton & Upp Mercantile Company against Dymont & Lane, in which a petition of interpleader was filed by Florence J. Hall, as trustee of the Evans-Snider-Buel Company, and in which judgment by default went against the attaching creditor. The default was set aside, and at the trial the mercantile company had judgment, and Hall brings error.

Solomon E. Jackson, for plaintiff in error.

W. B. Johnson, A. C. Cruce, and Lee Cruce, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The controversy in this case was over some cattle in the Indian Territory. The Houghton & Upp Mercantile Company, the defendant in error, attached them as the property of their debtors, Dymont & Lane, a partnership composed of Walter Dymont, Thomas F. Lane, and Ridge Wheelock. Florence J. Hall, as trustee for Evans-Snider-Buel Company, the plaintiff in error, claimed them under a prior mortgage as an interpleader. The case was set for trial of the issue between the attaching creditors and the interpleader for March 30, 1892. On March 25, 1892, a judgment by default was rendered against the attaching creditor for want of an answer to the claim of the interpleader. At the same term, and on March 31, 1892, the court below, upon an affidavit of merits, set aside the default, and permitted the attaching creditor to answer.

It is contended that this action of the court was error, because section 5153, Mansfield's Digest of the Laws of Arkansas, which is

in force in the Indian Territory, provides that "the application for a new trial must be made at the term the verdict or decision is rendered and (except in a case not material here) shall be within three days after the verdict or decision was rendered unless unavoidably prevented." But this section had no application to the motion to set aside this default. That was not an application for a new trial. There had never been any trial, verdict, or decision. That was an application for an opportunity to have a first trial. It goes without saying that, during the term at which it was rendered, this judgment by default was within the jurisdiction of, and under the control of, the court below, and it was a matter entirely within its discretion whether it would set it aside, and permit the defendant in error to answer or not. It does not appear that there was any abuse of this discretion in the action taken by the court below, and hence there is nothing here for this court to review.

At the trial, a jury was waived, and the parties agreed that the mortgage was valid, and the plaintiff in error entitled to recover the property, if Thomas F. Lane was a resident of the third judicial division of the Indian Territory when the mortgage was made, but that, if he was not, the mortgage was void, and the defendant in error entitled to judgment. Evidence was introduced upon this issue, and the court below found that Lane was not a resident of the Indian Territory, and this finding of fact is the other supposed error complained of. There was considerable evidence in support of this finding, and section 1011 of the Revised Statutes, which governs this court in this matter, provides that "there shall be no reversal in a supreme court or in a circuit court upon a writ of error * * * for any error in fact." We could not, therefore, reverse this judgment if we were of the opinion that the court below had committed an error in this finding. This finding has the effect of a verdict upon this question of fact, and, as there was some evidence in support of it, the finding must stand. As we have repeatedly said, when a case comes to this court upon a writ of error, the circuit court of appeals sits to review the errors of law of the court below, and those only. The method in which such errors may be presented to this court has been repeatedly pointed out. In the case at bar no errors of law are alleged, and no rulings upon questions of law appear to have been made by the court below that the plaintiff in error seeks to review here. *Trust Co. v. Wood*, 60 Fed. 346. The judgment below is affirmed, with costs.

LACLEDE FIRE-BRICK MANUF'G CO. v. HARTFORD STEAM-BOILER
INSPECTION & INS. CO.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 318.

INSURANCE—ORAL MODIFICATION OF POLICY.

In an action on a policy of boiler insurance, it appeared that the policy only covered seven boilers, which were all that the insured had when

the policy was issued, and that he afterwards put in two more boilers, one of which exploded. When the two boilers were put in, they were inspected by the company's inspector, at the insured's request, and the inspector told him that these boilers were insured. It appeared that both the insured and the inspector erroneously believed that there was no more risk in using nine boilers than in using seven, if only seven were used at once, and that the policy covered any seven boilers in use by the insured. *Held*, that the statement of the inspector did not constitute a modification of the policy. Caldwell, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by the Laclede Fire-Brick Manufacturing Company against the Hartford Steam-Boiler Inspection & Insurance Company. Defendant obtained judgment. Plaintiff brings error.

J. E. McKeighan (B. D. Lee, J. P. Ellis, and H. S. Priest, on the brief), for plaintiff in error.

Leo Rassieur (Benjamin Schnurmacher, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. At the close of the plaintiff's evidence the circuit court directed the jury to return a verdict for the defendant. This writ of error is sued out to reverse the judgment upon this verdict. There was but one question of fact in the case, and that was whether or not a policy of insurance, which, confessedly, prior to that date, did not cover the boiler which exploded, was so modified February 24, 1892, by a verbal agreement, that it did cover it on March 21, 1892, when it exploded.

The Laclede Fire-Brick Manufacturing Company, the plaintiff in error, was a corporation engaged in manufacturing fire brick at Cheltenham, in St. Louis. In May, 1891, it had seven steam boilers, and no more, on its premises. It made a written application to the Hartford Steam-Boiler Inspection & Insurance Company, the defendant in error, a corporation engaged in the business of insurance, to insure these seven boilers against explosion; and on May 8, 1891, the defendant issued to the plaintiff its policy upon the seven specified boilers, insuring each of them, in the sum of \$30,000, for three years, against explosion, provided the pressure of steam did not exceed 100 pounds per square inch on six of the boilers nor 35 pounds per square inch on the seventh, when the explosion should occur. The defendant was a Connecticut corporation. The policy provided that it should not bind the defendant unless it was countersigned by C. C. Gardner, its general agent, and it was so countersigned. The plaintiff alleged in its petition that on February 24, 1892, this policy was modified by the agreement of the defendant so that, without the payment of any additional premium, it thereafter covered nine boilers of the plaintiff, whenever only seven were exposed to the pressure of steam, and that on that day the defendant caused the two additional boilers to be inspected, and reported them sound. The defendant, by its answer, denied the agreement

of modification, and alleged that the plaintiff applied to it for such a modification, and it caused the boilers to be inspected, and found that the attachments were not completed, and the boilers were not sound, and declined to insure them until the defects were remedied, and the attachments made.

In the conduct of its business, the defendant caused the boilers it insured to be inspected and tested, before taking risks upon them, and every few months during the continuance of the risks. The men it employed to make these tests were called "inspectors." On February 24, 1892, Mr. Eickhoff, one of the defendant's inspectors, tested the boiler which exploded, at the request of the plaintiff, and told the plaintiff's engineer that it was sound; but it was not then inclosed, nor were the attachments to it made, and it was not subjected to steam pressure until March 19, 1892. There was no testimony that the general agent or any officer of the defendant made, or was informed of, any modification of the policy; but the agreement concerning it was claimed to have been made with the inspector Eickhoff, and is based on the following testimony: Mr. Green, the president of the plaintiff, testified: That Mr. Eickhoff was one of the defendant's inspectors. That he first met him at some time while the plaintiff was insured by the defendant in the sum of \$10,000 by a former policy. That, at some time subsequent to this first meeting, Mr. Eickhoff told him that he could not afford to inspect the plaintiff's boilers every few months for the money he was getting for it, and suggested that the plaintiff raise its insurance to \$30,000, and he replied: "All right. Go ahead, and make it thirty thousand dollars." That at that time he told Mr. Eickhoff that he might put in additional boilers, and that, if so, they would be auxiliaries or duplicates; that the risk would be no greater; that six boilers would be running for two weeks, and seven for the next two weeks, and the rest would be idle,—and Mr. Eickhoff said, "All right," the insurance by the policy would certainly cover this risk, as it was less every two weeks, and no greater at any one time. That he supposes they talked this a dozen times. He testifies that, after this talk, Mr. Eickhoff either brought to him, or left on his desk, the written application for the policy on the seven specified boilers then on his premises; that this application was not filled out by any one connected with the plaintiff; that he signed the application for the plaintiff, as president, and delivered it to Mr. Eickhoff, who took it away, and brought back, and delivered to him, the policy of May 8, 1891; that he never had any conversation with any agent or officer of the defendant, except Mr. Eickhoff, regarding his insurance, until after the explosion. He testifies that he was the president of the Helmbacher Steam-Forge Company, which operated a rolling mill, and was not insured by the defendant; that shortly after the policy was issued he bought the two additional boilers, one of which subsequently exploded, for that company; that he did not then intend to have them insured, but intended to use them at the rolling mill; that before buying them he asked Mr. Eickhoff, as his friend, to inspect them for him, so that he might

know whether or not they were a good purchase, and he did so, and reported them sound; that about six months later he asked him to inspect them for him again, and he did so, and reported that they needed some little repairs, which he caused to be made; that he then bought them for the plaintiff, and took them to Cheltenham, and put them up, and that when the brick walls were up about four feet he sent for an inspector; that Mr. Eickhoff responded to the call, and he asked him to inspect them again, and have the city inspector test them, and "he says to me: 'You telephone to your engineer to let the water out of the boiler. Our inspection is good enough. I will go out this afternoon and tell him so,' which he did. During this conversation, I asked him if he considered those boilers insured, and he says, 'I do.' I says, 'Will you attend to this business for me.' * * * He says: 'I will. It is all right. Go ahead.' He told me the boilers were insured, and they were in good shape; to 'go ahead and put them walls up. The boilers are all right.'" He testifies that this was all the talk there was about insuring these boilers, at the time they were put up; that this was at the continuance of a six-months talk; that he and Eickhoff had had a dozen conversations about it; and that Eickhoff may have said the insurance would cover these boilers three or four times before that. George R. Blackford, the secretary of the plaintiff, testified that Mr. Eickhoff solicited Mr. Green to take the policy, and that, when the question of insuring the two additional boilers came up, he "said that the boilers would be insured under that policy;" that the second day after the explosion he went with Mr. Green to see Mr. Gardner, the general agent of the company; that Mr. Gardner said that the boilers were not insured under that policy, and "Mr. Green then told him that it was his understanding with Mr. Eickhoff that the boilers were insured under that policy;" that at this interview Mr. Gardner stated that the boilers were inspected February 24, 1892; that they were not then complete, and imperfections were pointed out, so that they were not in condition to be passed; that he showed them a copy of an inspection report of that date in the book of inspectors' reports, and said that a copy of that report had been sent to the plaintiff, and that he would send it another copy; that the next day the plaintiff received a copy of such a report, which bears date March 24, 1892, has the words, "Take notice," "Repairs ordered," on one side of it, and states that the boilers are defective, dangerous, and incomplete; and that the plaintiff never received any copy of such a report before that day, and had never asked for any inspection after the attachments of the boilers were completed.

Judges of the federal courts are not required to submit a case to a jury merely because there is some evidence in support of the case of the party who has the burden of proof, but it is their duty to instruct the jury to return a verdict against the party in any case in which they would be compelled to set aside a verdict in his favor, if rendered. *Commissioners v. Clark*, 94 U. S. 278, 284, and cases cited; *Gowen v. Harley*, 6 C. C. A. 190, 56 Fed. 973, 980, and cases cited. Was this evidence of such a character that it would warrant a jury

in finding a verdict in favor of the plaintiff? This question must be determined by a consideration of the conversation of February 24, 1892, in the light of the surrounding circumstances. Unless that talk constituted a contract of modification of the policy, it was never modified. There is nothing in the evidence regarding the inspection of the boilers and the report of Eickhoff on that day, or the action of the defendant upon his report, that even approaches proof of a contract. It appears that in the course of its business the defendant caused boilers to be inspected before it insured them, to see whether or not it was wise to do so, as well as after they were insured, to see whether or not it was safe to continue its insurance; so that the fact that they were inspected tends as strongly to show that they were not insured, but an application to insure them had been made, as it does to show that their insurance had been effected. Nor does the fact that, on this inspection, Eickhoff reported to the plaintiff or to the defendant that the boilers were sound or unsound tend to establish any contract or modification of the policy, because he would have made one report or the other, whether such a contract had been consummated or not. His report to one or both parties that they were sound and safe to insure could not modify the policy of insurance, or make a contract of insurance, and certainly his report that they were unsound could not. Nor could the act of the defendant in sending, or failing to send, a copy of this report to the plaintiff, make such a contract, or prove that it had or had not been made. Hence, we are relegated to a consideration of the conversation of February 24, 1892, to determine whether or not there was any contract of modification or of insurance made subsequent to the date of the policy. Before considering the effect of this conversation, it is well to note the character of the contract the plaintiff seeks to base upon it. Mr. Green testifies that, in the talk before he signed his application for the policy, he told Mr. Eickhoff, and the latter admitted, that, if nine boilers were so used that only seven were exposed to the steam pressure for two weeks, and then the two idle ones, and four of those in use before were exposed to the same pressure for two weeks, and so on alternately, the risk of explosion would be no greater from the nine thus used than it would be from seven boilers constantly in use. This was a demonstrable mistake. The risk of the explosion of steam boilers is varied far more by the number of square inches exposed to the pressure than by the length of time the pressure continues. There is by no means twice as much risk that a boiler will explode in two hours, days, or weeks, under a pressure of a hundred pounds of steam, as there is that it will explode in one hour, day, or week. If it can withstand the pressure for any appreciable time, the risk that it will explode, under proper care, for many years, is comparatively light. But the risk that one of two boilers of equal size and strength will explode under a given pressure in a given time is twice as great as that either one will explode, because there are twice as many square inches of surface exposed to the pressure, and each inch must be able to resist it. This risk of explosion is analogous to the risk of the breakage of an iron chain sustaining a heavy weight. That risk increases in propor-

tion to the number of links in the chain, because every link must sustain the weight, while it is but slightly affected by length of time, short of that which would produce crystallization or stratification of the iron, because, if the chain will stand the strain one moment, it will do so indefinitely. If these boilers were able to stand the 100 pounds pressure to the square inch specified in the policy for one week, the risk during the three years named in the policy would be but slightly, if at all, diminished by permitting them to be idle two-ninths of the time, while the risk of explosion from nine boilers of equal strength would be two-sevenths greater than that from seven. The fact that one of these additional boilers did explode the first day it was exposed to full steam pressure shows that the risk of explosion from the exposure of additional surface to the pressure was far greater than that of continuing the pressure on the surface that had been exposed for months. It follows that the contract of modification, if made, insured the plaintiff, in the sum of \$30,000, for two years and three months, against the explosion of two old boilers, before their gauges were attached or their connections made, and several weeks before they were put in use. So radical a change in this contract ought not to be inferred, so burdensome a liability ought not to be imposed on this defendant, unless there is substantial evidence that at least the minds of Eickhoff and Green met upon and agreed to it.

Turning now to the conversation of February 24, 1892, between these two men, and bearing in mind their previous conversations, the condition of their minds, and the circumstances surrounding them, let us see what the evidence is that they agreed that the policy should be thus modified. They started, in their negotiation for the original policy, and still continued, in the erroneous belief that it made no difference in the risk whether seven boilers, in use all the time during the term of the policy, or nine boilers, each of which was in use seven-ninths of the time, were insured under the policy; hence, they both supposed that the modification pleaded by the plaintiff was immaterial to the defendant. Not only this, but before the policy was issued, at least a dozen times, Eickhoff had declared to Green that the policy on the seven boilers would cover all the additional boilers he might acquire after the date of the policy, if but seven were used at a time. After the policy was issued, Green says, Eickhoff continued to talk with him about it; that he talked about it a dozen times; that he may have said three or four times before the conversation of February 24th that the insurance would cover the two additional boilers; and that the talk of February 24th was at the continuance of these conversations. Is it not plain, from this testimony, that both these men were of the opinion that the policy, as it was, covered the two additional boilers, without any modification? It seems so to us, and the subsequent conversations and acts of these men confirm this view. February 24, 1892, Green sent, not for Eickhoff, particularly, but for some inspector, not to insure his boilers, but to inspect them so that they would pass the city inspection. Eickhoff happened to be the inspector who responded to the call. Green immediately requested him, not to insure these boilers, but to inspect them, and

have the city inspector test them. A long conversation followed about the method of inspection, about emptying the boilers, which were then full of water, and the necessity of calling the city inspector, which resulted in Eickhoff's agreeing to make the inspection for himself and the city also. The only reference to the insurance in this entire conversation, according to Green, was that he asked Eickhoff if he considered the boilers insured, and he said he did. Green then asked him if he would attend to this business for him, and he said he would; that it was all right; that the boilers were insured, and were in good shape. The "business" that Eickhoff agreed to attend to—the "business" that Green sent for some inspector to attend to—was the inspection and testing of these boilers, and not their insurance. The statement of Eickhoff that he considered them insured, that they were insured, was but a repetition of the opinion he had always expressed,—that the policy on the seven boilers insured all the boilers the plaintiff could acquire, if only seven were used at a time. That this is the true construction of this talk is evidenced by the testimony of the secretary, Blackford, who said that what Eickhoff said was "that the boilers would be insured under that policy," and that when, after the explosion, the general agent, Gardner, informed him and Mr. Green that these additional boilers were not insured by the policy, Green replied, not that he and Eickhoff had agreed that the policy should be changed so as to insure them, but "that it was his understanding with Mr. Eickhoff that the boilers were insured under that policy." In this entire record, the only suggestion of any contract modifying the policy, or insuring the additional boilers, subsequent to the date of the policy, appears in the pleadings, and is attributable to the superior knowledge and ingenuity of counsel. The plaintiff alleges such a contract. The answer denies it, but admits that an application for such a change was made. The evidence discloses neither contract of modification nor application for a contract of modification. Green and Eickhoff entered upon their negotiations under two mistakes,—a mistake of fact, suggested by Green, that the risk of explosion from nine boilers in use seven-ninths of the time for three years was not greater than the risk of explosion of seven boilers constantly in use for that term; the other, a mistake of law, based on the opinion of Eickhoff that a policy insuring seven specified boilers would cover all the additional boilers the assured might acquire subsequent to its date, if he exposed but seven to steam pressure at a time. Laboring under these mistakes, Eickhoff gave it as his opinion, after the policy issued as before, that it covered the additional boilers the plaintiff acquired, and that he considered them insured by that policy. Green accepted that construction. In their view, it would have been a futile act to modify or change the policy, because they thought it was itself sufficient to accomplish their purpose.

It is true that a written contract may be modified by a subsequent oral agreement, and that a contract of insurance may be made by parol. But it is nevertheless true that the contract here in question was one of considerable magnitude,—one involving \$30,000; that the customary method of modifying policies of insurance and of making

contracts of insurance for long terms is by written agreements, and that, in most cases where oral contracts of insurance are made, they are initial, temporary contracts, to continue only until they can be embodied in a policy; and that the method pursued by the defendant when this policy was issued was to issue a written policy upon a written application. The fact that this took place 26 days before the explosion, that no steps had been taken by either party meanwhile to put any contract of modification or of insurance in writing, and no demand had been made by the plaintiff for any such evidence of its contract, strongly indicates that no such contract was ever made. In *Head v. Insurance Co.*, 2 Cranch, 127, 168, Chief Justice Marshall, in delivering the opinion of the supreme court, said:

"A contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law. The force of the policy might, indeed, have been terminated by actually canceling it; but a contract to cancel it is as solemn an act as a contract to make it, and, to become the act of the company, must be executed according to the forms in which, by law, they are enabled to act."

In *Farley v. Hill*, 14 Sup. Ct. 186, the supreme court declared the positive testimony of two witnesses to the existence of an oral agreement that but one witness denied, insufficient evidence to prove it, in view of the inherent improbability that such a contract would exist without some written evidence of it.

In our opinion, the plaintiff's evidence in this case was not only insufficient to establish the important agreement of modification of the policy or of insurance of the additional boilers he alleges, but, in the absence of the admission of the application in the answer, it fails to show that, after the issuance of the original policy, either Green or Eickhoff ever contemplated, or suggested to each other, the making of any such agreement. This conclusion disposes of this case, for it is conceded, and is too well settled to warrant more than the statement of the proposition, that the opinion Eickhoff expressed, or, if it could be so called, the "promise" he made, before the policy issued, that it would cover all after-acquired boilers, while but seven were in use, was merged in the written contract evidenced by the policy, and was not available to the plaintiff in this action either as a representation, an agreement, or an estoppel. *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 549; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290; *Insurance Co. v. Lyman*, 15 Wall. 664; *Thompson v. Insurance Co.*, 104 U. S. 252; *Pearson v. Carson*, 69 Mo. 550; *Tracy v. Iron-Works Co.*, 104 Mo. 193, 16 S. W. 203; *Insurance Co. v. Neiberger*, 74 Mo. 167; *Lewis v. Insurance Co.*, 39 Conn. 100.

There is another reason why the judgment below should be affirmed, and that is that there is no sufficient evidence in this record that the inspector had authority from the defendant to modify the policy, or to make a supplemental contract of insurance in its behalf, to warrant a verdict against it. To maintain the negative of this proposition, the authorities in support of the following propositions are cited: Where an insurance company defends against a loss on the ground that the policy is forfeited by a false representa-

tion in the application of the insured, it is in some cases an answer to this defense, in the absence of fraud, that the insured told the agent who solicited the insurance the truth, and the agent wrote the falsehood into the application himself. In such cases the false statement becomes the statement of the company, and not of the insured. *Insurance Co. v. Wilkinson*, 13 Wall. 222, 225; *Insurance Co. v. Baker*, 94 U. S. 610; *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Chamberlain*, 132 U. S. 304, 312, 10 Sup. Ct. 87; *Insurance Co. v. Snowden*, 58 Fed. 342;¹ *Kausal v. Association*, 31 Minn. 17-21, 16 N. W. 430; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616. An agent who is authorized to agree on terms of insurance may make a preliminary oral contract that the insurance to be evidenced by a policy shall commence from the date of the verbal contract. *Insurance Co. v. Colt*, 20 Wall. 560, 568; *Insurance Co. v. Shaw*, 94 U. S. 574; *Eames v. Insurance Co.*, Id. 621; *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Audubon v. Insurance Co.*, 27 N. Y. 216; *Fish v. Cottenet*, 44 N. Y. 538; *Angell v. Insurance Co.*, 59 N. Y. 171. A corporation that holds one out as its agent in a particular business is bound by his acts within the scope of his apparent authority, although his real authority may be more limited, unless notice of the limitations is brought home to the party affected by his acts. *Insurance Co. v. McCain*, 96 U. S. 84; *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504; *Walsh v. Insurance Co.*, 73 N. Y. 5. These propositions and authorities, however, do not rule this case. There is no attempt here to avoid the policy, and no question of false representation or description in it, or in the application on which it is based. Both plaintiff and defendant admit and count upon the existence and validity of the original policy. It goes without saying that the fact that an agent assumed to do an act is no evidence of his authority to do it, where that authority is questioned. *Lohnes v. Insurance Co.*, 121 Mass. 439, 441; *Bush v. Insurance Co.*, 63 N. Y. 531. This case is barren of evidence that Mr. Eickhoff ever had any real authority from the defendant to make or modify contracts of insurance on its behalf. It does appear that he was not the general agent of the company at St. Louis empowered to fill out and countersign policies, and that one Gardner was. It does appear that his title was not "insurance agent," but "inspector," and that his general business was inspecting and testing boilers. There is no evidence that he ever made, or agreed on the terms of, or solicited, any contract of insurance for the defendant, except the policy in question; so that his apparent authority to make and modify contracts of insurance for the defendant rests entirely upon his acts at the time of the issuance of that policy. What authority did he appear to have, from that transaction? He solicited the plaintiff to take \$30,000 insurance from the defendant. He told the plaintiff that this insurance would cover the seven boilers it then had, and all the boilers it ever acquired, if it used but seven at a time. If this statement was, as we believe, his opinion of the legal effect of a policy on seven boilers, it certainly could not establish his authority.

to construe the contracts of the defendant. If it was, as plaintiff claims, a promise, it was repudiated by the issuance of the policy. When he solicited the policy, Eickhoff did not make, or assume to make, any oral contract of insurance for the defendant. He did not agree, or assume to agree, that the term of insurance should commence from the time of that conversation. So far as the evidence discloses, he went away without any discussion of, or agreement concerning, the time when the insurance should commence, the length of the term, the amount of the premium, or any of the other terms that were finally embodied in the policy, with the single exception of the amount. He subsequently brought to the plaintiff a written application for \$30,000 insurance on the seven boilers only. There is no evidence that he filled out that application. The evidence is that the plaintiff did not, and there it stops. The plaintiff signed it. Eickhoff carried it away, and brought back the policy signed by the officers and the general agent of the defendant at St. Louis, but Eickhoff's name does not appear on it. That policy did not insure the plaintiff against the explosion of boilers acquired subsequent to its date, if but seven were in operation; and if Eickhoff's statement was a promise, and not an opinion, the policy was in itself a repudiation of the talk of Eickhoff, and a notice to the plaintiff that the defendant did not recognize his authority to make terms of insurance. Not only this, but the fact that no policy issued on the oral application of the plaintiff to Eickhoff, but a written application signed by the plaintiff, containing different terms from those named in the oral negotiations, was required, before the company would act at all, was complete notice and conclusive proof that the defendant not only did not hold him out as having authority to make contracts for it, but did not even recognize his authority to receive oral applications for insurance, on which it would act. This was all the evidence that this inspector had any apparent authority even to make or modify contracts of insurance on behalf of the defendant; and it was insufficient. *Insurance Co. v. Mowry*, 96 U. S. 544; *Morse v. Insurance Co.*, 21 Minn. 407; *Healey v. Insurance Co.*, 5 Nev. 268, 274; *Lohnes v. Insurance Co.*, 121 Mass. 439, 441. In *Insurance Co. v. Mowry*, supra, Mr. Justice Field, in delivering the opinion of the supreme court, said of a general agent of the insurance company, who had authority to take applications, countersign policies, and collect premiums:

"There is nothing in the record which shows that the agent was invested with authority to make an insurance for the company. In representing himself as an agent, he only solicited an application by the assured to the company for a policy. That instrument was to be drawn and issued by the company, and it shows on its face that the authority to the agent was limited to countersigning it before delivery, and to receiving the premiums."

In *Morse v. Insurance Co.*, supra, an action was brought on an oral contract made by a soliciting agent at the time he obtained a written application, to the effect that the insurance should commence immediately, and a policy should be subsequently issued. The evidence was that the year before the agent had obtained a like application from the plaintiff, and made a like agreement, and

the company had issued a policy for a term commencing at the date when the application was obtained, but there was no evidence that the company was notified of the agreement made by the agent. The plaintiff had a verdict, and the supreme court of Minnesota set it aside on the ground that the evidence of the agent's authority was insufficient to warrant it.

How much stronger the evidence of the apparent authority of these agents to make insurance contracts was, than is the evidence in this case of the authority of this inspector, appears from what has already been said. Moreover, there is no evidence in this case that Eickhoff was the clerk or general representative of the general agent, in conducting his insurance business. The utmost stretch of his apparent authority reaches no further than to make him the occasional agent of the general agent to solicit an application, deliver it to him, and carry back the policy. The functions of such an agent cease with the delivery of the policy. From an apparent authority so limited, no authority to subtract from, add to, or modify the written contract of the insurance company can be inferred. *Healey v. Insurance Co.*, 5 Nev. 268, 273; *Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 265, 269, 13 N. E. 902; *Kyte v. Assurance Co.*, 144 Mass. 43, 46, 10 N. E. 518; *Lohnes v. Insurance Co.*, supra; *Tate v. Insurance Co.*, 13 Gray, 79, 82; *Wilson v. Insurance Co.*, 14 N. Y. 418; *Hoffman v. Insurance Co.*, 32 N. Y. 409; *Walton v. Insurance Co.*, 116 N. Y. 317, 322, 324, 22 N. E. 443; *Mitchell v. Insurance Co.*, 51 Pa. St. 402, 411. The judgment below is affirmed, with costs.

THAYER, District Judge. I concur in the order affirming the judgment of the circuit court on the ground first stated in the foregoing opinion, but would not be understood as expressing any opinion with reference to the further ruling that there was no evidence tending to show that the inspector had authority to modify the original contract of insurance.

CALDWELL, Circuit Judge (dissenting). There was abundant evidence to go to the jury, and from which they might rightfully have found, that Eickhoff was an agent of the defendant, and clothed with authority to modify or extend the original contract of insurance, and that such a contract was in fact made. His agency is not denied in the answer, but, by necessary implication, admitted. In its answer the defendant says:

"And defendant states the truth and the fact to be that at some time in the month of February, 1892, the plaintiff did apply to the defendant for insurance upon two additional boilers to the seven boilers mentioned in said policy of insurance, and did request the defendant to add said two boilers to said seven boilers, and did request defendant to agree that said policy of insurance issued to it in the month of March, 1891, should cover said two additional, as well as said original seven, boilers. * * *"

The testimony shows that all the dealings in reference to this insurance business—those relating to the policy that was issued in 1891, as well as those relating to the supplementary or ancillary

agreement for the insurance of the two additional boilers—were had between Mr. Green and Mr. Eickhoff. Mr. Green was asked:

"Q. Who did you have your dealings with about this matter of this application? A. Mr. Eickhoff. Q. Did you see anybody but Mr. Eickhoff about it? A. No, sir. Q. Did you ever have any [negotiations] with Mr. Gardner at all? A. None at all. Q. Did you ever see any other representative of this company, either in taking out this policy or putting in this auxiliary battery of boilers, except Eickhoff? A. No, sir. Q. How did you come to ask Eickhoff to come and inspect these boilers for you? A. Well, he was doing my insurance."

There is not a word of testimony to the contrary of this in the record, but much more to the same effect. Reading the paragraph of the answer I have quoted in the light of this evidence, it is perfectly clear that the application which the answer admits was made "to the defendant" to insure the two boilers was the application made to its agent Eickhoff, for Mr. Green testifies positively that no such application was ever made to any one else. But what ought to be conclusive on the question of Eickhoff's agency and authority to make the contract, as well as the fact that he did make it, is the circumstance that, when the plaintiff's evidence tended strongly to establish both these facts, the defendant declined to put either Eickhoff or Gardner on the stand to deny them. Whether Mr. Eickhoff was an agent of the company to effect insurance, and whether he did insure these two boilers, were facts peculiarly within the knowledge of himself and Mr. Gardner. It is a well-settled rule of evidence that when the proof tends to fix a liability upon a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the proof tends to establish, and he declines to offer such proof, the jury are at liberty to presume that the proof, if produced, instead of rebutting, would support the inferences against him. *Railway Co. v. Ellis*, 4 C. C. A. 454, 54 Fed. 481. In *Starkie on Evidence* (volume 1, p. 54), it is said:

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

This rule is applicable to criminal cases (*Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438), and it is difficult to perceive why it should not be applied to an insurance company.

The bill of exceptions shows that the precise ground upon which the case was taken from the jury by the circuit court was "that there was no evidence to show that Mr. Eickhoff, the defendant's inspector, had any authority from the defendant to change or modify the policy of insurance sued on." The case comes here upon an exception to that particular ruling, and that is the only question discussed by counsel for plaintiff in error. It is now well settled that, when a given state of facts is such that reasonable men may fairly differ upon the question, the determination of the matter is for the jury. It is only where it appears that all reasonable men would agree that the evidence was insufficient to warrant a verdict that the court is justified in withdrawing a case from the jury. Rail-

way Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railway Co. v. Ellis, 4 C. C. A. 454, 54 Fed. 481. Upon this question of fact, one judge of this court holds that the evidence was sufficient to warrant the jury to find a verdict for the plaintiff, one that it was not, and one is in too much doubt to express an opinion. When this is the attitude of the appellate court, the cause ought, plainly, to be sent back to be tried by that tribunal appointed by the constitution to try the facts.

The remaining question is, did the agent Eickhoff make the ancillary contract to insure the two boilers? It is well settled that, unless prohibited by statute or other positive regulation, a valid contract of insurance can be made by parol (*Insurance Co. v. Shaw*, 94 U. S. 574), and that an ancillary agreement, such as was made in this case, is binding, without any written memorial of it, and that such an agreement is not within the statute of frauds (*Insurance Co. v. Colt*, 20 Wall. 560). Whether the majority of the court mean to be understood as asserting that no such contract was made, or that, though made, it was void by reason of a mutual mistake of the parties, is not very clear, from the opinion. The supposed mistake, as stated by a majority of the court, consisted in Mr. Green and Mr. Eickhoff agreeing "that, if nine boilers were so used that only seven were exposed to the steam pressure for two weeks, and then the two idle ones and four of those in use before were exposed to the same pressure for two weeks, and so on alternately, the risk of explosion would be no greater from the nine thus used than it would be from seven boilers constantly in use." As I understand the proposition of the majority, it is that the risk of explosion of two boilers of equal size and strength, when one is used one week and the other the next week, and so on, alternating, through the year, is just as great as if both boilers were used at the same time continuously through the year. This proposition is original, in this case, with the majority of the court. It is not found in the pleadings, was not raised in the court below, and is not alluded to in the briefs of counsel. It is not sound. It ignores the wear and tear and gradual deterioration and weakening that result from constant use. It takes no account of a change in the atmospheric conditions, and of the fact that boilers frequently explode from causes which are unknown, and cannot be ascertained. It is undoubtedly true that the view of the majority of the court on this question never suggested itself to the minds of Mr. Green and Mr. Eickhoff, although the latter is a skilled boiler inspector. But, if the proposition be true, it was a mistake of fact, or rather a want of that scientific knowledge possessed by the majority of the court, relating to a matter about which both parties had equal opportunities of knowing what the fact was; and, there being, confessedly, no fraud on the part of either, the validity of the contract is not affected by the mistake. The consideration for the ancillary contract was ample. Mr. Green set up the boilers, and incurred a large expense which he would not have done but for the agreement and assurance of the agent Eickhoff that they were insured, and that he might rest easy on that subject. The contract for the an-

cillary insurance was completed after the written policy was issued. The written policy bears date March 8, 1891, and the supplementary agreement was made in February, 1892. The answer admits that "some time in the month of February, 1892, the plaintiff did apply to the defendant for insurance upon two additional boilers;" and there was abundant evidence to go to the jury that such insurance was effected. When Mr. Green called on Mr. Gardner after the loss, the latter did not then pretend that Eickhoff did not have authority to make the contract, or that the contract was not in fact made, but his claim was that "he didn't think he was liable for anything that happened there, because it wasn't backed on the back of the policy;" evidently laboring under the impression that the company was not bound by the contract, because it had not been reduced to writing. The testimony in this case shows that Mr. Green is a very prudent and careful business man, and that he had no thought of putting up these boilers without first having them inspected and insured. He did everything that a prudent man could do to effect that object. He would not purchase the boilers until he knew the defendant would insure them, and for that reason he applied to Mr. Eickhoff, the defendant's agent and inspector, to inspect them before he purchased them. And it was only upon being assured by the defendant's agent that the boilers were sound, and that if he purchased them the defendant would insure them, that he concluded the bargain for them. When they were set up, and before casing them with brick, he had them inspected by the defendant's agent and inspector, with a view to insuring them; and after the inspection he was assured by the defendant's agent, Mr. Eickhoff, over and over again, that they were insured, and he laid out money upon the faith of that assurance. When a loss occurred, payment was refused, not because Eickhoff was not an agent, or that no contract had been made, but because the contract "wasn't backed on the back of the policy;" and, when the company is sued, it sets up various other defenses, which are obviously afterthoughts. The contract of insurance should be characterized by the utmost honesty and good faith on the part of the insurer and the insured. It is no uncommon thing for business men to place reliance in, and act upon, the verbal agreements and assurances of insurance agents. It sometimes occurs that it is inconvenient or impracticable to do the business, at the time, in any other mode. The law does not require the evidence of the agent's authority to be made a matter of record, and no man ever requires an insurance agent to show his power of attorney to act as such, before insuring with him. It has always been supposed, and so all the courts have held, that when a man assumed to act as an agent for an insurance company, received applications, delivered the policies, and received the premiums (and Eickhoff did all this), that was sufficient prima facie evidence of his agency. And certainly it ought to be, when neither he nor any other agent of the company dare take the stand and deny his agency. There is in this country to-day millions of dollars' worth of property insured, and effectually insured, upon verbal contracts, such as was proved in this case. The doctrine of the ma-

majority of the court does not accord with the understanding and practice of the business community, and puts it in the power of insurance companies to adopt a standard of business integrity much below that which ought to characterize the dealings of reputable business men. The question as to whether such a contract was made is one for the jury to decide upon the evidence, and there was abundant evidence to entitle the plaintiff to go to the jury upon it. It has never been submitted to a jury. It was not passed upon by the circuit court, and has not been argued by counsel. For these reasons the judgment of the circuit court ought to be reversed, and a new trial directed. Not to do so is to deprive the plaintiff, wrongfully, of its constitutional right to have the facts of its case tried by a jury.

UNION PAC. RY. CO. v. ARTIST.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 342.

1. RELEASE AND DISCHARGE—CONSTRUCTION.

A release for settlement of claim for certain personal injuries specified in the release, and also "of and from all manner of actions, causes of action, claims and demands, whatsoever, from the beginning of the world to this day," does not cover personal injuries not therein specified, and not known to exist at the time the release is executed, since the general terms in the release are limited by the preceding specifications.

2. MASTER AND SERVANT—NEGLIGENCE OF MASTER—CHARITY.

A master who sends his servant for treatment to a hospital maintained by the master for charitable purposes is not responsible for injuries caused to the servant by the negligence of the hospital attendants, where the master has exercised ordinary care in selecting such attendants.

3. CHARITIES—HOSPITAL—RAILROAD COMPANIES—NEGLIGENCE.

A hospital maintained by a railroad company for the free treatment of its employes, supported partly by the monthly contributions of all its employes and partly by the company, and not maintained for profit, is a charitable institution.

In Error to the Circuit Court of the United States for the District of Wyoming.

Action by Andrew S. Artist against the Union Pacific Railway Company. Plaintiff obtained judgment. Defendant brings error.

This writ of error is brought to reverse a judgment against the Union Pacific Railway Company for the malpractice of physicians and the negligence of attendants in a hospital maintained by it, for the benefit of its employes, at Denver, in the state of Colorado. The evidence tended to show these facts:

The Union Pacific Railway Company requires each of its employes to contribute from his wages 25 cents a month towards the support of a medical department. The railway company contributes the amount required in addition to the sum thus raised from the contributions of the employes to pay the expenses of this department. At the time the defendant in error was treated at the hospital, the company was contributing from \$2,000 to \$4,000 per month for this purpose. With this fund the railway company maintained several hospitals for the treatment of its employes when they were sick or injured, and employed physicians and attendants to care for them at the hospitals, and physicians and surgeons to attend them outside the hospitals, at important points on its lines of railroad. All the employes of the

railroad company, except those injured in fights, those injured when drunk, those sick from chronic diseases, and those suffering from certain specific diseases, were received and treated at these hospitals free of expense or charge, whenever they were sick or injured, regardless of the manner in which, or the time at which, the injury was received, or the disease contracted, and whether the railway company had or had not any connection with the cause of it. The physicians attending the hospitals had the privilege of treating their private patients in them, and these patients were the only ones who were required to pay for their board and treatment; but the moneys received from this source were inconsiderable,—not more than \$300 per annum. Andrew S. Artist, the defendant in error, had his foot and leg injured on the 4th day of October, 1889, while he was in the employment of the company, and was treated at one of the hospitals maintained by it in the way we have stated from October 7, 1889, until January 7, 1890, when he was discharged as cured. In the course of his treatment the physicians at the hospital properly inserted a rubber drainage tube, but, through the carelessness of the physicians or of the attendants, a portion of it was left in the leg as the wound healed, and when he was discharged. It caused suffering and partial disability until it was removed by a surgical operation in April, 1892. January 13, 1890, while both parties were ignorant that this tube remained in the leg, Artist received from the company \$150, and signed a receipt or release, the material parts of which are as follows:

"The Union Pacific Railway Company,

"To Andrew S. Artist of Cheyenne, Wyoming.

"1890.

"January 13

"For amount agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received at McCammon, on Oregon Short Line, on October 4, 1889, while assisting in switching a burning baggage car from main track to side track, said Artist being an engineer in the employ of said company, but returning from leave of absence at time of accident, said injury consisting of deep, punctured, and lacerated wounds, as follows: On inner surface of right thigh. On inner surface of right foot. Comp. fracture of fourth toe of right foot. Contusion in region of spine. Contusion on left foot and face. (Settlement is in full of all claims and demands of whatever character.) * * *

"Received, Pocatello, Idaho, January 13, 1890, of the Union Pacific Railway Company, one hundred and fifty dollars in full payment of the above account. In consideration of the payment of said sum of money, I, Andrew S. Artist, of Cheyenne, in the county of Laramie, in the state of Wyoming, hereby remise, release, and forever discharge the said company, its operated, leased, controlled, and auxiliary lines and companies, of and from all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands, whatsoever, in law or equity, which I have had or now have against said company by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day.

"In testimony whereof, I have hereunto set my hand this thirteenth day of January, 1890."

Counsel for the company requested the court to charge the jury that this release was a complete defense to the action, and the refusal to give that request is the first error assigned. The same counsel requested the court to charge the jury as follows: "If you believe from the evidence that the hospital was maintained by the defendant, not for the purpose of deriving profit therefrom, but as a charitable enterprise, so far as defendant's employees were received therein, then the only obligation of the defendant, in receiving its employees at said hospital, was to use ordinary care in selecting its physicians and attendants therein; and, since no negligence in the employment of physicians is here charged, you will, in case you find the hospital to have been maintained as above stated, find for the defendant." The court refused to give this instruction, and charged the jury that the hospital was not a

charitable institution, in any sense that those words are used in the law, and that the company was bound to use reasonable care to see that the treatment given to patients in this hospital was such as was ordinarily given in hospitals of this kind to such patients; and this ruling is the second error complained of.

John W. Lacey (John M. Thurston and Willis Van Devanter, on the brief), for plaintiff in error.

Frank H. Clark, for defendant in error.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

General words, alone, in a release, are taken most strongly against the releasor. But when there is a particular recital followed by general words the latter are qualified by the particular recital. *Jackson v. Stackhouse*, 1 Cow. 122, 126, and cases cited; 2 Pars. Cont. 633, note. The court below properly applied this rule to the release in this case. The general words in the last half of it are limited by the very specific recital of the injuries that the \$150 was to be in settlement of, which is contained in the first half of the release. It was the claims for these injuries, and for these only, that this release discharged the company from. The injury now complained of was then unknown to both parties, and their settlement was without reference to it. A disregard of the rule would work manifest injustice, and impose upon the defendant in error a release he did not intend to make. There was no error in this ruling.

Was the company liable for the malpractice of the physicians, or the carelessness of the attendants, at the hospital, if that hospital was maintained as a charitable enterprise, and not for the purpose of deriving profit from it? If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of respondeat superior has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of respondeat superior no longer applies, because, by fair implication, he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are

engaged in dispensing their own charities, or in dispensing the charitable gifts of others intrusted to them to administer. One reason why corporations and individuals conducting hospitals supported by charitable endowments and contributions, and operated to heal the sick and injured, but not for profit, are not liable for the negligence of their employes, is, that the moneys in their hands constitute a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants. Moreover, the corporations or individuals that administer such trusts must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They cannot direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. If they did do so, the physicians would be bound to exercise their own superior skill and better judgment, and to disobey their employers if, in their opinion, the welfare of the patients required it. And, finally, the patient is not required to accept the proffered accommodations and attendance. They are but freely offered to him. He may refuse to accept them, and seek other physicians and other accommodations. It would be a hard rule, indeed,—a rule calculated to repress the charitable instincts of men,—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them. *McDonald v. Hospital*, 120 Mass. 432; *Insurance Patrol v. Boyd*, 120 Pa. St. 624, 647, 15 Atl. 553; *Van Tassell v. Hospital* (Sup.) 15 N. Y. Supp. 620, and note; *Glavin v. Hospital*, 12 R. I. 411; *Laubheim v. Steamship Co.*, 107 N. Y. 228, 13 N. E. 781; *Secord v. Railway Co.*, 18 Fed. 221; *Richardson v. Coal Co.*, (Wash.) 32 Pac. 1012.

Under the evidence in this case, the medical department and hospitals of the Union Pacific Railway Company fall fairly within this rule, and the reasons that support the rule apply to this case with all their force. The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operation, it is charitable. Tried by this test, the hospitals and medical department of this company are a great public charity. They are supported by the voluntary contributions of this great corporation and of its employes, without the purpose to profit thereby. We say by their "voluntary contributions" not unadvisedly. We have not failed to notice that the defendant in error testified that the contribution of 25 cents a month made

by each employe was a compulsory assessment, and that the company took it out of the pay of such employe. But how it could be compulsory does not appear. If it was a part of the pay of the employe, the company could not lawfully take it out without his consent. If he did not consent, then he did not contribute, and the company still owes him the amount of this assessment. If he did consent, he voluntarily contributed the amount of his assessment. Whatever may be said of the contributions of the employe, there is no question whatever but that the gift of \$2,000 to \$4,000 per month made by the company was purely voluntary and charitable. These contributions of 25 cents per month from each employe, and of from \$2,000 to \$4,000 per month from the company, constituted a trust fund devoted to the purpose of furnishing hospital accommodations, physicians, and surgeons for the relief of the sick and injured employes without charge or expense to them. For this purpose this fund was intrusted to this company to administer. There is no evidence that there ever was any purpose or intention on the part of the company of making any profit through the operation of this hospital or the supplying of these physicians. The sole purpose that this record discloses was to relieve these employes from sickness and suffering. In *Jackson v. Phillips*, 14 Allen, 556, Mr. Justice Gray defined a "charity" as follows:

"A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The gifts of this corporation and its employes are clearly within this definition. There is no doubt that any one of these employes could compel the application of this fund to the purpose for which it was collected, in any court of equity having jurisdiction. There was no express contract made by this company to treat this defendant in error in the hospital, for his injuries. It is true that he made his contribution to the fund to maintain this charitable enterprise, but he paid nothing further for his hospital accommodations or his treatment. He neither contributed nor paid any more than he would have contributed if he had never been treated at all. The company, as the trustee and administrator of this charity, offered him the hospital accommodations and the physicians in its employment, and he accepted them. From these facts no contract to treat him with ordinary skill and care can be implied, because, in all that it did in this behalf, this company was conducting a charitable enterprise. The company was not organized for the purpose of furnishing and operating hospitals and supplying medical attendance for gain, and such a business would be clearly beyond its chartered powers. It was chartered to construct and operate a railroad and telegraph line. It was under no legal obligation to give thousands of dollars per annum to furnish hospitals and physicians for its employes, and its appropriation of this money to this purpose was a

gift, a charity. If it be urged that this gift may have been prompted by an ulterior and selfish motive,—that the company may have thought that the operation of its medical department would protect it from excessive claims for injuries resulting to its servants,—the answer is that the true test of a public charity is not the motive of the donor, but the purpose to which the money given is to be applied. If argument, authority, and illustration in support of this proposition are wanted, they will be found in the learned and exhaustive opinion of Mr. Justice Paxson in *Insurance Patrol v. Boyd*, 120 Pa. St. 642, 646, 15 Atl. 553. If a dozen of the employees of this company had contributed a fund, out of charity, to furnish one of their number, who was injured, with hospital accommodations and medical attendance, they certainly would not have been liable to him for the malpractice of the physicians or the negligence of the attendants they employed. If they had intrusted such a fund to a third person to administer, who, out of charity, contributed to it more largely, and he furnished the accommodations and attendance by the use of this fund, it goes without saying that he would not be liable for the negligence of the physicians or attendants he employed. That the party to whom this charitable gift is intrusted, the party that contributes most liberally to it, and the party that cannot by any possibility derive any direct profit or benefit from it, since it is not subject to bodily ailments and injuries, is a corporation, cannot extend the limits of legal liability here.

The result is that the doctrine of respondeat superior has no application to this case. The only contract the law implies here is the agreement on the part of the company to use reasonable care to select and obtain skillful physicians and careful attendants, and if the company performed that contract it was responsible no further. In other words, it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employees. In our opinion the instruction on this subject requested by the counsel for the company should have been given, and the judgment is accordingly reversed, with costs, and the case remanded, with instructions to grant a new trial.

ATCHISON, T. & S. F. R. CO. v. REESMAN.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1894.)

No. 240.

1. RAILROAD COMPANIES—NEGLIGENCE—FENCES—INJURY TO EMPLOYE.

Where, through the failure of a railroad company to erect and maintain sufficient fences, as required by Rev. St. Mo. 1889, § 2611, an animal gets on the track, causing the derailment of a train, an employee on the train, who is injured by the accident, is entitled to sue the company therefor, since such statutes are designed to protect the persons on trains as well as the cattle owners.

2. SAME—NEGLIGENCE OF FELLOW SERVANT.

The defense that the insufficiency of the fence was caused by the negligence of a fellow servant is not available, since the duty of fencing, cast by the statute upon the company itself, cannot be delegated by it to its servants.

8. TRIAL—OBJECTIONS TO EVIDENCE—WAIVER.

Where the company has introduced evidence as to repairs made by it on the fence after the accident, it cannot complain of the admission of further evidence on that point offered by the plaintiff in rebuttal.

4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULES.

The mere knowledge and assent of the conductor of a train to a violation by a brakeman on the train of a rule of the company requiring him to be on top of the car, in order to give signals to the engineer, does not exonerate the brakeman from the charge of contributory negligence for injuries received by him in consequence of his violation of such rule.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by David B. Reesman against the Atchison, Topeka & Santa Fe Railroad Company for personal injuries. Plaintiff obtained judgment. Defendant brings error.

Gardiner Lathrop and Ben Eli Guthrie, for plaintiff in error.

B. R. Dysart and John F. Mitchell (Joseph Park, on the brief), for defendant in error.

Before BREWER, Circuit Justice, and SANBORN, Circuit Judge.

BREWER, Circuit Justice. This was an action to recover damages for personal injuries. Plaintiff below (defendant in error) was on the 17th day of June, 1891, in the employ of the railroad company as brakeman. He had been in such employ for about three years. At the time of the injury he was on a ditching train, composed of an engine and four cars, the engine pushing the cars. Just in front of the engine was a flat car, then a car on which the ditching machine was placed, then a box car fitted up for the men to sleep in, and in front of that a way car or caboose. Plaintiff had been at work on this train only eight or ten days, though for two years he had been acting as brakeman between Marceline, Mo., and Ft. Madison, Iowa, and was therefore familiar with the track at the place where the injury happened. On the morning of June 17th the train left Marceline for the purpose of doing work at a place six miles east thereof. The track, for some distance, was nearly straight. After going about a mile and a half, and while running at a rate of speed of from 15 to 18 miles an hour, the train ran over a steer, which derailed it, and caused the plaintiff's injury. The crew of the train consisted of the engineer and fireman, conductor, head brakeman, and the plaintiff,—the rear brakeman. From the time of leaving Marceline up to the time of the accident, the conductor and the plaintiff were on the platform of the caboose at the head of the train. The head brakeman was on the inside, in the cupola, while there was no one on top. The ditching machine had arms or dippers extending on either side in such a manner and to such an extent as to interfere with the view of the engineer of the front end of the train. Rule 104 of defendant's rules was in force at the time of the accident, and is as follows:

"When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineer."

There was testimony on the part of the defendant tending to show that the conspicuous place on the ditching train, within the meaning of that rule, was on top of the caboose, where the flagman could be seen by the engineer whenever he made any signals, and that it was the plaintiff's duty to be at that place. The burden of the plaintiff's case was that the defendant company had negligently suffered the fences along its right of way to become and remain out of repair, and insufficient to keep cattle off the track; that in consequence thereof a steer broke through such insufficient fence, got upon the track, and derailed the train, causing the injury to plaintiff. The defendant denied that this steer entered onto the track through any defective or insufficient fence; claimed that, even if it did, the duty to erect and maintain a fence was not one which would avail one or its employees in an action for damages resulting from a neglect of such duty; and, third, that the plaintiff was guilty of contributory negligence, in not being in his proper place, on top of the caboose, and in a place where he could see the danger, and give the signal to the engineer.

The provision of the Missouri Statutes in reference to the fencing of railroad tracks is found in Rev. St. Mo. 1889, p. 659, § 2611. The first part of the section is as follows:

"Every railroad corporation formed or to be formed in this state, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad; and until fences, openings, gates and farm crossings and cattle guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or enclosures occasioned in either case by the failure to construct or maintain such fences or cattle guards. After such fences, gates, farm crossings and cattle guards shall be duly made and maintained, said corporation shall not be liable for any such damage unless negligently or willfully done."

Following this provision are others, giving adjoining proprietors the right to construct the fences on the failure of the railroad company so to do, and recover the cost thereof from the company, and declaring that any person leading or driving stock onto the track within such fences should forfeit and pay a sum not exceeding \$10, and should also pay to the party injured all damages sustained thereby.

In respect to the liability of the company under this section, the court gave this instruction to the jury:

"If the jury believe from the evidence that the defendant suffered the fence along its right of way to become and remain out of repair in the manner described by plaintiff's witnesses, so that cattle could with little difficulty get through or under the fence, and if you believe from the evidence that, by reason of its being so out of repair and defective, a steer did in that manner

go upon defendant's right of way and track, and cause the derailment of the ditching train, by which plaintiff was injured, then you will be authorized to return a verdict in plaintiff's favor, provided you further believe from the evidence that defendant's section men in charge of that section had knowledge of the defect in the fence in time to have repaired it before the accident, or that such defect in the fence had existed for such length of time that, by the exercise of ordinary care, they ought to have had knowledge of it, and repaired it, before the derailment."

And refused an instruction that, under the pleadings and evidence, the plaintiff was not entitled to recover.

In this is presented the most important question arising in this case. The contention of the company is that the fence statute referred to was enacted for the benefit of the proprietors of adjoining lands, and that the plaintiff, as an employee of the railroad company, takes nothing by reason of the failure of the company to comply with its terms. It is doubtless true that, when a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits, but it does not follow that when a duty is so imposed a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. In this case a technical argument might be made from the mere language of the section. It provides that the corporation shall be liable in double the amount of all damages, not only for those "done by its agents, engines or cars to horses, cattle," etc., but also for those done "by reason of any horses, cattle," etc., "escaping" from such contiguous fields. As the presence of the steer on the track was the cause of the derailling of the train, and as that steer escaped from the adjoining field through the defective fence, it may plausibly be argued that the recovery in this case comes within the express language of the statute, as being for damages done by reason of the escape of the steer from the adjoining field through the defective fence. But we do not care to rest our conclusions upon this technical construction. The purpose of fence laws, of this character, is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon, is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the com-

pany, if it fails to comply with this statutory duty. The authorities are clear on this proposition. In the case of *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, the facts were these: A railroad company was required by an ordinance of a municipal corporation to erect a fence upon the line of its road, within the corporate limits. It failed to comply with this ordinance, and the plaintiff, a boy of tender years, while running near the track, fell on it, and was run over by the passing cars. An action having been brought to recover for such injuries, the trial court directed a verdict and judgment for the defendant, but this judgment was reversed by the supreme court. Mr. Justice Matthews, in the course of his opinion, discussed the question of general liability in these words:

"It is said, however, that it does not follow that, whenever a statutory duty is created, any person who can show that he has sustained injuries from the nonperformance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of *Atkinson v. Waterworks Co.*, 2 Exch. Div. 441, as authority for that proposition, qualifying, as it does, the broad doctrine stated by Lord Campbell in *Couch v. Steel*, 3 El. & Bl. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited,—that whether such an action can be maintained must depend on the 'purview of the legislature in the particular statute, and the language which they have there employed,'—we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although, in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. 'The nature of the duty,' said Judge Cooley in *Taylor v. Railroad Co.*, 45 Mich. 74, 7 N. W. 728, 'and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit.' See, also, *Railroad Co. v. Terhune*, 50 Ill. 151; *Schmidt v. Railway Co.*, 23 Wis. 186; *Siemers v. Eisen*, 54 Cal. 413; *Railroad Co. v. Loomis*, 13 Ill. 548; *Railroad Co. v. McClelland*, 25 Ill. 140; *Railroad Co. v. Dunn*, 78 Ill. 197; *Massoth v. Canal Co.*, 64 N. Y. 524; *Baltimore & O. R. Co. v. State*, 29 Md. 252; *Pollock v. Railroad Co.*, 124 Mass. 158; *Cooley, Torts* 657."

And again, answering the objection that the want of a fence was not the proximate cause of the injury, observes as follows:

"It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true, but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*? (a cause which, if it had not existed, the injury would not have taken place,—an occasional cause;) and that is a question of fact, unless the causal connection is evidently not proximate. *Railroad Co. v. Kellogg*, 94 U. S. 469. The rule laid down by Willés, J., in *Daniel v. Railway Co.*, L. R. 3 C. P. 216, 222, and approved by the exchequer chamber (Id. 591) and by the house of lords (L. R. 5 H. L. 45), was this: 'It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is

reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to."

Another case—and it is exactly in point—is that of *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051. In discussing this question the court said:

"A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be and come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and, if they do, there is danger that the train may come in collision with them, and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty, and for a violation thereof, causing injury, the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified, and was not intended to be specified, in the statute. Responsibility for injury to animals was specially imposed because in most cases there would, independently of the statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them, and if they trespassed upon the railroad there was no liability for their destruction, unless it was willfully or intentionally caused. We are therefore of the opinion that the railroad company was responsible to the plaintiff for the injuries he received without any fault on his part, and for this conclusion there is much authority in judicial utterances;" citing a large number of cases, and overruling the case of *Langlois v. Railroad Co.*, 19 Barb. 364, so far as it holds a different doctrine.

See, also, *Quackenbush v. Railroad Co.*, 62 Wis. 411, 22 N. W. 519.

In *Thornton on Private Fences and Railroad Crossings* (page 571), it is said that:

"The cases are full of expressions touching the object of a statute requiring railroad companies to fence their rights of way, and there is an almost unanimous opinion that it is not only to protect domestic animals, but to protect the passengers on the trains."

So, also, in Missouri,—the state where this cause of action arose. In *Trice v. Railroad Co.*, 49 Mo. 438, 440, the court, referring to the claim that the provisions of a section substantially like the one in controversy were for the exclusive benefit of the landowner, observed:

"But such is not the theory upon which this statute has been uniformly sustained. While the protection of the property of adjacent proprietors is an incidental object to the statute, its main and leading one is the protection of the traveling public. To insure such protection, railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion."

To like effect are the cases of *Isabel v. Railroad Co.*, 60 Mo. 475; *Barnett v. Railroad Co.*, 68 Mo. 56; *Rutledge v. Railroad Co.*, 78

Mo. 286; *Silver v. Railroad Co.*, Id. 528; *Rozzelle v. Railroad Co.*, 79 Mo. 349.

Nor is there anything in the cases of *Berry v. Railroad Co.*, 65 Mo. 172; *Harrington v. Railroad Co.*, 71 Mo. 384; *Johnson v. Railway Co.*, 80 Mo. 620; *Peddicord v. Railway Co.*, 85 Mo. 160,—cited by plaintiff in error,—antagonistic to the views expressed in the cases cited. The proposition is laid down, it is true, that remote land-owners were not within the protection of the statute, and that it was intended for the owners of contiguous lands, but nowhere is it said that protection to the traveling public was not also one of the objects intended to be secured by the statute. And, if the purpose is to protect the traveling public, a party riding upon a train may invoke the statute, in case injury results to him through the failure of the company to comply with its requirements, because he is one of the parties for whose benefit it was enacted. Within the reasoning of all these authorities, and by the express decision of *Donnegan v. Erhardt* and *Quackenbush v. Railroad Co.*, supra, an employe has the same right as a passenger to complain of injuries caused by a violation of duties imposed by such a statute. The purpose is protection to the train. All who are on that train are exposed to equal danger. It is not a case where the employe has the means of protecting himself, and the traveler not, for if the train be derailed the danger to each is equal. It is urged, however, by the defendant, that the failure to keep the fence in repair is the negligence of a coemploye, and that, therefore, it is not responsible. But the duty is cast by the statute upon the company, and it is cast as an absolute duty. It must erect and maintain safe and secure fences. It is a duty whose object is the securing a safe place for the employes on the train to do their work, and that, as is known, is an absolute duty cast upon the company, responsibility for neglect of which cannot be evaded by intrusting it to some employe. Our conclusion, therefore, is that there was no error in the instructions of the court in respect to this matter, and that the law is that if, through a failure of the company to erect and maintain a sufficient fence as required by the statute, an animal gets onto the track, whereby a train is derailed, and an employe on that train is injured by such derailment, the latter is entitled to maintain his action for damages against the company.

A second objection is to the admission of testimony as to work done subsequently to the accident in the way of repair to the fence at the place where the steer entered upon the track, and we are referred to the two cases of *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, and *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188, as authorities for the proposition that proof of such subsequent repairs is not admissible in evidence for the purpose of showing the existence of a defect. But the difficulty with the objection is that this testimony was introduced, at least in the first place, by the company itself. After proof of such repairs had been made by the company, the mere fact that the plaintiff, on his rebuttal, introduced further testimony in reference to the matter, is not sufficient to justify any interference with the verdict. It is unnecessary to

inquire whether the court erred in not giving, when requested, an instruction as to the consideration to be given to this testimony, for on the new trial, which we are compelled to award, probably no such question will be presented.

The only remaining matter that we notice is in respect to the instructions concerning contributory negligence. This instruction was asked by the defendant, and refused:

"If the jury believe from the evidence that plaintiff voluntarily assumed his position on the platform of the way car, and that, under defendant's rules, his proper place was on top of that car, and if the jury further believe from the evidence that he was not in such position, and that, by reason of his failure to be on top, he was unable to immediately signal the engineer on first perceiving the steer, and thereby contributed in any way to produce the wreck and his consequent injury, then he cannot recover."

It is obvious that if there was in the charge no reference to the matter of contributory negligence, and the case stood alone upon the refusal to give this instruction, the ruling could not be sustained. But the court did refer to the matter; and the question to be determined is whether the charge, as given, fully and accurately stated the law in respect to contributory negligence, so as to obviate any objection which arises from the failure to give this instruction. This was its language:

"Again, it is suggested (and it seems to be claimed) that Reesman was guilty of contributory negligence in not taking a proper position on the way car, and with reference to that specification of negligence the court gives you this instruction: It was the duty of Reesman to comply with the rules made by the defendant company for the government of its brakemen. If a rule of the company required Reesman to be on top of the way car on the occasion of the accident, and he was on the rear platform, without the consent of the conductor, then he was guilty of such contributory negligence as will prevent a recovery, provided you believe that his being on the platform, instead of on the top of the way car, helped, in any direct way, to occasion the derailment; but if being on the platform, instead of on the top of the car, did not in any way help to occasion the accident, or if Reesman was on the platform with the knowledge and consent of the conductor of the train, under whose orders he worked, then he was not guilty of contributory negligence merely because he was on the platform, though the rule did require him to be on the top or roof of the car. In other words, gentlemen, although they may have had rules requiring him to be on the roof of the car, and he was not on the roof, yet, unless you are able to say that if he had been on the roof the accident would not have occurred, why the fact that he was not on the roof is no defense. It is not contributory negligence, such as will preclude the plaintiff from recovering. If the position which he took on that rear platform on the morning of the accident was a position which he took with the knowledge and consent of the conductor who had charge of the train, the fact that he was there, and not on the roof of the car, does not make him guilty of contributory negligence, notwithstanding the rule which has been read in evidence."

The proposition here plainly stated is that if plaintiff disobeyed the rules of the company, and such disobedience contributed directly to the injury, he may nevertheless recover, and cannot be held guilty of contributory negligence, providing that such disobedience was with the knowledge and consent of the conductor of the train. Or, in other words, if the conductor fails to enforce the rules of the company the employe may knowingly disregard them, and yet in no manner be barred from recovering for injuries which would not have

resulted but for such disobedience. With that doctrine we cannot concur. It is not pretended that the conductor directed the plaintiff to remain on the platform, and not go onto the top of the caboose. A different question may arise in case the violation of the rules of the company is in obedience to a direct command from the immediate superintendent, but a decision of that question is unnecessary in this case. The duty of obedience to the rules of the employer is one resting alike upon all employees; and, when an employe claims to recover from his employer for injuries resulting through the latter's negligence, he cannot escape the consequences of his own act contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation. If it were otherwise, then the supineness and negligence of any superintending officer of a corporation would relieve a subordinate from responsibility for his own conduct. In other words, the wrong of one employe is excused by a like wrong of another. The employe injured through his own omission of duty escapes liability for such omission because some other employe is equally careless. The question has not infrequently arisen whether knowledge and assent on the part of the conductor, or other official on a train, of a violation of one of the rules of the company by a passenger, relieves the latter from the burden of contributory negligence arising from such violation, and the response has almost uniformly been in the negative. It is true that in those cases the party injured was not an employe, subject to the control of the officer whose knowledge and assent to the violation was relied upon as an excuse, but the principle underlying is the same. The question is not one of obedience to orders, but of a compliance with rules; and, generally speaking, the duty of compliance is not waived by the mere fact that some controlling official has knowledge of the failure to comply. In the case of *Railroad Co. v. Jones*, 95 U. S. 439, the party injured, who, though an employe, was not employed on the train or subject to the control of the conductor, was riding on the pilot of the locomotive, contrary to the directions of his employer, but with the knowledge and assent of the persons in charge of the train; and it was held that his thus riding was contributory negligence and not excused, the court observing, "The knowledge, assent, or direction of the company's agents as to what he did is immaterial." In *Railroad Co. v. Langdon*, 92 Pa. St. 21, the plaintiff, a passenger, was injured while riding in the baggage car in violation of the rules of the company. It was held that he could not recover, although such riding was with the knowledge of the conductor of the train. In the course of the opinion the court said, "We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a position of danger, so as to make the company responsible." See, also, the following cases: *Hickey v. Railroad Co.*, 14 Allen, 429; *Railroad Co. v. Moore*, 49 Tex. 31; *Railroad Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Railroad Co. v. Lucado's Adm'r*, 86 Va. 390, 10 S. E. 422; *Railroad Co. v. Davis* (Ala.) 9 South. 252. Nor is there anything in the case of *Railroad Co. v. Nickels* (decided by this court) 4 U. S.

App. 369, 1 C. C. A. 625, 50 Fed. 718, in conflict with the views herein expressed. In that case a brakeman was injured while coupling a car, and on the trial an instruction was asked of the court to direct a verdict for defendant on the ground of the contributory negligence of the plaintiff, in failing to use a stick in making such coupling, as required by the rule of the company, which instruction was refused, and the matter of negligence submitted to the jury. There was testimony tending to show that the rule was universally disregarded, and that the superintendent of the road was fully aware of its constant violation; and it was held that under the circumstances the jury were at liberty to consider whether the rule was not, in effect, abrogated. The court thus disposed of the question (page 382, 4 U. S. App., page 625, 1 C. C. A., and page 718, 50 Fed.):

"To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it, and be bound by it, one day, and know and acquiesce, without complaint or objection, in the complete disregard of it by the plaintiff, and all its other employes associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff, because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe, from the long-continued acquiescence of the defendant in the disregard of this rule, that it had been abandoned, and that it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right."

It is unnecessary to pursue this matter further. It may be laid down as a general rule that the mere knowledge and assent of his immediate superior to a violation by an employe of a known rule of the company—the employer—will not, as a matter of law, relieve such employe from the consequences of such violation. The judgment of the court below must be reversed, and the case remanded for a new trial.

NEW ORLEANS & N. E. R. CO. et al. v. THOMAS.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1894.)

No. 156.

1. CARRIERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, traveling on a cattle train with his cattle, reached New Orleans, where it was necessary to have his cars switched a short distance over another road, to the slaughterhouse. With the acquiescence of the train hands of this road, he climbed on top of a car, to go with his cattle; but on the way the car was run into by another train, and upset, whereby plaintiff received injuries. Plaintiff and other cattle men had before ridden on top of cars, with the consent of the train hands, but such riding was prohibited by a general order of the company. He testified that he knew it was a dangerous place to ride. *Held*, that the question of contributory negligence was a proper one for the jury, and there was no error in refusing to direct a verdict for defendant. Pardee, Circuit Judge, dissenting.

2. SAME—INSTRUCTIONS.

It was proper, under the circumstances, for the court to modify a requested charge by adding that, if the company had held out their em-

ployes as authorized to consent to plaintiff's being carried on the train with his cattle, and they so consented, then there was a consent by the company itself. Pardee, Circuit Judge, dissenting.

In Error, to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by Oscar C. Thomas against the New Orleans & Northeastern Railroad Company and the New Orleans & Southern Railroad Company to recover damages for personal injuries. There were a verdict and judgment for plaintiff, and defendants bring the case on error to this court.

E. H. Farrar, E. B. Kruttschnitt, and H. H. Hall, for plaintiffs in error.

W. S. Parkerson, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The defendant in error, a citizen of Alabama, brought this action in the circuit court for the eastern district of Louisiana against the plaintiffs in error, corporations created under the laws of Louisiana, claiming damages for personal injuries alleged to have been inflicted on him by their negligence. He charged that he had shipped two car loads of cattle from Epes, Ala., to New Orleans, over the Alabama & Great Southern Railroad and its connecting lines, under what is known as a "live-stock contract," that by the terms of his contract he was required to load, unload, feed, water, and take all proper care of said stock, and for that purpose he traveled on the same train with the stock from Epes to New Orleans, over the lines of the Alabama & Great Southern Railroad, the New Orleans & Northeastern Railroad Company, and the New Orleans & Southern Railroad Company; that the cars containing his cattle were transferred from the New Orleans & Northeastern Railroad Company to the New Orleans & Southern Railroad Company for the purpose of transporting them to the slaughterhouse, the point of destination in New Orleans; that while moving on the track of the New Orleans & Southern Railroad Company, and at a point where that track is crossed at right angles by the track of the New Orleans & Northeastern Railroad Company, a locomotive of the latter company ran into the cars containing his cattle, and on which he was riding, derailed said cars, and severely injured him; that said collision resulted from the gross negligence of the employes of the plaintiffs in error. The New Orleans & Northeastern Railroad Company, besides the general issue, avers that its contract for carriage terminated at the point where the transfer of the cars was made to the track of its coplaintiff in error; that under the contract between plaintiffs in error to convey said cars from New Orleans to the slaughterhouse the defendant was not required to load, unload, feed, water, and care for said stock, and was not required to travel with his cattle that short distance, but should have taken a street car, which is the usual method of conveyance employed to reach the slaughterhouse; that no provision had been

made by the New Orleans & Southern Railroad Company for the transportation of passengers, cattle owners, or others from New Orleans to the slaughterhouse; and that defendant in error was guilty of contributory negligence in riding on the cattle cars in question. The New Orleans & Southern Railroad Company, besides the general issue, denies that it had any contract with the defendant in error, and avers that under a contract between it and the New Orleans & Northeastern Railroad Company it did switch certain car loads of cattle a distance of only one or two miles from the junction of its track with that of its coplaintiff in error to the slaughterhouse; that the defendant in error was not required to travel with said cattle, and had no right to do so, in or about said cattle cars; that it had made no provision for the transportation of the defendant in error in or about said cattle cars; and that he, in riding on said cars, acted in direct violation of the rules of this company, and was guilty of gross contributory negligence, which contributory negligence it specially pleads as a defense to the action. There was a verdict and judgment against the plaintiffs in error, to review which this writ of error was sued out.

There are 13 assignments of error, 12 of which rest on bills of exception taken to the refusal of requested charges, the modification of requested charges given, and to certain portions of the general charge of the trial judge to the jury. These bills of exception cover 75 pages of the printed record. The first of these bills of exception, and the basis of the first assignment of error, purports to embrace all the evidence admitted on the trial, and on which the plaintiffs in error asked the trial court to instruct the jury peremptorily to find a verdict for the defendants (below, plaintiffs in error), on the ground that on the facts disclosed by the evidence there was nothing left in the case but questions of law, and that it appeared from the facts as a matter of law that the plaintiff (below, defendant in error) was guilty of contributory negligence, and could not recover. This the trial court refused, and the plaintiffs in error now urge that the circuit court erred in refusing to take this case from the jury. It can hardly escape observation that, in the judgment of the very able counsel who generally represent parties of the class of these plaintiffs in error, the error here complained of is one into which the judges of the circuit court often fall.

The second bill of exceptions refers to the facts shown in the first bill, makes a fair argumentative statement of what the evidence tended to prove on the basis of which plaintiffs in error asked a charge which the court gave, with this addition:

"But if the jury find that the defendants, by their conduct, had held out their employes to the plaintiff as authorized to consent to his being carried on the train with his cattle, and such employes consented, then there will be a consent of the corporation."

The plaintiffs in error urge that the circuit court erred in thus modifying their requested charge.

The bills of exception from 3 to 12, inclusive, each refer to the facts as shown in bills numbered 1 and 2, and the point of all and of each is that the trial judge erred in not instructing the jury as

matter of law that the defendant in error was guilty of contributory negligence, and could not recover. We are constrained to hold that the provision of our constitution, which gives parties to an action at law the right to a trial by jury, embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide as questions of law the issues most commonly joined in cases where recovery for personal injuries is sought should not be encouraged. The varying language of the swelling current of reported opinions, which already deluges the assizes, can be so collected and directed against almost any conditions of proof possible in such cases, as to convert the questions as to what is negligence and what is contributory negligence into issues of law instead of fact; while, in our view, the authority of adjudged cases is that whether there was negligence on the one part or contributory negligence on the other is a question of fact, to be determined by the jury under proper instructions. It is, of course, elementary that whether there is any evidence is a question of law. But we must beware that in applying this rule we do not substitute the judgment of the judge that there is not sufficient evidence for his judgment that there is no evidence. In this case the trial court was not even asked to charge the jury that there was no evidence to charge plaintiffs in error with negligence, but, on an issue on which they had the burden of proof, the trial judge was asked to charge as matter of law that they had made out their case.

We do not feel called on to review the evidence in this case, as we would on an appeal from a decree in equity, and deem it only necessary to say that, in our view, the proof in this case justified the trial judge in refusing to take the whole case away from the jury, and in modifying the requested charges that he gave, and in refusing those he refused. And that the part of the general charge excepted to presents no error for which the case should be reversed. The following cases support this opinion: *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, and cases therein cited; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Railroad Co. v. Horst*, 93 U. S. 291; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Eddy v. Wallace*, 1 C. C. A. 435, 49 Fed. 801.

The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge (dissenting). I respectfully dissent from all that part of the opinion of the court which deals with the case. The whole evidence in the case is brought up in a somewhat lengthy bill of exceptions, and all the bills of exception cover 75½ printed pages of the transcript; but the evidence is not conflicting on the main points involved, nor are the bills of exception unnecessarily prolix. The evidence shows without dispute these facts, shortly stated: The plaintiff in the court below shipped two car loads of

cattle over the Alabama & Great Southern Railroad and its connections from Epes, Ala., to New Orleans, under a special contract, requiring him to load, unload, feed, and water his cattle, etc., and impliedly giving him transportation on the same train with his cattle. The contract was performed, and plaintiff and his cattle were safely brought over the Alabama & Great Southern Railroad and its connection the New Orleans & Northeastern Railroad to the terminus of the latter in the city of New Orleans. When the plaintiff, with his cattle, reached New Orleans, his agents gave directions to have the cars switched to the slaughterhouse in the parish of St. Bernard, whereupon the Southern Railroad Company, under a general contract it had with the New Orleans & Northeastern Railroad Company, covering the switching of cars over the tracks of both companies, undertook the switching of plaintiff's two cars and one other cattle car to the slaughterhouse. The plaintiff, who had traveled in the caboose on the cattle train in coming to New Orleans, at the suggestion of the train hands of the Northeastern Railroad, and with the acquiescence of the train hands of the Southern Railroad, climbed with his satchel on top of one of the cattle cars, to ride to the slaughterhouse. The train of three cattle cars, with no accommodations or provisions for passengers, was backed rapidly out of the Northeastern yards; but when crossing the track of the Northeastern road was run into by another train, also backing on the main track, the car on which plaintiff was was thrown over, upset, and the plaintiff thrown off, severely spraining his ankle.

The Southern Railroad Company had, by written notice issued to its employes, and posted in its depot, where it transacted business with the public, forbidden all persons—except the employes—from riding on the cattle trains without an express permission from the freight agent, which it is not contended plaintiff had. The plaintiff and others, in cases of former shipments of cattle over the same route, had, with the consent of train hands, ridden on the top of cattle cars when the same were switched by the Southern Railroad Company to the slaughterhouse, and plaintiff testified he knew it was a dangerous place to ride. There was no necessity for the plaintiff to ride on the cattle cars to the slaughterhouse, as the distance was short, and plaintiff's cattle were not to be loaded or unloaded, fed or watered, en route; and, besides, there was a line of street cars, which furnished the usual conveyance to and from the slaughterhouse. There was no evidence showing by whose or what negligence the collision occurred. The only conflicting evidence is with regard to the extent of the plaintiff's injuries. The question in the case is whether, under the facts of the case, the plaintiff was guilty of contributory negligence; and the answer depends on whether the consent of the train hands of the Southern Railroad Company, on the occasion plaintiff was injured and on previous occasions, that the plaintiff should ride on the top of cattle cars while they were being switched, in spite of the orders of the company forbidding such riding, was sufficient to establish a usage such as would justify the plaintiff in so riding on the top

of the cattle cars, although he knew it was dangerous, and to make him a passenger of the company, although otherwise he was a stranger, if not a trespasser.

The circuit court held in favor of the sufficiency of such consent to establish such usage; for, although the question was apparently left to the jury, the charges of the judge maintain the proposition in the clearest terms, and are otherwise meaningless and misleading. Besides, as the evidence was entirely without conflict and undisputed on the point, there was nothing to be done by the jury but apply the law to the facts, and a refusal to direct a verdict for the defendants was practically directing a verdict for the plaintiff. In generally discussing the respective duties of judges and juries in cases of negligence, the opinion of this court says:

"In this case the trial court was not even asked to charge the jury that there was no evidence to charge the plaintiff in error with negligence, but, on an issue on which they had the burden of proof, the trial judge was asked to charge as a matter of law that they had made out their case."

I suppose that this statement refers to the request of counsel for plaintiffs in error as recited in the first bill of exceptions, to wit:

"To find a verdict for the defendants on the ground that on the facts declared by the said evidence there was nothing left in the case but questions of law; and that it appeared from the said facts, as a matter of law, that the plaintiff was guilty of contributory negligence, and could not recover."

Now, in the case of *Railroad Co. v. Jones*, 95 U. S. 439, which was a case where evidence was offered on both sides, and where the railroad company was guilty of negligence and the plaintiff was guilty of contributory negligence, the supreme court said:

"If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse;" citing respectable authorities in support thereof.

And in *Railroad Co. v. Houston*, 95 U. S. 697, a case where the negligence of the railroad company was admitted, but the contributory negligence of the plaintiff's wife, the person injured, was sworn, the supreme court, after reciting evidence much more involved than in the case in hand, said:

"Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

The true rule seems to be that, when the plaintiff's evidence does not show contributory negligence, the burden of proving it is on the defendant (*Railroad Co. v. Horst*, 93 U. S. 291); but, where contributory negligence is shown by undisputed evidence, whether offered by the plaintiff or the defendant, and such negligence will in law defeat a recovery by plaintiff, it is proper for the defendant to ask a peremptory instruction in his favor, and in such a case it is error on the part of the trial court to refuse.

The question raised by the first bill of exceptions is whether the evidence in the case shows such undisputed facts that, as a matter of law, the defendant was guilty of contributory negligence; and, as said above, this depends on the sufficiency of the usage proved.

Now, it seems to me, for the Southern Railroad Company to be

liable to the defendant in error for the injuries he received while riding on top of the cattle cars,—a place which he says he knew to be dangerous,—and while the cattle cars were being switched, it should appear that he was so on the cattle cars with the consent of the Southern Railroad Company, either express or implied, and without knowledge of the danger and risk he assumed; or that there was a contract of carriage as to him with his cattle while the cars were being switched, and no safer place was furnished him to travel. Neither is proven nor can be fairly inferred from the evidence in the case; on the contrary, it is proved without contradiction that the Southern Railroad Company had, by notice issued to its employes, and published in its depot, where it transacted business with the public, expressly forbidden travel upon cattle cars on its route. It is true that there was evidence tending to show that the plaintiff had never seen this notice, and that on previous occasions he and others had traveled on cattle cars of the Southern Railroad Company to the slaughterhouse while the same were being switched from the terminus of the Northeastern Railroad, with the consent and direction of train hands of the Northeastern Railroad Company, and, inferentially, with the knowledge of the train hands of the Southern Railroad Company; but I take it to be clear that it was not necessary for the plaintiff to see any such notice, for he was bound to know that, without a contract of carriage, he had no right to be there; nor can the permission of train hands justify him, in the absence of a contract of carriage, in placing himself in a dangerous place, or in fact in any place, on the cattle cars, for he was bound to know that such permission was beyond the scope of their authority, and that he could only act on it at his peril.

That the plaintiff, by reason of having previously ridden on the cattle cars of the Southern Railroad Company in violation of the rules and orders of the company, could have acquired the right to ride on top of the cattle cars of that company at the time he was injured, is a proposition which, I think, for the first time gets judicial sanction in this case. As it appeared from the undisputed evidence that the defendant in error, plaintiff below, had no right, by contract or otherwise, to ride on the cattle cars while they were being switched by the Southern Railroad Company, and as he knew that so riding was dangerous, the proper application of the maxim, "*volenti fit non injuria*," required an instruction of the court to the jury directing a verdict for the defendants. In *Railroad Co. v. Jones*, supra, it is laid down as follows:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Whart. Neg. § 1, and notes. One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff, in such cases, is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or im-

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proper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not. *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Railroad Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Clayards v. De-thick*, 12 Q. B. 439; *Van Lien v. Manufacturing Co.*, 14 Abb. Pr. (N. S.) 74; *Ince v. Ferry Co.*, 106 Mass. 149."

The third bill of exceptions is as follows:

"Be it remembered, that on the trial of this cause on the 9th, 10th, and 14th days of March, 1893, before the Hon. Edward C. Billings, United States district judge, holding the circuit court, and a jury, on the issues of law and fact herein raised by the pleadings, and the facts being such as set forth in bill of exceptions Nos. 1 and 2, the counsel for the defendants then and there requested the court to charge the jury as follows: 'That the plaintiff, as a man of ordinary prudence and intelligence, was bound to know that a freight train, without accommodation for passengers, was not intended for the carriage of persons, and that he was bound to ascertain for himself, before he started upon the New Orleans and Southern Railroad train with his cattle, whether he had a right to be there or not; that he was bound to use reasonable diligence to find out what the rules and regulations of that company were; and if the jury find that by the use of such reasonable diligence plaintiff could have found out that the rules of the company prohibited the riding on the top of cattle cars, then he is chargeable in law with knowledge of the rule, and they must find for the defendants,'—which instruction the court gave to the jury, but with the following amendment or modification: 'If the plaintiff had good reason to believe from his former dealings with the defendants that it was intended by them that he, as the owner of the live stock, should go on top of the cattle car, then he was right-fully there,'—to which addition and modification the defendants' counsel then and there excepted before the jury retired, and tenders this, their bill of exceptions, which is duly allowed and signed accordingly."

It is assigned as error that the court erred in adding to and modifying the instructions asked. It seems to me that the modification was unwarranted. If the plaintiff knew that the positive rules of the defendant prohibited the riding on top of cattle cars, he could have had "no good reason to believe from former dealings that it was intended that he, as owner of cattle or otherwise, should go on top of the cattle car; and therefore the charge, with the additional modification, is misleading and erroneous."

The fourth bill of exceptions in the record is as follows:

"Be it remembered, that on the trial of this cause on the 9th, 10th, and 14th days of March, 1893, before the honorable Edward C. Billings, United States district judge, holding the circuit court, and a jury, on the issues of law, such as set forth in bills of exceptions Nos. 1 and 2, the counsel for the defendants requested the court to charge the jury as follows: 'That if the jury find that the governing officials of the New Orleans and Southern Railroad did, in October, 1891, issue a general order in the following words: "New Orleans and Southern Railroad Company, No. 34 St. Charles Street. J. A. Larned, President and General Manager; H. S. Bell, Secretary and Treasurer. [Copy.] New Orleans, La., Oct. 16, 1891. Paul Baker, Esq., Conductor—Dear Sir: I am informed that boys and other parties occasionally ride down from our depot to the slaughterhouse on the roof of the cattle cars. This must be stopped. Hereafter no one, except the employees of the train, under any circumstances, will be allowed on our cattle trains, without a written permit from the freight agent, Mr. Long. You will return, with your reports to this office, any permits for passage given by Mr. Long. Respectfully yours, [Signed] H. S. Bell, Secretary,"—prohibiting all

persons, not its own employes handling the train, from riding on the top of cattle cars between the city of New Orleans and the slaughterhouse without the written permission of the local agent, and that notice of this written order was given to said employes, and a copy of it was posted in its station at its depot in the city of New Orleans, where it transacted its business with shippers and passengers,—then it was under no legal obligation to give any other or further notice to the public of such rule or regulation. And if the jury further find that the plaintiff was at the time of his injury riding on the top of a cattle car, in violation of said general order, even though he was there with the permission of the trainmen, he was a trespasser on said car, and the company owed him no duty except that of not wantonly injuring him. And if the jury further find that the plaintiff would not have been injured if he had not been on the roof of said cattle car, then, by being there under the above circumstances, he was guilty of contributory negligence, and cannot recover,—which instruction the court refused; to which refusal of the court to give the said instruction the defendants' counsel then and there excepted, before the jury retired, and tenders this, their bill of exception, which is duly allowed and signed accordingly."

It is difficult to conceive what the railroad company could have done, more than it did as recited in this bill, to signify to the defendant in error that he was not authorized to ride on the top of cattle cars of the Southern Railroad Company. The argument seems to be that, because the train hands permitted him to go upon the car, and did not peremptorily eject him as a trespasser, he thereby became a passenger, and the case seems to require that, although he voluntarily—and, as the evidence shows, unnecessarily—put himself in a place known by him to be dangerous, yet, when injured, he can legally recover damages from the railroad company.

In my opinion, the trial court erred in refusing to instruct the jury to find for the defendants, in modifying the instruction asked as given in the third bill of exceptions, and in refusing the instruction as to notice given in the fourth bill of exceptions, and that this court errs in affirming the judgment of the trial court.

UNITED STATES ex rel. FISHER et al. v. BOARD OF LIQUIDATION OF CITY DEBT OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1894.)

No. 105.

1. MUNICIPAL CORPORATIONS—BONDS—MANDAMUS—EVIDENCE.

Relators, who held a judgment against the board of school directors of the city of New Orleans, applied for a writ of mandamus to compel the board of liquidation of the city debt to issue bonds in liquidation of such judgment. *Held* that, on such application, evidence that a special tax had been levied by the city to pay the indebtedness held by the relators, and that all claims but the school indebtedness had been funded, is irrelevant.

2. SAME—BOARD OF LIQUIDATION OF NEW ORLEANS—POWERS.

Under Act La. No. 74 of 1880, which authorizes the municipal government of the city of New Orleans to issue bonds in payment of the valid unbonded indebtedness of the city, the municipal government alone is invested with authority in the premises; and mandamus will not lie against the board of liquidation of the city debt to compel them to issue such bonds.

B. SAME—ISSUE OF BONDS.

Act La. No. 110 of 1890, which is the sole authority under which such board of liquidation can now issue the bonds of the city, does not empower it to issue bonds, except in exchange for valid outstanding bonds of the city, and for sale, to provide a special fund to pay certain bonds and judgments against the city therein specified.

4. SAME—PAYMENT OF JUDGMENTS.

Act La. No. 67 of 1884, which authorizes the board of liquidation to pay certain judgments, applies only to judgments against the city of New Orleans based on floating debts or claims against the city, and does not include relator's judgment against the board of school directors.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was a proceeding by the United States on the relation of M. M. Fisher and wife against the board of liquidation of the city debt of New Orleans, for a writ of mandamus. The writ was denied, and relators bring error.

The plaintiffs in error, relators in the circuit court, filed their petition against the board of liquidation of the city debt of New Orleans, therein alleging that the relators had obtained judgment in said circuit court against the board of school directors of the city of New Orleans for the sum of \$8,097.17, with 5 per cent. interest from May 22, 1890; that the said judgment was final and executory; that a writ of fieri facias had been issued against the defendant, and had been returned nulla bona; that, under the provisions of Act No. 74 of 1880, relators were entitled to have their said judgment liquidated in bonds of the city of New Orleans provided for under said act; that relators were also entitled, under Acts Nos. 67 of 1884 and 110 of 1890, to have the same funded, and to obtain the new constitutional bonds provided for in such cases; and that the relators had made amicable demand for the issuance of said bonds. The prayer of the petition was that a writ of mandamus issue, ordering the board of liquidation of the city debt to issue to petitioners the bonds of the city of New Orleans, in such cases provided, for the full amount of principal, interest, and costs, of the judgment aforesaid. Upon the said petition an alternative writ of mandamus was issued, and thereupon the board of liquidation of the city debt filed an answer at length, in substance, that the judgment of the relators was based upon certificates of alleged indebtedness issued by the board of school directors of the city of New Orleans for asserted salaries of teachers and expenses of said board, and that the said certificates upon which the judgment was founded, and the judgment, were the obligations solely of the board of school directors, and not the obligations of the city of New Orleans or of the board of liquidators; that Act No. 74 of 1880, in so far as it undertook to authorize the issue of bonds by the city of New Orleans for salaries of school teachers or school expenses, was wholly void, and of no effect; that the said act was abortive, and no bonds were ever issued under it, and that it had been superseded and made void and of no effect, as well because of its unconstitutionality as by the effect of subsequent legislation providing for the issuance of bonds and the levies of taxes to pay them, referring to Acts No. 133 of 1880, Nos. 57 and 68 of 1882, the constitutional amendment of 1890, and Act No. 110 of that year; that, in the suit of the relators against the city of New Orleans in the civil district court of the state, it was finally adjudged by the said court, as well as by the supreme court of the state on appeal, that the relators had no demand whatever against the city of New Orleans on said certificates on which their judgment is founded, and the said judgment is now res judicata; further, that under the law the bonds of the city can be issued by the board of liquidation only for judgments against the city for debts of the city contracted prior to 1879; that the relators have no judgment against the city; and that the board of liquidation is not only not authorized to issue bonds for relators' judgment, but is prohibited from such issue; and refers to the acts creating the board of liquidation, defining its powers, and to all the legislative acts in relation thereto. On the issues thus made, the parties waived

trial by jury, and submitted the cause to the court. On the trial, the plaintiffs offered the testimony of John L. Newman and John E. Roux, and various ordinances of the city of New Orleans, and also the report of the city comptroller, all of which testimony and evidence tended to prove that the city of New Orleans had reduced and canceled assessments on which a large amount of the school taxes was based for the years between 1872 and 1879, such as would satisfy plaintiffs' claim, and had also remitted to the same extent school taxes; also, that the city tax was divided into a police tax, interest tax, park tax, and school and general tax, all of which stood on the same footing as the school tax, and that the indebtedness against each of said particular revenues had been funded, with the exception of the school indebtedness. Objection was made to said evidence on the ground that it was irrelevant, and could be of no effect in the cause, which objection was maintained by the court, and the evidence ruled out. The judgment of the circuit court, to enforce which the writ of mandamus was asked for, is as follows: "It is ordered, adjudged, and decreed that the plaintiff, Mrs. M. Fisher, and her husband, M. M. Fisher, have judgment in her favor, and against the board of directors of the city schools of New Orleans, for the sum of \$8,097.17, with five per cent. interest per annum from May 22, 1890, and costs, payable out of the school tax levied by the city of New Orleans prior to 1879." The court below refused the mandamus, for the reason that the relators have no judgment against the city of New Orleans, and it is only judgments against that municipal corporation which, under the existing law, can be dealt with and funded by the board of liquidation.

Charles Louque, for plaintiffs in error.

Henry C. Miller, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The first assignment of error is that the circuit court erred in excluding the evidence tending to show that a special tax had been levied by the city of New Orleans to pay the indebtedness held by the relators, a large amount had been reduced and canceled by the city, and all other claims had been funded, with the exception of the school indebtedness. The suit being one to compel the performance of a strictly legal and ministerial duty, the evidence in question was wholly irrelevant. If it had been admitted, it would only have tended to show an equity in favor of relators, and against the city of New Orleans, which could in no event avail relators in the present suit.

The second assignment of error is that "the court erred in not enforcing section 3 of the act No. 74 of 1880." The act referred to provides, in its first section, that "the municipal government of the city of New Orleans be and is hereby authorized and empowered to issue from time to time, as they may be required, bonds of the sum of five dollars (\$5), having ten years to run from the 1st day of July, 1880, bearing interest at the rate of 3 per cent. per annum, payable at the city hall in New Orleans, and with semiannual coupons attached;" and, in its third section, that the said bonds may be issued to take up the unbonded valid indebtedness of the said city of New Orleans, and the unpaid salaries of school teachers and expenses of maintaining the public schools, created since 1872 and prior to January 1, 1880, with certain other provisions not necessary to enumerate. The other sections of the act relate to details with regard to the issuance of bonds, and with regard to providing a special fund

and sinking fund to redeem the bonds. See Acts La. 1880, p. 84. Three very distinct and complete answers may be given this assignment: (1) Under the act in question, the board of liquidation of the city debt, defendant in this suit, is not by said act authorized to issue any bonds whatever, but that duty, under the terms of the act, devolves upon the municipal government of the city of New Orleans. (2) The act in question was superseded and practically repealed by Act No. 133, passed three days after by the same legislature, which latter act created the board of liquidation of the city debt, gave the said board exclusive control and direction of all matters relating to the bonded debt of the city of New Orleans, provided when and how new bonds should be issued, and otherwise turned over to said board the matter of liquidating the indebtedness of the city of New Orleans, and applying its assets to the satisfaction thereof. See Acts La. 1880, p. 180. (3) The act in question, so far as it places the unpaid salaries of school teachers and the expenses of maintaining the public schools created since 1872 and prior to January 1, 1880, on the same footing as the valid indebtedness of the city of New Orleans, is in violation of article 45 of the constitution of 1879, which denies the power of the general assembly to grant extra compensation to public officers, or pay, or otherwise authorize the payment of, any claim against the state or any parish or municipality of the state, under any agreement or contract made without express authority of law, and declaring all such contracts or agreements null and void; and it was so adjudged by the supreme court of the state of Louisiana in *Labatt v. City of New Orleans*, 38 La. Ann. 283. See, also, *New Orleans Taxpayers Ass'n v. City of New Orleans*, 33 La. Ann. 567.

The third assignment of error is that the court erred "in not granting the relators the relief prayed for under Act No. 110 of 1890 and the act No. 67 of 1884." The first section of Act 110 of 1890 (Acts La. 1890, p. 144) provides for the submission to the electors of the state of amendments to the constitution for the purpose of retiring the existing valid outstanding bonds of the city of New Orleans, including certificates or the bonds issued under the act No. 58 of 1882, and to retire judgments then or thereafter rendered against the city on floating debt claims prior to 1879, entitled to be funded under Act No. 67 of 1884; and, further, that the said bonds shall not exceed \$10,000,000. It also provides for the issue of constitutional bonds of the city of New Orleans to the amount of \$10,000,000. Section 2 of the act authorizes the sale of such bonds. The third section provides for the deposit of funds received from the sale of constitutional bonds, which fund shall be used solely and exclusively for the purpose of retiring by payment all the said now outstanding valid bonds of the city of New Orleans, matured or subject to be called, including the certificates or bonds issued under the fourth section of Act No. 58 of 1882, and including judgments now or hereafter rendered on floating claims prior to 1879, entitled to be funded under Act 67 of 1884, but excluding premium bonds issued under Act No. 31 of 1876. The fourth section provides the manner in which the board shall purchase out-

standing bonds of the city, and the fifth section for the exchange of the constitutional bonds authorized for the valid outstanding bonds of the city of New Orleans. The other provisions of the act need not be referred to. It will be noticed that this act (and it is the sole authority under which the board of liquidation of the city debt is now authorized to issue bonds of the city of New Orleans) does not, in terms nor by necessary implication, authorize the issue of bonds except for exchange for the valid outstanding bonds of the city of New Orleans, and for sale to raise a special fund which is to be used solely and exclusively for the purpose of retiring by payment outstanding valid bonds, including certain certificates and including judgments then or thereafter rendered on floating claims prior to 1879, and entitled to be funded under Act No. 67 of 1884; and, further, that said board of liquidation is authorized to exchange the constitutional bonds authorized to be issued only for the valid outstanding bonds of the city of New Orleans. As to the judgments then and thereafter to be rendered on floating debt claims prior to 1879, it seems that the board is not authorized to deal with them otherwise than by payment. Act No. 67 of 1884 (Acts La. p. 89), in its second section provides as follows:

"That the said board of liquidation of the city debt be and it is hereby authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans, now in the form of executory judgments and registered, under the provisions of Act No. 5 of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879, and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments, at present rendered against such city, and to such floating debt or claims against said city for 1878, and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and canceling said judgment debt, the said board is authorized and required either to sell the bonds to be issued under this act at not less than their par value and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments."

The judgments on floating claims prior to 1879 that are entitled to be funded under the act of 1884 (No. 67) are described in the section just quoted as executory judgments rendered against the city, and based on floating debts or claims against the city. The legislative intent declared in the act itself renders this perfectly clear. Now, the relators have no judgments against the city, and it is shown in *Labatt v. City of New Orleans* that the relators' claims are not, and cannot be made, a debt of the city. Besides this, in the case of *Fisher v. School Directors*, 44 La. Ann. 184, 10 South. 494, which was a suit by the relators herein to establish their claims, being the same claims now merged into a judgment in the circuit court, which is the basis of the present suit for a mandamus brought against the board of school directors, and by way of obtaining recognition of the claims also against the city of New Orleans, it was expressly adjudged that the claims in question were in no sense debts or liabilities of the city of New Orleans, and this judgment in favor of the city is

res judicata. The circuit court refused the mandamus prayed for by relators, because they have no judgment against the city of New Orleans, and it is only judgments against that municipal corporation which, under the existing law, can be dealt with by the board of liquidation. This ruling was in all respects correct, and should be affirmed, with costs. Judgment accordingly.

DURAND et al v. GREEN et al.

(Circuit Court, E. D. Pennsylvania. February 19, 1894.)

No. 6.

1. PATENTS FOR INVENTIONS—CLAIM—PROCESS AND PRODUCT.

In letters patent No. 252,721, granted February 14, 1882, to Horace Koechlin, for the "manufacture of colors or dyestuffs," the claim was as follows: "The improvement in the manufacture of coloring matters, consisting in the production of violet coloring matters by the action of nitroso derivatives of the tertiary amines on tannin, or equivalent reaction." Held, that this claim was for a process, and not for the resulting product; and it cannot be extended to cover the latter on the ground that the product inheres in the process.

2. SAME—SPECIFICATION—ENLARGEMENT OF CLAIM.

The claim being distinctly for the process only, it cannot be enlarged to cover the product as well, by reference to statements in the specification that "the products, as well as the methods of producing the same, constitute part of the invention, which comprises, therefore, the preparation and the coloring matters above mentioned."

In Equity. On final hearing. Bill by L. Durand, Huguenin & Co. against Green, Schulze-Berge & Koechlin, for infringement of patent.

Livingston Gifford, for complainants.

Cowen, Dickerson, Nicoll & Brown, for defendants.

DALLAS, Circuit Judge. The complainants, claiming to be assignees and present owners of letters patent No. 252,721, issued to Horace Koechlin on February 14, 1882, for "manufacture of colors or dyestuffs," filed their bill charging the defendants with infringement thereof. The latter, by their answer, have set up several defenses, including a denial of the infringement alleged. The case thus presented has been heard and considered upon the pleadings and proofs, and is now for decision.

He who conceives a new method, and by that method produces a new substance, invents, by one and the same exercise of the creative faculty, both a process and a product. The exploit is single, though the achievement is double. The manner of producing and the thing produced may, of course, be separately contemplated, but the inventive act from which both are derived is not divisible. The fruit is twofold, but the germ is one. This seems to me to be self-evident; but, were demonstration required, it would be found in the characteristically vigorous and lucid opinion of Judge Greer in the case of *Goodyear v. Railroad Co.*, 1 Fish. Pat. Cas. 626, Fed. Cas. No. 5,563. But from this unquestioned premise a conclusion was reached in

that case which does not result from its acceptance in this one. It is not necessary to challenge the correctness of that conclusion in order to support my own. If it were, I would greatly distrust the latter. It may well be conceded that, at the time the Goodyear Case was decided, it was right to hold that a patent which claimed a process, but which also disclosed that, by the practice of that process, an entirely new fabric was produced, covered and included the latter as well as the former. The doctrine of that decision is that, under the act of 1836, to the peculiar language of which the opinions repeatedly refer, the exclusive privilege conferred by a patent is coextensive with the actual invention, as discoverable from the entire instrument; and from that doctrine it necessarily resulted in that case that the product disclosed, as well as the process claimed, was protected. The first general statute passed by congress in pursuance of its power to secure to inventors, for limited times, the exclusive right to their respective discoveries, is that of 1790. That statute was, however, repealed by the act of 1793, which was afterwards supplemented by the enactments of 1794, 1800, 1819, and 1832; and these last-mentioned statutes comprised the whole of the positive law of the subject until, by the act of 1836, the present more complete and rational patent system was inaugurated. None of the earlier acts had contained any provision with respect to claims. The act of 1793 required that every petitioner for a patent should "deliver a written description of his invention," and that the letters patent should "be made out, * * * reciting the allegations and suggestions of the said petition, and giving a short description of the said invention or discovery;" but this is all that was made necessary, and it appears from the forms given in the appendix to Fessenden on Patents (published in 1822) that it was not the practice to deliver with the petition, or to recite in the patent, anything more than the law directed. The former was accompanied by a specification merely, and to the latter was annexed a schedule "containing a description in the words of" the petitioner, and which "recited the specification," and nothing else. It is important to bear in mind that, during this era of unperfected patent law, patents were granted without examination by any governmental agency for ascertainment of either the novelty or the utility of the asserted invention. It was sufficient that the petitioner "alleged" and "made oath" that he "believed" it to be new and useful. Upon this alone the patent issued; but it was accepted in reliance, solely, upon the recipient's own unaided investigation, and with the unmitigated hazard that, by reason of subsequently appearing lack of novelty or utility, it might turn out to be absolutely worthless. Subject to this risk, however, he was secured in his invention as described, and, as has been shown, was not required to, and did not, present any claim whatever. By the act of 1836 a radically different and vastly superior policy was adopted, and its administration provided for. In the interest both of the public and of inventors, investigation by the patent office was established for the determination of, at least, the probable validity of a patent, in advance of its issuing. The increased, and increasing, demands of other duties upon the officers to

whom the execution of the patent laws had theretofore been confided, and the almost marvelous extent of the inventive genius displayed by our countrymen, necessitated the erection of the separate department or bureau, the creation of which was the primary object of the statute of 1836. But the principal new feature introduced by it in mode of procedure was that to which I have referred,—thorough and orderly preliminary examination to test the right of each applicant to receive the patent applied for. The work thus devolved upon the patent office was very considerable, and in its performance the exercise of great care and skill was requisite. That it might not be rendered unnecessarily difficult, it was but reasonable to require that every applicant should not merely, as under the act of 1793, “deliver a written description of his invention,” but should also, as part of that description, “particularly specify and point out the part, improvement, or combination, which he claims as his invention or discovery;” and such is the precise addition which, in this regard, is made by the act of 1836, § 6, to that of 1793. Still, it was directed (1836, § 5) that the patent, although annexing the specification (as above stated) of what the applicant claimed as his invention should “contain a short description or title of the invention or discovery, correctly indicating its nature and design,” and should “grant the full and exclusive right to the said invention.” It was with express reference to, and upon construction of, these terms of the act of 1836, that it was decided in *Goodyear v. Railroad Co.* that the patentee’s monopoly was not, in that case, limited by his claim, but extended to the invention which was described, and the nature and design whereof were correctly indicated in the specification. After the passage of the act of 1836, the profession recognized the convenience and utility of formally stating the claim for which it made provision at the end of the specification; and, from the practice which ensued, as well as for other manifest reasons, the courts were led (as in *Goodyear v. Railroad Co.*) to give to such claims much, but not controlling, weight in determining the scope of patent rights.

I turn now to the act of 1870, under which the patent in suit was granted. It is, as to the subject under consideration, markedly different from the act of 1836. It mentions the specification and the claim as two distinct things, and requires an inventor, not merely to specify and point out, but to “particularly point out and distinctly claim,” his invention. The change in words is very slight, but the difference in meaning is obvious and important. By the one act he was instructed to specify what he alleged to be his invention; by the other he is told that the invention for which he desires a patent he must distinctly claim. The fact that, except as to the change just indicated, the words used in the two acts, when dealing with this matter, are substantially identical, is quite convincing that the draughtsman of the act of 1870, actually as well as in presumption of law, thus peculiarly varied the language of the act of 1836, not without reason, but with a definite purpose. Nor is the legislative design hard to discern. The practice of the profession, and the opinions of the judges to which I have adverted, had suggested that the embarrassments attendant upon the efforts of the courts to construe

vague and indefinite patents might, without doing injustice to patentees, be much alleviated by denying protection for anything, though original, new, and useful, which was not also distinctly claimed. In brief, it was prescribed that the claim must be taken as defining precisely what the invention covered by the patent is; and hence the true question is not what the patentee might have claimed, but what he has claimed,—the latter, not the former, being made the measure of his right. The rules for determining what is claimed in any case are few and simple, and are not peculiar to the patent law, except as respects the doctrine of liberality in construction in favor of pioneer inventors. The benefit of that doctrine is claimed by these complainants, and, without pausing to examine their title to invoke it, for it cannot avail them, I concede, for the present purpose, its applicability to the achievement of Koechlin. As to the rest, it is sufficient to say that, if the language of a claim has a plain and distinct meaning, that meaning must prevail. That which is to be ascertained is, of course, the intent of the claimant; not, however, that intent as elsewhere, or in some other manner, disclosed, but as expressed in the claim itself. If the meaning of the claim be uncertain,—that is to say, if the claim be ambiguous, but still be reasonably capable of elucidation by reference to the specification,—the latter may be resorted to for interpretation of the former, but never to change the plain meaning of its language, nor to extend it beyond the limits imposed by its own terms, and *a fortiori* not so as to create a separate or additional claim.

From these preliminary observations I now pass to the consideration of the only claim of the patent involved, which claim is as follows: "I claim the improvement in the manufacture of coloring matters, consisting in the production of violet coloring matters by the action of nitroso derivatives of the tertiary amines on tannin, or equivalent reaction, substantially as described." Is this claim for a process, or for a product, or for both? It is true that the word "manufacture" may be used to denote either the act of manufacturing or a manufactured article, and that the word "production" may designate as well a thing produced as the operation of producing. Each of these words does possess the double sense which the complainants ascribe to it; and, if any insurmountable difficulty in comprehending the claim resulted from this, the consequence, perhaps, might be that the patent would fall for want of any distinct claim to support it. But these words, when properly related to their context, do not render the claim equivocal. The improvement is expressly stated to be "in the manufacture of coloring matters,"—that is to say, in making coloring matters; for otherwise it would be necessary to suppose that (at this point) it was intended to claim the substances called "coloring matters," which would be absurd. Then, the claim, continuing, explains that the referred-to improvement in manufacture of coloring matters consists in—what? In a substance; in a fabric; in an article of merchandise? No; but "in the production of violet coloring matters." I do not think it possible than any person having the least degree of skill in the use of the English language would so have expressed himself if his intention had been to

claim "coloring matters," restricted to violet coloring matters, either generally or when produced by a particular method. On the other hand, even if the claim ended here, its natural meaning (and that is the meaning which should be adopted) would clearly require its acceptance as a claim for a process only. But, as we proceed in the reading of the claim, the notion that it is, or was intended to be, for a product, becomes even more surely inadmissible, for from what follows it appears that what is claimed is not something which exists or is to be created, but something to be done,—to be accomplished by "action" or "reaction." On the whole, therefore, I am of opinion that this claim does not require, and consequently does not admit of, interpretation, but that, upon a fair and natural reading of it, unaided by construction, it appears to be, and therefore is, a claim for a process, and for nothing else. As, however, it has been very earnestly urged that it should be so extended as to include the product, because of the asserted broader scope of the invention as described and designated in the specification, I will briefly refer to that part of the patent. In the first place, it is there said: "My invention consists in the production of violet coloring matters by the action," etc.; and certainly, if this language be related to the closing words of the claim, "substantially as described," its only tendency is to sustain the view I have expressed. But the particular portion of the specification upon which the complainants rely is this: "Other coloring matters can be made by similar reactions. The products, as well as the method of producing the same, constitute part of the invention, which comprises, therefore, the preparation and the coloring matters above mentioned." This statement, however, does not aid them—First, because an existing claim cannot be enlarged by, nor an additional one be imported from, the specification; and, second, because the assertion that "the products * * * constitute part of the invention," when taken in connection with their omission from the claim, pregnantly indicates that the applicant had process and products distinctively in mind, and yet, either in disregard of the statute, or because he was satisfied to secure only process, limited his claim to process alone.

It remains only to notice the contention that in this instance the product inheres in the process, and that, therefore, the claim of the one necessarily includes the other. For reasons already stated, this position is untenable. Product and process are quite distinct matters, even where both are created by the same inventive act. If the point here was the same as in *Goodyear v. Railroad Co.*, it might be decided favorably to the complainants; but as, in this case, the question is not as to the scope of the invention, but as to the subject-matter of the patent as defined by the claim, it must be determined against them. It was not held in *Goodyear v. Railroad Co.* that, because the process was expressly claimed, the product was constructively claimed. The theory upon which the judgment was founded is quite different. It is that, though not at all included in the claim, product was patented, because it appeared, from other parts of the instrument, to have been invented. In other words, the scope of the patent was determined, not by construction of the

claim, but by exploring the specification in search of invention; and invention disclosed, not claimed, was made the measure of right. The difference is a palpable one, and it clearly distinguishes that case from this one.

I have reached the conclusion that the only claim of the patent in suit is for a process, and is not for a product; and, waiving any question as to whether use or sale of the product by the defendants jointly has been shown, it has at least not been established that they have in any manner used the process. It results from this that the charge of infringement has not been sustained. Other defenses were interposed, and the points which they involve have been very thoroughly and ably argued; but it is unnecessary, and therefore not desirable, that I should intimate any opinion upon them. I do not do so; but upon the ground, and for the reasons, which have been stated, the bill is dismissed. with costs.

EDISON ELECTRIC LIGHT CO. et al. v. PHILADELPHIA TRUST, SAFE-DEPOSIT & INS. CO. et al. SAME v. MANUFACTURERS' CLUB OF PHILADELPHIA. SAME v. SPRECKELS SUGAR-REFINING CO.

(Circuit Court, E. D. Pennsylvania. January 26, 1894.)

Nos. 29, 30, and 31.

PATENTS—PRELIMINARY INJUNCTIONS — DECISIONS BY CIRCUIT COURT OF APPEALS AND OTHER CIRCUIT COURTS.

The Edison incandescent electric lamp patent, No. 223,898, was sustained by the circuit court of appeals for the second circuit after exhaustive litigation. Afterwards the new defense of anticipation by one Henry Goebel was set up in a suit in the circuit court for the eastern district of Massachusetts, and, after a thorough investigation thereof, a preliminary injunction was granted. In other suits in which this defense was interposed a preliminary injunction was granted by the circuit court for the eastern district of Wisconsin but was denied by the circuit court for the eastern district of Missouri on the defendant's giving bond. A subsequent suit was brought in the circuit court for the eastern district of Pennsylvania, and the defendants therein claimed that they should be exempted from a preliminary injunction in respect to using certain lamps made by the company, which the court for the eastern district of Missouri had refused to enjoin. No evidence was submitted on which the court could form an independent judgment as to the alleged Goebel anticipation. *Held* that, in view of the decision of the circuit court of appeals, the injunction should be granted.

These were three suits, brought by the Edison Electric Light Company and the Edison Electric Light Company of Philadelphia against the Philadelphia Trust, Safe-Deposit & Insurance Company and others, the Manufacturers' Club of Philadelphia, and the Spreckels Sugar-Refining Company, respectively, for infringement of the Edison incandescent electric light patent. Heard on application for preliminary injunctions.

Samuel B. Huey, Richard N. Dyer, and C. E. Mitchell, for complainants.

Crarath & Houston and John O. Bowman, for defendants.

ACHESON, Circuit Judge. The patent in suit, No. 223,898, granted on January 27, 1880, to Thomas A. Edison, after protracted litigation and a most vigorous defense, was sustained by the circuit court of the United States for the southern district of New York and by the United States circuit court of appeals for the second district. *Edison Electric Light Co. v. United States Electric Lighting Co.*, 47 Fed. 454; *Id.*, 3 C. C. A. 83, 52 Fed. 300; *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 592. The uncontradicted proofs in the several cases now before me show infringing use by the defendants, respectively, and it is conceded that the plaintiffs, the Edison Electric Light Company, and its exclusive licensee in the city of Philadelphia, the Edison Electric Light Company of Philadelphia, are entitled to a preliminary injunction in each of these three suits. The court, however, is asked to exempt from the operation of the injunctions certain lamps (confessedly within the second claim of the patent) which were manufactured by the Columbia Incandescent Lamp Company, a corporation of the state of Missouri, for the reason that in a suit brought against that company by the Edison Electric Light Company and the Edison General Electric Company in the circuit court of the United States for the eastern district of Missouri, after the decisions in the second circuit, Judge Hallett refused a motion for a preliminary injunction upon the defendant's giving a bond in the penal sum of \$20,000, conditioned for the payment of any sums which might be decreed in that suit in favor of the complainants therein. 56 Fed. 496. The ground for this refusal was a defense there set up, which had not been made in the second circuit, that the incandescent electric lamp for which Edison was granted the patent was really the prior invention of one Henry Goebel. But in the earlier case of *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678, that defense was interposed to a motion for a preliminary injunction, and was very carefully investigated by Judge Colt, who found and decided that Goebel's story of his invention in itself was so improbable, and the evidence to sustain the alleged anticipation was of such doubtful character, that the consideration of this defense ought to be postponed until final hearing, and that in the mean time the plaintiff was entitled to enjoy the fruits of the decrees sustaining the patent. Accordingly, Judge Colt granted a preliminary injunction. In the more recent case of *Edison Electric Light Co. v. Electric Manuf'g Co.*, 57 Fed. 616, in the circuit court of the United States for the eastern district of Wisconsin, Judge Seaman expressed views similar to those of Judge Colt, and awarded a preliminary injunction to restrain infringement of this patent. No evidence whatever in support of the Goebel defense has been submitted to me, so that I am without the means of forming an independent opinion as to whether it rests upon a substantial basis. Under all the circumstances, then, to give to Judge Hallett's refusal to grant an injunction the effect here claimed for it would be to carry the principle of judicial comity to a most extravagant length. The Edison Electric Light Company of Philadelphia, vitally interested here, is not a party to the Missouri suit. But, aside from that con-

sideration, the owner of a patent undoubtedly may maintain suits for infringement against the manufacturer and user of the patented device simultaneously. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244; *Kelley v. Manufacturing Co.*, 44 Fed. 19. True, pending a test suit against a manufacturer involving the validity of a patent, in which a preliminary injunction against him has been denied, courts in other jurisdictions have declined to enjoin preliminarily the users of the device. But the Edison patent has been sustained under circumstances which entitle the adjudications to high regard. It is the accepted doctrine that the decision of the supreme court, after exhaustive litigation upon the merits, sustaining a patent, will ordinarily be regarded as conclusive on a motion for a preliminary injunction, the presumption against the existence of any valid defense against the patent prevailing at that stage of the case. *Purifier Co. v. Christian*, 3 Ban. & A. 42, 51; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 795; *American Bell Tel. Co. v. McKeesport Tel. Co.*, 57 Fed. 661. I think the same effect ought here to be accorded to the decisions of the United States circuit court of appeals for the second circuit sustaining the Edison patent. In each of these cases a preliminary injunction in the form prescribed by the courts of the second circuit will be allowed.

BALL & SOCKET FASTENER CO. v. BALL GLOVE FASTENING CO.

(Circuit Court of Appeals, First Circuit. February 21, 1894.)

No. 57.

On petition for rehearing. The facts are fully stated in the prior opinion of this court, reported in 7 C. C. A. 498, 58 Fed. 818.

Before PUTNAM, Circuit Judge, and NELSON, District Judge.

PUTNAM, Circuit Judge. The appellee filed, October 30, 1893, a petition for a rehearing in this cause, and a brief in support of it. The matters which it desired to reargue were two, and were stated in the following:

"Your honors, in considering the Mead buttonhole member, have mentioned, and apparently have considered, only one of the forms of this device as made by the appellant. The record discloses a number of forms of the Mead device, and it is only by an examination and knowledge of each and all of these buttonhole members that they can be considered as a whole, or separately. The appellee, your petitioner, does not believe it necessary to present arguments to change in any degree the construction given by your honors to the fourth claim of the Kraetzer patent No. 306,021; it desires the opportunity to present the various buttonhole members which the record discloses the appellant has made, and to show that, under the very construction which your honors have put upon this claim, it covers these devices. * * * In relation to Kraetzer patent, No. 290,067, it is respectfully desired to argue what the record discloses the 'eyelet' of that patent is."

The brief had prefixed to it a drawing showing the appellee's construction of what it styles the Mead fastener as made by the appellant with a so-called "perforate cap," and the Mead fastener as made

by appellant with a so-called "imperforate cap," and the brief stated that the court had apparently considered "only the Mead fastener with the perforate cap," and added:

"We ask you now to consider the Mead fastener with the imperforate cap, made almost, in the minutest detail, in accordance with the language of the fourth claim of the Kraetzer patent No. 306,021."

Thereupon the court entered the following order:

"The appellant and appellee may each, on or before January 1, 1894, file a brief on the question whether any of the various buttonhole members which the record discloses the appellant has made are covered by the construction the court has already put upon the fourth claim of the Kraetzer patent No. 306,021, and are within the contract of the parties; and upon the further question what the record discloses the 'eyelet' of Kraetzer patent No. 290,067 to be,—the briefs to be limited to the above questions, and to contain references to such parts of the record as each relies on in this connection; and the court will dispose of the matter on the briefs without oral or further argument, unless it shall hereafter otherwise order."

Under color of this order the appellee filed an elaborate brief, taxing the court with a new discussion of the larger part of the entire case, and closing with the proposition:

"There can be no question whatever that all of appellant's buttonhole members come within the second claim of patent 290,067."

The appellee, however, fails to point out any evidence in the record that the appellant manufactured fasteners with the imperforate cap, the appellant denies that there is any such evidence, and the court has been unable to find any. All the exhibits put in proof have the perforate cap. Therefore, we are not called on to consider any propositions based on that distinction.

With reference to the point touching the "eyelet" of the Kraetzer patent No. 290,067, which we permitted should be covered by the briefs referred to, because there was some confusion arising from the peculiar use of the word in the patent, the appellee now says that it was used to designate the buttonhole member as an entirety. This was the view taken by us; so that no further consideration need be given that topic. For that reason, and because the court, in its former conclusions, considered only the perforate cap, and there is no evidence in the record that appellant manufactured the imperforate cap, and without any intimation whether or not this distinction is essential, the petition for a rehearing must be denied.

The appellee has apparently proceeded on the theory that the issues in the case were with the Mead patent of September 8, 1885, some of the drawings attached to which show imperforate caps. This is erroneous, as the sole issues were with such fasteners only as the evidence in the record shows were manufactured by appellant.

The appellee also refers us to *Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. 48. In our view, this decision tends to confirm the conclusion reached by us in the case at bar, because the supreme court (page 116, 150 U. S., and page 48, 14 Sup. Ct.) recognize "different principles" of construction as between the Mead fasteners and those constructed by Kraetzer as shown to that court, although the latter had the semblance of a button, on which the appellee re-

lies so much in this case, and an elastic ring, which answers for the Kraetzer eyelet, if the latter is to be so broadly construed as the appellee claims.

Petition for rehearing denied. Mandate according to the order entered October 27, 1893, may issue forthwith.

EDISON ELECTRIC LIGHT CO. v. ELECTRIC ENGINEERING & SUPPLY CO.

(Circuit Court, N. D. New York. March 21, 1894.)

No. 5,949.

1. PATENTS—LIMITATION BY FOREIGN PATENT.

When, for the purpose of limiting the duration of an American patent, defendant introduces a foreign patent for a shorter term to the same inventor, he is not bound to show further that the foreign patent has not been extended, especially when there is no proof that the foreign law authorizes extensions. *Bate Refrigerating Co. v. Hammond Co.*, 9 Sup. Ct. 225, 129 U. S. 151, explained.

2. SAME—INVENTION—ELECTRIC LAMP HOLDERS.

The Edison patent No. 265,311, for an electric lamp and holder for the same, shows patentable invention as to claims 2 and 3, which relate especially to the socket for holding the lamp.

3. SAME.

The Johnson patent, No. 251,596, for an improvement in sockets or holders for electric lamps, is void for want of invention as to claim 5, which is for an exterior metal covering protecting the interior portions of the socket.

4. SAME.

The Bergmann patent, No. 257,277, for an improvement in electric lamp sockets, shows invention as to claim 2, which covers a form of construction in which the contacts are compressed, instead of drawn apart, while screwing the lamp into the socket.

Bill by the Edison Electric Light Company against the Electric Engineering & Supply Company for infringement of patents. On final hearing.

C. E. Mitchell and Richard N. Dyer, for complainant.

Alfred Wilkinsor, for defendant.

COXE, District Judge. This suit is based upon five patents owned by the complainant. All of them relate to improvements in sockets for incandescent electric lamps. They are No. 251,596, granted December 27, 1881, to Edward H. Johnson, No. 257,277, granted May 2, 1882, to Sigmund Bergmann, No. 265,311, granted October 3, 1882, to Thomas A. Edison, No. 293,552, granted February 12, 1884, to Sigmund Bergmann, and No. 298,658, granted May 13, 1884, to Sigmund Bergmann. The last of these patents, No. 298,658, was, at the argument, withdrawn from the consideration of the court. Regarding No. 293,552 it is admitted that at one time, three years or more ago, the defendant made sockets which infringed. As I understand the situation, therefore, there is no objection to a decree for an injunction and an account, so far as this patent is concerned. It remains to consider the other three.

No. 285,311.

Although the patent to Thomas A. Edison was issued after the other two it was, in fact, applied for February 5, 1880, before either of the others. It is regarded by all as the principal patent in controversy and will, therefore, be considered first. The patent is for a new and useful electric lamp and holder for the same. In the specification the inventor says:

"In order to adopt a system of electric lighting for ordinary and domestic uses, it seems essential that a lamp should be devised complete in itself, so that it may be supplied as a separate article ready for attachment to a suitable support, and with conductors so arranged that when the lamp is placed in position the circuit connections are completed without further adjustment, and the holder or socket for receiving the lamp should be arranged to subserve this purpose, this that there may be no difficulty encountered, no skilled care or attention needed in placing the lamps in position or in replacing one which from breakage or any cause whatever should become disabled. The object of this invention is to attain this; and to that end it consists in an electric lamp as a separate article adapted to be readily placed upon or within or removed from a suitable holder, and in a socket or holder as a separate article adapted to receive and support upon or within it an electric lamp, and in the combination of these two separate articles and proper contacts for completing the electric circuit, and in other features more particularly hereinafter described and claimed. * * * A is the socket or holder for receiving the lamp. It is made of suitable insulating material, shaped and ornamented as may be desired, receiving and supporting the neck of the electric lamp and fashioned at one end so as to be fastened into a gas fixture or other suitable support. As shown in the annexed drawings, it has a cylinder hollowed out from the top with a screw-threaded aperture in the base, by which it is attached to the bracket or chandelier arm, L."

The inventor then describes in detail the construction of the socket. The claims involved are the second and third. They are as follows:

"(2) A socket for an electric lamp, adapted to be placed upon a gas pipe or other suitable support, and provided with contact plates forming the terminals of an electric circuit, and arranged substantially as set forth.

"(3) A socket for an electric lamp, adapted to be placed upon a gas pipe or other suitable support, and provided with contact plates forming the terminals of an electric circuit, and also provided with a circuit controller inserted in one branch of the circuit for controlling the circuit substantially as set forth."

It will be observed that the second claim is the same as the first with the exception that the second has an additional element, viz., the circuit controller. The defenses relied on are, first, that the patent expired with a prior Russian patent in December, 1891, and, second, that the patent is void for lack of invention. Infringement is not disputed.

The Russian Patent.

The answer avers that the Edison patent has expired under the provisions of section 4887 of the Revised Statutes. The preamble to the specification says that the invention was patented "in Russia December 14, 1881." A copy of the Russian patent was offered in evidence by the defendant and the complainant admits it to

be a correct copy of the Edison patent of December 14, 1881. This patent recites that a petition was presented "for granting to the foreigner, Thomas Alva Edison, of Menlo Park, in the state of New Jersey, United States of America, a ten years' patent for improvements in the arrangement and manufacture of electric lamps." It concludes with the statement that the government "gives to the foreigner, Thomas Alva Edison, the present patent of a ten years' from this date, exclusive right to use, sell," etc., the invention. The defendant also introduced a certificate from the Russian department of trade and manufacture that the patent expired or became "exhausted" in December, 1891. This certificate is criticised by the complainant as not being sufficiently authenticated. I am inclined to think that the absence of a seal and the signature of a superior officer of the Russian government renders the certificate inadmissible. *Church v. Hubbard*, 2 Cranch, 187.

Does the absence of the certificate materially change the situation? It is conceded that a prior patent was granted in Russia, December 14, 1881. As the court recollects the discussion at the final hearing it was admitted that the Russian patent was for the same invention as the patent in suit. It certainly seems to be for the same invention and no contention to the contrary is found in the complainant's briefs. It appears on the face of the Russian patent that Mr. Edison, through his agents, asked for and received a 10 years' patent. Unquestionably then the proof establishes the existence of a prior Russian patent, for the same invention, granted for a term of 10 years from December 14, 1881. But the complainant contends that this is not enough; that the defendant must go further and prove that the patent has not been extended. The case of *Bate Refrigerating Co. v. Hammond Co.*, 129 U. S. 151, 9 Sup. Ct. 225, is cited as authority for this proposition. The decision in the Refrigerating Case did not turn upon a question of *onus probandi*; it was decided upon stipulated facts. It appeared affirmatively that pursuant to the laws of Canada, a Canadian patent originally for 5 years had been extended 10 years. The court held that under section 4887 the patent did not expire till the end of the 15-years' term. In other words, the court decided that it would not hold a patent to be dead when the affirmative proof showed it to be alive and operative. Surely this is not an authority for the proposition, that a presumption exists that a patent, limited to 10 years on its face, has been extended beyond that period. What is there upon which to base such a presumption? If an extension were, in fact, proved the law for it might be presumed. If a law permitting extensions were proved the fact might possibly, in some instances, be presumed. But how can the court draw an inference where there is neither fact nor law? The case of *Pohl v. Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. 577, appears to sustain the proposition that the foreign patent itself is proof of the duration of its term. At page 382, 134 U. S., and page 577, 10 Sup. Ct., the court says:

"It appears, by translations into English of the German and French patents, annexed to the bill, that the German patent began to run September 6, 1877, and its longest duration was until December 12, 1891."

Again on page 383, 134 U. S., and page 577, 10 Sup. Ct.:

"The German patent on its face appears to have been granted for a term extending from September 6, 1877, to December 12, 1891. * * * If the United States patent does not expire until the end of the term expressed on the face of that one of the two patents, German and French, which has the shortest term so expressed on its face, it does not expire until the end of the term so expressed on the face of the German patent, namely, December 12, 1891."

Where a foreign patent clearly and unmistakably shows on its face a definite term of years, it would seem, in the absence of proof to the contrary, that the term so shown must be accepted by the court as limiting the life of the patent.

In the present case there is an entire absence of proof on which to base an inference that the 10-years' term was extended. It was either a patent for 10 years or it was no patent at all. If the patent was for another or an extended term it was for the complainant to show it. The defendant's proof of a 10-years' patent is properly before the court. Until the contrary appears it must be presumed that the Russian patent was granted pursuant to Russian law for 10 years. The court cannot ignore or reject this proof upon a mere intimation of counsel that it may be erroneous. I conclude, therefore, that the Edison patent expired in December, 1891. The court, however, has jurisdiction, as the suit was begun some two months before the patent expired.

It is contended by the defendant that in construing claims 2 and 3 of the Edison patent the court should confine itself strictly and closely to the socket described therein, and by the complainant that the court should import into the socket all the virtues and ingenuity of Mr. Edison's incomparable system of electric lighting. Neither view is correct. The claims should not be defeated because other lamps have been supported in sockets, or upheld, because Mr. Edison has lighted up the world and illuminated electrical science with his Aladdin lamp. It is not necessary to consider his other patents. The one in suit furnishes all the data necessary. It is intended to cover an electric lamp and the socket for the same. The socket and the lamp form one complete structure; neither is of any value without the other. In construing the claims the completed lamp should be considered. It would be a most narrow and illiberal construction to leave out of view the lamp and the particular kind of lamp which the inventor described as inseparable from the socket. It is plain from the portions of the specification quoted above that the inventor's main idea was to reduce the lamp proper to the minimum of cheapness and simplicity and place all the durable and expensive mechanism in the socket so that the socket would outlast a great number of lamps which necessarily become broken or worn out and are cast aside. In short, the socket of the claims is the socket of the specification and drawings. It is a socket, small, compact and symmetrical in form. Although mere matters of shape are, probably, im-

material it is a noticeable fact that all subsequent sockets have in general appearance adhered very closely to the socket of the patent. It is made of insulating material and carries the two electrically segregated contact plates, the circuit controller and the leading in wires, so arranged that the most inexperienced person may light the lamp by merely inserting its neck in the socket. Finally, it must be so constructed that it can be fastened to a gas fixture or other suitable support, the lamp taking the place of the gas jet. The prior art does not disclose a socket which anticipates such a construction. Many of its separate features are found there, but not the completed structure organized as described. I cannot doubt that the production of such a structure involved invention, of a very inferior order to some of the other inventions of Mr. Edison, of course, but still sufficient to support a patent.

To discuss the prior art in detail would unduly protract this decision. The best reference offered by the defendant is admitted on all sides to be the English patent granted to Powell in 1874. It relates to arc and not incandescent lamps, the socket has but one contact plate and it is not insulated from the support. Mechanically it would be impossible to substitute this socket for the Edison socket, but if the mechanical changes were made it would be electrically impracticable for the reason that connecting it with a gas fixture or other conducting support would instantly ground the circuit. The patent to Jablochhoff shows adjustable metal jaws, but it can hardly be said to describe a socket at all. Manifestly it shows nothing that could take the place of the Edison socket. The other alleged anticipating structures are still further removed from the patent. No one of them anticipates and it is thought that all of them together would not have suggested the Edison socket to the skilled mechanic in the winter of 1879 and 1880, which is the time when the test should be applied. If the mechanic had all these before him, plus the Edison lamp fully organized and ready for insertion, he might be able to devise a suitable socket to hold the lamp, but this was not the problem with which Edison had to deal. The socket and the lamp form one structure and came into being at the same time as the result of a high order of inventive genius. The argument of the learned counsel for the defendant shows marked ingenuity and research, but for the reasons outlined above it is thought that the claims must be sustained.

No. 251,596.

The patent to Edward H. Johnson is for an improvement in sockets or holders for electric lamps. The inventor says:

"The object of my invention is to construct a socket or holder for incandescent electric lamps in which the circuit connections shall be completed by the placing of the lamp in the socket, subject, however, to such a circuit controller as shall instantaneously and effectually make or break the circuit and light or extinguish the lamp. * * * The socket is made in two parts—an upper portion, made of wood or other insulating material hollowed out to receive the neck of the lamp, and containing on its interior surface two metal bands corresponding to those of the lamp neck, and so connected with the conductors that when the lamp is screwed into the socket electrical connection is immediately completed to the lamp; and a lower part, consisting

of a piece of wood set into a metal cap having at the bottom a screw-threaded aperture, by which the socket is attached to a bracket or other fixture, and through which pass the conductors, which terminate in metal plates set into the wood of this part of the socket. * * * A metal covering may surround the upper part of the socket in order that the whole may present a uniform and ornamental appearance."

The fifth claim only is involved. It is as follows:

"(5) In a socket for electric lamps the combination, with interior insulating portions provided with circuit connections, of exterior metal portions, forming a covering therefor, substantially as set forth."

The defense is lack of patentability—aggregation. It will be observed that the patentee makes the use of the metal covering optional, for there can be no covering with the upper part omitted. He says, "A metal covering may surround the upper part of the socket." The only virtue he attributes to this covering is that it ornaments the socket, a feature which is conceded to be immaterial. In the last brief submitted, the learned counsel for the complainant says, quoting from the Edison specification, "It is shaped and ornamented as may be desired." * * * Mr. Edison's conception from the outset was that mere shape and ornamentation were nothing." If there is "nothing" in the upper part of this metal box it is not easy to see how it involved invention to place it upon a similar lower part and thus form a covering. The experts seem to agree that the claim in question is for an exterior metal covering protecting the interior portions of the socket. In other words, that the patentee placed Edison's socket in a metal shell and the claim covers that shell. If all the features described in the specification and covered by the other claims could be imported into the fifth claim it might be sustained, but the language of the claim itself in connection with the specification and the other claims seems to preclude such a construction. If the claim relates, as I think it does, to the parts of the specification in which the patentee says, "A metal covering may surround the upper part of the socket in order that the whole may present a uniform and ornamental appearance," and, "The parts E, B, meeting and producing a continuous metal exterior for the socket," I think it must be held invalid for lack of patentability. One who covered the interior insulating portions of an electric light socket with such a case would infringe the claim without reference to the manner in which the terminals of the wires were connected to the binding posts. To provide such a case in view of all the prior knowledge on the subject did not involve invention. The socket looked better, but the case added no new function; the old parts operated in the old way. Mr. Johnson has very likely made an ingenious and patentable improvement, but the difficulty is that the claim in controversy is not aptly worded to cover such improvement.

No. 257,277.

The patent to Sigmund Bergmann is also for an improvement in electric sockets. He says in his specification:

"The object I have in view is to produce a socket for incandescing electric lamps which will have the electric terminals or contacts so constructed and

arranged that the terminals can be used on the base of the lamps, which, from their position, will subject the base to compression when it is screwed into the socket, instead of to tension, thus permitting the use of a molded base without danger of cracking between the terminals. The invention is applicable to sockets of all kinds used in systems of electric lighting, whether for lamps or for simple plugs, for connections or for 'safety-catch' plugs, such as are used in the 'cut-outs' or blocks for branching circuits. The invention consists mainly in providing a socket with terminals or contacts, one of which is a horizontal metal ring located on its side walls, which ring is screw-threaded or otherwise formed to engage an oppositely constructed ring on the base or plug, and the other of which is a plate, spring, or equivalent device, located in the bottom of the socket, the base or plug having a metal tip, which is forced down on this plate by the engagement of the rings; and, further, in peculiar details of construction, all as more fully hereinafter explained, and pointed out by the claims."

The second claim only is involved. It is as follows:

"(2) In an electric socket, the combination, with the body of insulating material, of a plate in the bottom of the socket, and a horizontal screw ring located between the bottom plate and the mouth of the socket, said plate and ring engaging opposite parts on an entering base or plug, and serving to compress the base or plug between the terminals carried by it, substantially as set forth."

The defense is that the patent is void for lack of patentability. Infringement is not seriously disputed. This claim is for minor details of construction and relates to differences in the arrangement and shape of the terminals, its object being to screw the lamp firmly in the socket without cracking or breaking the plaster of Paris or other insulating material by which the lamp terminals are fastened to the neck of the lamp. The scope of the invention is tersely explained by Mr. Bergmann himself, who was called as a witness for the defendant. He says in substance:

"I remember that before February, 1882, the plug and terminals of the lamp were made quite different, instead of compressing the contacts when screwing the lamp into the socket you pulled the terminals apart in the old style. As this was a serious matter for the safety plug as well as for the lamp—and the material which was applied generally at that time was plaster—broke the plug or the lamp at its terminals very often, and made the same useless, I went to work and just reversed what had been done before, viz., compressing the plaster or insulating material, and I remember being glad at having overcome this difficulty so easily, and I went up and saw Mr. Edison, and he at once sent word to the manager of the lamp factory, to stop making the old-style lamp bases and make them the way we have made the safety plug, viz., compressing the plaster when screwing the lamp in, instead of pulling it apart."

It is unnecessary to discuss the prior art. The Powell patent does not anticipate for the same reasons that it does not anticipate the Edison patent. The other references are no better and, in fact, not so good. None of them shows the combination in controversy. I am of the opinion, therefore, that the invention, though a narrow one, is sufficient to sustain the claim.

The questions arising under section 4900 of the Revised Statutes may become important in view of the expiration of the Edison patent. It is enough now to say that the defendant's counsel did not allude to these questions upon the argument and they are not discussed in his brief. Should it become necessary they can be pre-

sented hereafter. The attention of the counsel is called to the recent case of *Dunlap v. Schofield*, 14 Sup. Ct. 576.

It follows that the complainant is entitled to a decree for an accounting upon claims 2 and 3 of No. 265,311, and for an injunction and an accounting upon claim 2 of No. 257,277, and claims 4 and 6 of No. 293,552, but without costs.

TATUM et al. v. EBY.

(Circuit Court, N. D. California. January 29, 1894.)

1. PATENTS FOR INVENTIONS—GANG EDGERS—INFRINGEMENT.

Patents Nos. 227,926 and 290,358, for gang edgers, granted to J. A. Robb, held valid, and infringed by defendant. *Tatum v. Gregory*. 41 Fed. 142, 51 Fed. 448, followed.

2. SAME—PRIOR KNOWLEDGE AND USE—PLEADING.

In pleading prior knowledge and use under section 4920, Rev. St., as anticipatory of a patent, the names of the persons by whom, as well as the place where, the prior use was had, must be given; and the allegation that the prior machine was built by a person named is not an allegation of prior use by that person.

3. SAME—PROOF.

The defense of prior knowledge and use, as anticipatory of a patent, is not made out, unless the fact of such prior knowledge and use, and also the identity of the prior device with the patented structure are proved beyond a reasonable doubt.

In Equity. Suit by Henry L. Tatum and others against John D. Eby for infringement of letters patent No. 290,358, issued to J. A. Robb, December 18, 1883, for a gang edger. On final hearing. Decree for complainants.

Suit on two letters patent for improvements in gang edgers, granted to J. A. Robb, and assigned to complainants, numbered 227,926 and 290,358, and dated, respectively, May 25, 1880, and December 18, 1883. The defendant is the Pacific coast agent of the Stearns Manufacturing Company, of Erie, Pa., and sells, on the Pacific coast, edgers made by the Stearns Company at Erie, Pa. The defense interposed to the first patent is alleged anticipation by a prior edger made and sold by the said Stearns Company, and referred to in the opinion as the "Stearns Edger." That edger was on sale several years prior to the issuance of Robb's patents, but it proved unsatisfactory, and was withdrawn from the market, the present infringing edger being substituted in its stead. The defense interposed to the second patent is alleged anticipation by a prior edger made by James Brett and Bethune Perry, and claimed to have been used at the Whitesboro Mill, in Mendocino county, Cal., and referred to in the opinion as the "Whitesboro Edger."

Estee & Miller, for complainants.

John L. Boone, for respondent.

McKENNA, Circuit Judge. This is an action for an infringement of patents for a machine called a "gang edger." These patents were passed on and sustained by my learned predecessor, Judge Sawyer, in the case of *Tatum v. Gregory*, 41 Fed. 143, and subsequently by myself in the same case, 51 Fed. 446.

In that case the same defenses were made as in this, except as to the effect of the edger called the "Whitesboro Edger." As to the

Stern edger, which is urged earnestly as preceding the Robb patent, under which plaintiffs claim, and as negating its novelty, Judge Sawyer said, "I do not think that Stearns' patent * * * affords any ground for limiting the construction of the patent in such manner as to avoid infringement." After careful examination and consideration of the evidence, I have come to the same conclusion, and also think the defendant's edger is an infringement of plaintiffs'.

As to the Whitesboro edger, the testimony shows that it was built some time in the fall of 1880, more than two years before the Robb edger was invented. The witnesses do not agree as to the month, but, allowing for all differences, its building is established more than two years before the Robb invention; but it was not put into use until some months afterwards, and plaintiffs contend it is use, not making, which constitutes anticipation, and that the evidence leaves a reasonable doubt as to whether its use was before Robb's invention. The invention may have been as early as February, 1881,—certainly in June, 1881. Assuming the latter date, I think the testimony fails to establish, beyond a reasonable doubt, that that machine was used two years prior to the invention. There is some conflict in the authorities as to whether there must be use of a machine two years before the invention of the patented device, or whether knowledge alone is sufficient,—knowledge, of course, of the character, as well as of the existence, of the machine. That both knowledge and use are necessary is not strenuously contended against by counsel for respondent, and I have adopted that view, notwithstanding I have already said there are authorities to the contrary, and good reasoning to the contrary.

Assuming a prior use to be necessary, it is questionable if it is sufficiently pleaded. The allegation of the answer is—

"That, in the year 1880, the said parties, James Brett and Bethune Perry, built a second gang edger, in all essential particulars like the gang edger described and claimed in complainants' alleged letters patent, Exhibit B, and that said gang edger was used in the year 1880, and for many years thereafter, in the Whitesboro mill, near Whitesboro, in Mendocino county, California; that said gang edger, which was used in said Whitesboro mill, is now in the possession of the defendant herein, at his place of business, Nos. 29-31 Spear street, in San Francisco, California, and is ready to be produced in court."

The place where used is alleged; by whom used is not alleged. The allegation that it was built by James Brett and Bethune Perry is not an allegation of use by them.

Passing by the technical defenses, and comparing the patented device with the Whitesboro edger, there appears substantial difference between them. At any rate, their identity is not established beyond a reasonable doubt.

Decree for plaintiffs.

BUTTE CITY ST. RY. CO. v. PACIFIC CABLE RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1894.)

No. 120.

1. PATENTS—INVENTION—CABLE RAILWAYS.

In view of the prior art, there was no invention in simply placing the gripping device of a cable railway upon a "dummy" car, and attaching the latter to one of the carrying cars. 55 Fed. 760, reversed.

2. SAME.

The Hallidie patent, No. 182,663, for an improvement in street cable railways, is void for want of invention. 55 Fed. 760, reversed.

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Bill by the Pacific Cable Railway Company against the Butte City Street Railway Company for infringement of letters patent No. 182,663, granted September 26, 1876, to Andrew J. Hallidie, for an improvement in cable railways. The patent was sustained by the court below, and infringement declared. 55 Fed. 760. Defendant appeals. Reversed.

Warren Olney, (Geo. H. Knight, on the brief,) for appellant.

Wm. F. Booth, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and ROSS, District Judge.

McKENNA, Circuit Judge. This is an action for an infringement of patent for an improvement in street cable railways, issued to Andrew J. Hallidie, September 26, 1876, and assigned to appellee. The patent recites that the "invention relates to that class of street railways in which the cars are propelled along the track by means of an endless rope or chain;" but such railroads are now very familiar, and need no long description. The inventor says:

"This system of propelling railway cars has long been used upon uniform planes. Sometimes these planes were inclined, and sometimes they were horizontal; but previous to my invention it was never made available for long lines of railway which passed over changing levels, or for propelling the cars over steep inclines, in the length of a road which was operated by horse or other power at either end of the line, so that the same car could proceed from one system of propulsion to the other without trouble or delay. My invention is intended to accomplish this object by providing a separate truck or car, which I call a 'dummy' for supporting and carrying the gripping device, and which will be a permanent part of the road, while the car to be propelled is simply connected by a coupling with this car or dummy, so that it can be disconnected and run upon another track without disarranging any of the mechanism connected with the gripper."

The appellant (respondent in the court below) urges, among other defenses, that the patent is void for want of invention, and that it has been anticipated. The infringement of the patent consists solely of placing the gripping device on a "dummy" car, and attaching the latter to one of the carrying cars. In view of the state of the art, as disclosed by the evidence and in common knowledge, we do not think this involved invention.

Judgment and decree reversed, and cause remanded, with directions to dismiss the bill.

APPLETON MANUF'G CO. v. STAR MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

No. 94.

PATENTS FOR INVENTIONS—PATENTABILITY—CORN HUSKERS.

Letters patent No. 290,571, issued Dec. 18, 1883, to S. P. Goddard for an improvement in the method of reducing corn in the stalk and separating the kernels, consisting of a cutter with feed rollers in front, a beater or thresher, a revolving screen or separator, and a shaking screen under it, all mounted in one frame, and so geared that the parts are driven by a single band wheel, are void for want of invention, since the device consists merely in the application to a new use of old and well-known devices. 51 Fed. 284, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Bill by the Appleton Manufacturing Company against the Star Manufacturing Company, Delos Dunton, and H. G. Sawyer to restrain infringement of a patent. Defendants obtained a decree. 51 Fed. 284. Complainant appeals.

The suit was by the appellant against the appellees for an accounting and to enjoin infringement of letters patent No. 290,571, issued December 18, 1883, to S. P. Goddard, for "improvements in methods of reducing corn in the stalk and separating the kernels," of which the specification and claims are as follows: "My invention has relation to a new and useful method of reducing and separating corn from the stalk, husk, and cob, and at the same time the stalk, husk, and cob are cut up or comminuted, and ready for use as stock food,—ensilage; or, in this fine condition, it may be plowed into the soil as a fertilizer without any further treatment; and to these ends the novelty consists in the method hereinafter described, and particularly set forth in the claims. In carrying out my invention, the result is accomplished by means of the devices shown in the accompanying drawings; but I do not wish to be understood as limiting myself to the means shown, as any mechanism which will produce the same result may be used. Fig. 1 is a longitudinal, vertical section of a machine adapted to carry out my invention, and Fig. 2 is a side elevation of the same. A is a feed trough, supported at one end by legs, one of which is shown at B. C, C', are the feed rollers, the upper one, C, being corrugated, and both driven by the ordinary gears. D is the cutter bar, rigidly secured to the base, and E is the cutters or knives secured to the cylinder, F, so that the latter rotates the material as it is fed by the rollers, C, C', when forced over the cutter bar, D, and the knives, E, cut it into suitable lengths, and the cut pieces fall on the incline, G, and are thence fed to the toothed cylinders, H, H', which thoroughly break up the pieces and discharge them into the inclined rotating screen, I. The grain corn then falls through said screen, while the stalks, cobs, and husks pass out the lower end of the screen onto the incline, K, and thence to the floor or ground. L is a shaking screen having inclined screen bottom, M, and, as the grain corn and chaff or refuse fall into it from the rotating screen, the shaking motion sifts all the dirt or foreign matter through, while the clean grain is carried forward and discharged through the opening, N, into a box or bin placed there to receive it. It will thus be seen that, as the stalks and ears with the husks on are fed to the cutters, they cut the stalks, and also the ears, husks, and cobs, into small disks. This in the first place practically shells the corn, in addition to cutting the cobs, husks, and stalks, and as the pieces of cob pass between the toothed cylinders, H, H', what few remaining grains may be attached are separated by the threshing operation of said cylinders. The knife cylinder, F, is mounted on a shaft, O, one end of which is provided with a band or fly wheel, P, and on the other end is a small gear, Q, giving motion, through the idler, R, to the gear, S, secured to the upper feed roller, C. The shaft of this feed roller has a vertical play in the slot, 2, to facilitate

feeding the material, and a spring, 3, serves to keep the roller to its work. 4 is an idler, which receives motion from the gear, V, on the shaft, O, and communicates it to the gear, 5, attached to the toothed cylinder, H, and the said gear, 5, in turn meshes with a larger gear, 6, on the other toothed cylinder, H'. To the face of the gear, 6, is secured an angle gear, 7, meshing with a similar gear, 8, on the shaft, 9, the lower end of which is provided with a band pulley 10, by means of which a rotary motion is given to the pulley, 11, on the shaft, 12, of the revolving screen, I, said pulleys, 10 and 11, being connected with a belt. (Not shown.) 13 is a pitman eccentrically connected to the face of the gear, 5, so as to give a shaking motion to the arm, 14, secured to the rock shaft, 15, upon which the shaking screen, I, is mounted. It will thus be seen that the machine may be placed in the field, and the stalks of corn, being first cut down a few inches from the ground, may then be fed in suitable bunches to the feed rollers, C, C', and cutters, which cut the stalks, ears, and husks into small pieces, and, as above stated, this cutting operation removes the greater portion of the grain corn from the cob, and the remaining adhering grains are entirely removed by the threshing action of cylinders, H, H', and the mass then passes into the revolving screen, I, where the corn and chaff or dirt pass through said screen, and fall into the shaker, L, while the stalks, husks, and cobs pass out the lower end upon the incline, K, thence to the ground. The grain corn and chaff in falling into the shaker, L, are continually agitated, which sifts the chaff through the bottom, leaving the corn clean and clear to be discharged through the opening, N. Having thus fully described my improved method of separating corn, what I claim as new and useful, and desire to secure by letters patent of the United States is: (1) The method herein described of reducing and separating corn in the stalk at a single operation, which consists, first, in cutting up the ears, husks, and stalks; second, in removing the remaining grain from the cobs; and, finally, in separating the clean grain from the stalks, cobs, and husks, as set forth. (2) The method herein described of reducing and separating corn in the stalks, which consists in cutting the corn, stalks, cobs, and husks at a single operation, and then removing the remaining grain from the cobs, as set forth." The defenses pleaded were justification under letters patent No. 437,803, granted October 7, 1890, to P. B. Still, noninfringement and noninvention, with references to the following patents in the prior art: No. 1,111, issued March 26, 1839, to T. Elliott; No. 3,775, issued October 3, 1844, to R. Miller; No. 5,207, issued July 31, 1847, to E. Potts; No. 8,753, issued February 24, 1852, to A. B. Earle; No. 19,425, issued February 23, 1858, to W. D. Hickok; No. 19,935, issued April 13, 1858, to John K. Landis; No. 22,718, issued January 25, 1859, to Ford, Sullivan & Gregg; No. 27,487, issued March 13, 1860, to Utley & Teed; No. 29,572, issued August 14, 1860, to P. S. Clinger; No. 32,273, issued May 14, 1861, to Bundy & Edgerton; No. 71,000, issued November 19, 1867, to J. T. Harvey; No. 177,304, issued May, 9, 1876, to I. and J. F. Wentzel; No. 180,862, issued August 8, 1876, to H. G. Fritz. Mr. M. E. Dayton, an expert examined in behalf of the complainant, on cross-examination, testified to the effect that assuming the Goddard claims, instead of being method claims, to be in fact claims for the machine, they would be void because anticipated by the construction shown in the Ford, Sullivan & Gregg patent; that in accomplishing Goddard's new process he uses a machine which in all its material parts and mechanical elements was old; that to cut, to thresh, and to sift grain by a single machine embodying each and every the elements shown in the Goddard patent, or their well-known equivalents, was old, as shown by the Ford, Sullivan & Gregg machine; that the cutting devices of the Goddard patent and of the Still patent and of the defendant's machine were all old and perfectly well known, and the use of the one or the other in any given machine a mere matter of selection, and not at all a matter of invention; that, if the cutting device of the Goddard patent were substituted for the cutting device of the Ford, Sullivan & Gregg device, it would make that a commercially operative device, which would do everything which can be done with the Goddard machine; that the prior public use of the Ford, Sullivan & Gregg machine with the cutting devices, modified as stated, upon Indian corn in the husk and on the stalk, would constitute a perfect anticipation of the

Goddard patent; that such use of such a machine, without a separator, would constitute a perfect anticipation of the second claim of the Goddard patent; that in such case there would not, in his opinion, be the slightest element of invention in adding a separator to the machine unless the separator itself was of a new construction; that revolving cylindrical sifters and either horizontal or tilted reciprocating cylinders were old and perfectly well known at the date of the Goddard patent; that the use of one rather than another in any given machine was solely a matter of selection, and not at all of invention; that the machine of the Miller patent, No. 3,775, could be used in the practice of the method described in the second claim of the Goddard patent without any changes whatever, and that the same is true of several other patents set up in the defendant's answer, and introduced in evidence, as, for instance, the Neff patent of 1860 and the Wentzel patent of 1876; that in respect to the threshing and screening devices, but not in respect to the cutting devices, the machine shown in the Still patent and the defendant's machine are more like the machine described in the Ford, Sullivan & Gregg patent in construction and organism than they are like the machine shown in the Goddard patent. The opinion of the circuit court is reported in 51 Fed. 284.

Offield, Towle & Linthicum, for appellant.
Raymond & Veeder, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge (after stating the case). The utterances of the supreme court upon the question whether or not a mechanical process is patentable are not in clear harmony: *Corning v. Burden*, 15 How. 267; *O'Reilly v. Morse*, Id. 62; *Tilghman v. Proctor*, 102 U. S. 707; *Lawther v. Hamilton*, 124 U. S. 1, 8 Sup. Ct. 342; *Cochrane v. Deener*, 94 U. S. 788; *Brown v. Piper*, 91 U. S. 37. In *Lawther v. Hamilton*, the process was for extracting oil from oleaginous seeds, and was not entirely mechanical; but the improvement for which the patent there considered was granted consisted merely in the omission of a mechanical part of the process, namely, the grinding of the seeds under muller stones, and the patent was sustained, though not in the broad and general sense of the claim; the process being held to be "limited by the clear terms of the specification, at least so far as the crushing of the seed is concerned, to the use of the kind of instrumentality described." In *Cochrane v. Deener*, the original process and the patented improvement which was in issue, comprising the use of an air blast, related to the manufacture of flour, and were entirely mechanical in character and operation.

"A process," it was there said, "is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

But in *Corning v. Burden*, quoted with approval in *Tilghman v. Proctor*, it is said:

"A process eo nomine is not made the subject of a patent in our act of congress. It is included under the general term 'useful art.' An art may require one or more processes in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function or to produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature or of some substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery, a machine of invention. * * * It is when the term 'process' is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. But the term 'process' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated upon, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

In general harmony with these propositions are the numerous cases of which, in *Pennsylvania R. Co. v. Locomotive, etc., Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, it is said:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially different in its nature, will not sustain a patent, even if the new form or result has not been before contemplated."

In *Brown v. Piper*, 91 U. S. 37, a patent for a method of preserving fish in a closed chamber by means of a freezing mixture was held to have been anticipated by a like method practiced by undertakers for the preservation of dead bodies; and, to the proposition that the process had never before been applied to the preservation of fish and meats, the court said:

"The answer is that this is simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public."

And so, in *Howe v. Abbott*, 2 Story, 190, Fed. Cas. No. 6,766, a patent for the process of curling palm leaf for mattresses was held invalid in view of the fact that hair had been prepared by the same means for analogous uses. Justice Story said:

"It is precisely the same as if a coffee mill were now for the first time used to grind corn. The application of an old process to manufacture an article to which it had never before been applied is not a patentable invention. There must be some new process or some new machinery used to produce the result. If the old spinning machines to spin flax were now first applied to spin cotton, no man could hold a new patent to spin cotton in all modes, although he had invented none."

In *Fuller v. Yentzer*, 94 U. S. 288, where the claims, though in terms for the function or result of the operation of the mechanism

described, were construed, in order to uphold the patent, to be for the mechanism itself, it is said:

"Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the patent act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation, independent of the mechanical devices employed; nor will a patent be held valid for a principle or for an idea, or any other mere abstraction. *Burr v. Duryee*, 1 Wall. 581."

And in *Roberts v. Ryer*, 91 U. S. 150, 157, is this expression:

"It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not."

To same effect, see *Stow v. Chicago*, 104 U. S. 550; *Heald v. Rice*, Id. 755; *Stimpson v. Woodman*, 10 Wall. 117; *Tucker v. Spalding*, 13 Wall. 453.

It being, as we suppose, well settled that a patent for a machine covers its use for all purposes, whether anticipated by the patentee or not, and that the functions or methods of operation of mechanical devices may not be patented, it would seem to follow that processes, which are to be effected wholly by mechanical means, in order to be patentable must be capable of being distinguished from the method of operation or mere function of the mechanism necessary for their accomplishment. Whether or not such processes are possible is a question primarily for inventors; the courts can decide only whether a particular process presented for consideration is of that character. The processes now in question were designed for—

"Reducing and separating corn in the stalk at a single operation, so that the grains will be separated from the cob, and at the same time the stalk, husk, and cob are cut up or comminuted and [made] ready for use as stock food,—ensilage."

The means specified for accomplishing these results are entirely mechanical, consisting of a combination of machines and devices long well known, and we find it impossible to see any distinction between the processes and the mere functions or mode of operation of the mechanism itself; and the same objection manifestly would apply if other devices were substituted for those described. But, if we waive the objection stated as one which under the decisions and dicta of the cases cited may or may not be tenable, and consider these processes in the light of the prior art in proof, we are constrained to find them devoid of patentable novelty. A completely analogous process is shown by the patent of *Ford, Sullivan & Gregg*, which is upon machinery designed for cutting, separating, and threshing wheat and other small grains. It is insisted, however, that cornstalks and ears in the husk resemble trees more than wheat, oats, rye, or barley, and that the process shown for the treatment of the latter afforded no suggestion for the treatment of the other by the same or a similar method; though it is admitted that if the cutting device of the *Goddard* patent were substituted for the cutting device of the *Ford, Sullivan & Gregg* machine,—a substitution which would not involve

invention, it would make of it an operative machine upon which the processes of the Goddard patent might be completely performed. But as our conclusion rests only in small measure upon the patent of Ford, Sullivan & Gregg, we do not stop to consider further the force of the arguments in respect to it.

The first two steps of the process covered by Goddard's first claim are identical with the two steps which constitute the process of the second claim, and the fair presumption is that those two steps were first conceived or discovered, and that the third was devised later. The first inquiry in logical order, therefore, is whether or not in the two steps common to both claims there was a patentable discovery. The proof to the contrary is convincing. The only feature of novelty asserted is that Goddard was the first to conceive or discover that the shelling of corn, either wholly or in part, could be done by means of a feed cutter; and "this fact," says the appellant's expert, "lies at the bottom of his invention or process." The same witness testified that "it has long been a practice among farmers to chop up ears of corn with an axe to fit it for feed for cattle;" that he did not know "that corn was ever cut in the stalk, husk, or ear, with a feed cutter;" though he admitted that upon the cutters shown in the patents of Miller, Neff, Wentzel, and others, referred to in the prior art, without any change of parts or construction, the process of Goddard's claim could be performed. Though not explicitly so stated, we think it inferable from this testimony that the practice of farmers was to chop up for feed the unhusked ears of corn, and it would seem entirely probable, because so manifestly practicable, if, indeed, the fact may not be affirmed upon common knowledge within the cognizance of the court, that the cutting was done upon the old-fashioned cutting boxes, as well as with axe or hatchet; and if corn and husk and stalk together were not cut in the same way, and especially by means of the improved and patented cutters after they came into use, it was because an obvious and important utility for which the inventions were adapted was blindly overlooked or purposely rejected. On account of late planting, early frosts, and for other reasons, growing corn is often cut when the grain upon the ears is too immature to ripen after cutting into a merchantable article, and in that condition the farmer, already possessed of a cutter adapted for the purpose, needed no inventive suggestion to enable him to subject the stalk and ear together to the very process of which appellant would have a monopoly. It is hardly to be believed, in the absence of proof, that since the introduction of improved cutters, designed to reduce the entire product of the corn plant into a condition fit to be fed to cattle, they have not been used more or less to chop cornstalks and ears of corn by a single operation, affording complete illustration of Goddard's second process, both in respect to its operation and result. And this proposition does not rest on probability alone. The Harvey machine, patented in 1867, which is in evidence, though called a straw cutter, was expressly designed "for cutting not only hay, straw, cornstalks, etc., but

also ears of corn and other vegetable products;" another part of the specification being that "when the material to be cut is of a coarser quality, such as cornstalks, ears of corn," etc., certain arms of the device were to be lengthened. While, therefore, it is not explicitly said that the cutter of that patent was designed to operate upon the unseparated ears and stalks, the obvious possibility of its being so used left no room for patentable novelty in a suggestion of that method; and whether Harvey's design was that the corn and stalks should be treated separately or together, and whether the practice with that and like machines was one way or the other, the result of the operation or process necessarily was the cutting of the stalks, ears, and cobs into disks, and the more or less complete shelling of the corn. It cannot be true, therefore, that Goddard was the first to discover that corn could be shelled by means of feed cutters, though he may have been the first to perceive how completely the shelling had been and could be accomplished in that way, and that by separating the shelled corn, when of good quality, from the comminuted mass of other materials, as they came from the cutters, the clean product could be made a merchantable commodity. To accomplish that, it was only necessary to add to Miller's cutter, or any other of the devices adapted to cutting cornstalks, or stalks and ears, a screen or sieve, which might be vibrating or revolving or stationary. They were well-known devices, of common use in threshers, as illustrated by the patent of Ford, Sullivan & Gregg, which, if it did not contain an obvious suggestion that corn in the husk and on the stalk could be treated by the method which it embodied, did show plainly enough how the process of the second claim could be carried to the third step, constituting the first claim of the patent, simply by annexing to the feed cutters adapted to chop cornstalks and ears of corn some form of screen or separator. As was said of the Grant patent in *Grant v. Walter*, 148 U. S. 547, 556, 13 Sup. Ct. 699, the most that can be said of the Goddard patent is that it is a discovery of a new use for old devices, which does not involve patentability. The decree of the circuit court should be affirmed, and it is so ordered.

GALT et al. v. PARLIN & ORENDORF CO.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

No. 95.

PATENTS FOR INVENTIONS—NOVELTY—WHEEL HARROWS.

The fifth, sixth, and seventh claims of reissued letters patent No. 8,765, granted June 24, 1879, to Jay S. Corbin for an improvement in wheel harrows, consisting of the combination with a gang of rotating harrow disks of a lever for setting the same, are void for want of novelty, the improvement being merely a change in the location of the lever previously used. 52 Fed. 749, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Southern Division.

v.60f.no.3—27

Bill by Thomas A. Galt and others against the Parlin & Orendorf Company to restrain the alleged infringement of a patent. Defendant obtained a decree. 52 Fed. 749. Complainants appeal.

The case is well stated in the following opinion of Judge Blodgett, delivered in the court below, and reported in 52 Fed. 749:

This is a bill in equity for an injunction and accounting by reason of the alleged infringement of patent No. 197,545, granted November 27, 1877, to Jay S. Corbin, for an improvement in wheel harrows, reissued June 24, 1879, No. 8,765. The inventor says in his specifications: "My invention relates to the improvement of that class of machines known as 'wheel' or 'disk' harrows, in which the disks are arranged in two or more gangs upon horizontal rotating shafts; and has for its object the construction of the machine in such manner as, to adapt the gangs to follow the even surface of the ground; also, to provide for the easy and rapid setting of the gangs at any desired angle to the line of draught while in motion or at rest, and holding the same when set. * * * Also, to provide a ready means of setting the gangs at different angles relative to the line of draught." The reissued patent has eleven claims, but infringement is charged only of the fifth, sixth, and seventh. The original claims relating to the part of the harrow in controversy are: "(5) The combination with a gang of rotating harrow disks of a lever connected to the gangs for setting the same at an angle with the line of the draught, substantially as described. (6) The combination with a gang of rotating harrow disks of a lever for setting the same at an angle with the line of draught, and a rack and dog for holding the disks in position when set, substantially as described." The fifth, sixth, and seventh claims of the reissue are: "(5) The combination, in a wheel harrow, of the following elements, viz.: a draft frame or a draft plank projecting laterally from the tongue, disk gangs pivoted to the draft frame or draft plank, and a set lever mounted on the tongue and connected with the disk gangs between the points at which said gangs are connected with the draft frame or draft plank, substantially as set forth. (6) The combination, substantially as set forth, in a wheel harrow, of the following elements, viz.: a tongue, a draft frame or draft plank, a lever mounted on the tongue, and rods connected with the levers and the metal bearings which support the inner ends of the disk gangs. (7) The combination, substantially as set forth, in a wheel harrow, of the following elements, viz.: a tongue, a draft plank or draft frame projecting laterally from the tongue, disk gangs pivoted to the draft plank or frame, a lever mounted on the tongue connected with the inner end of the disk gangs, and a rack and dog for holding the disks in proper position when set." It will be seen from these claims that the only controversy in the case is over what is called in the specifications the "set lever," by which the angle at which the disks shall cut the ground is regulated. This lever consists of a vertical arm pivoted to the tongue forward of the driver's seat, the lower end of which extends below the tongue, and from which two rods extend, one to the inner end of each of the gang shafts or axles, so that by the movement of the lower end of this lever forward or backward the axle of the gangs is regulated. There is also upon the top of the tongue a rack or sector, with a dog working in it, to hold the gangs at the required angle. The defenses relied upon are want of novelty in this lever device, and noninfringement. The proof shows that this patentee is only an improver, and a late improver at that, of this class of agricultural implements; that in September, 1859, a patent was issued to S. G. Randall for a disk harrow embodying all the elements of complainant's machine, except that no set lever for changing the angle of the gangs is shown in the patent. The proof, however, abundantly shows that, in constructing his harrows in accordance with his patent, Randall had a lever for adjusting the angle of the disk gangs which, although operating substantially in the same way and performing the same work as that done by the complainant's lever, was not mounted upon the tongue or frame of the machine, but was so placed that it must be operated by a person standing or walking behind the machine. There is also in proof a patent granted to E. C. Winters, in May,

1875, on a revolving cultivator, which is a machine analogous in its use to that of the complainant, in which a set lever is mounted on the tongue as shown, which operates to change the running depths of the spades, or cutters, which are shown in that device. In several other machines referred to in the testimony the regulation of the angles of the disk gangs by means of rods and levers is shown. So far as the terms of the claims on which infringement is charged in this patent are concerned, they are, it seems to me, completely met by the old Randall lever of 1863, applied to the harrow shown in the patent of 1859; that is, Randall had a combination with a gang of rotating harrow disks of a lever connected to the gangs for setting the same at an angle with the line of draught, and its operation was substantially as described, but it was not located in the same place; and undoubtedly it was more convenient to locate this lever, which Randall has introduced into the organization, upon the tongue than it was to locate it where Randall had it, at the rear of his frame; but, as it seems to me, no inventive talent was called into action to apply the lever shown in Winters' patent to the complainant's gang. It seems to me that this patent is but for an aggregation of parts. The idea of changing the angle of the disk frames is Randall's; the idea of doing that by means of a lever is Randall's. The lever used by Randall is substantially, in its mode of operation and effect, the same as that used by complainant; and simply to relocate that lever, or place upon the tongue of complainant's machine the Winters lever, does not seem to have required any inventive talent. It was merely a mechanical act to transfer Winters' lever to the tongue of complainant's machine. That it was an improvement upon the machine may be admitted, but that it was such an improvement as will sustain the patent I do not think, because this class of machines, according to the proofs, has always been operated, so far as the angles of the disk harrows are concerned, to a greater or less extent by means of a lever. Such a lever for shifting or changing the seed shoes and hoes of the seeding machine from a straight to a zigzag line is shown in the Davis patent of 1868; and the same device is also shown in the Schmidt patent of February, 1869, on a seeding drill, and in the Manny mower patent of 1871 for tilting and lifting the cutter apparatus. In fact, it may, perhaps, be said to be a part of common knowledge at the date of the patent that levers of this character for the purpose of regulating the movements of plows, cultivators, seeders, and harrows, were in constant use; and all this patentee has done is to take one of those old levers and mount it on his tongue for the purpose of adjusting the angle of his disk gang, instead of placing the lever where Randall placed it. It performs the same function, and no other, when placed on the frame of the machine as it did in Randall's old machine. If Randall's lever had been patented, it is quite clear the Corbin lever would have been an infringement. If Randall had attached a rod to his lever and extended the same forward to the driver's seat, so that the angle of the disk gang could be controlled from the driver's seat, he would have had a device operating upon the same principle and producing the same result as is done by the complainant's lever; and no one, I think, would contend that it would have been patentable to so attach a rod to the Randall lever, and hold it by any common locking device. I am, therefore, clearly of the opinion that this patent must be held void for want of novelty.

The following is the argument made here in support of the patent:

While invention is necessary only in the means, it involves or contains also the conception in the mind of the inventor that the result can be accomplished by such means. "In all discoveries, of course, there are two things,—there is an object to be achieved, and a means of achieving that object. No invention is required as to the object. The invention may be in the means for effecting the object, whether [the latter be] old or new." *Adie v. Clark*, 3 Ch. Div. 135, Wood, V. C. It is not a fair presentation of the problem to consider only whether a mechanic could take an ordinary lever and place it as Corbin has placed it, in connection with the disk gangs at their inner ends, without any quality of invention being involved in the transaction. But, as stated in *Adie v. Clark*, before cited: "In all discoveries, of course, there

are two things,—there is an object to be achieved, and a means of achieving that object." It might have occurred to a mechanic that a lever could be placed as Corbin placed it, but the mechanic might not have believed in advance that when thus placed the lever would accomplish the result, and have abandoned the idea. In none of the earlier constructions of the disk harrows, whether shown in patents or by evidence of actual use, was there any means of adjustability presented which were capable of adjusting the gangs while the harrow was in motion and the draft of the team exerted thereon. Corbin, therefore, had to determine, first, that adjustability as against the draft of the team could be effected while the harrow was in motion; and, second, he had to devise means for accomplishing the result under the conditions named. It is obvious, as well as established by proof, that there is an incalculable advantage in having means for adjusting the disk gangs while the machine is in motion; and without intermitting the draft of the team. And the result is certainly different, as the depth of cut effected by any special angle can be determined only by experiment; that is, while the machine is moving. Corbin's construction afforded not only the advantage of adjustability without loss of time, but it also afforded means of determining the adjustability required, by exhibiting, in actual experience, what degree of entrance into the surface of the earth any special point of adjustability produced. Therefore, Corbin produced a new result in this, that he not only effected an adjustability, but concurrently therewith illustrated the depth of cut resulting therefrom. * * * It does not meet the case, therefore, to contend that other means of adjusting the gangs while the machine was stationary had been previously employed; neither does it meet the case to insist that a lever as a means of adjustment of other machines, under other conditions, had been previously employed.

C. K. Offield and John G. Manahan, for appellants.
Bond, Adams, Pickard & Jackson, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge (after stating the facts). The bearing of the prior art upon the question of novelty and invention in Corbin's combination may be illustrated by supposing two of the older machines to be employed side by side,—the wheel harrow of Bayless, without a lever, and adjustable only by means of a movable bolt, and the revolving spader or cultivator of Winters, with a lever mounted on the tongue, ready for the hand of the driver in his seat. In that situation the advantage of one driver over the other in respect to the easy and ready control of his machine would be clear enough, but not more obvious than the means of correcting the inequality. So manifest, indeed, is the impossibility of finding invention in the mere fact of a lever mounted on the tongue of a wheel harrow to be used in controlling the alignment of the disk gangs that it is not insisted upon; but it is now contended that it is not a fair presentation of the problem to consider only whether a mechanic could place an ordinary lever, as Corbin placed it, in connection with the disk gangs; that Corbin, as he was compelled to do, went further, and determined first the possibility, as against the draft of the team, of adjusting the gangs while the machine was in motion, then the means of doing it, and thereby achieved the new result that, concurrently with the making of adjustments of the gangs in motion, the depth of the resulting cut is illustrated. This argument admits by implication that it would

have required no invention to introduce a lever into the Bayless harrow if intended only for the obvious advantage of enabling the driver, without leaving his seat, to adjust the gangs when not in motion; but if done for the purpose of making adjustments when the machine should be in motion, then, it is insisted, there was invention. But, the possibility of multiplying power by means of the lever being perfectly well understood, it is idle to contend that Corbin did more than an ordinary mechanic could have done when he determined that by means of a lever properly adjusted, and within the limits of the movement of its short arm, the disk gangs could be shifted at pleasure either when the machine was at rest or when it was in motion. In respect to the alleged new result, it is to be observed that, if Corbin apprehended what is now asserted, he did not deem it worthy of mention in his patent. As stated in the specification, his object in this respect was "to provide for the easy and rapid setting of the gangs at any desired angle to the line of draft while in motion or at rest;" and of the lever itself it is said "that, when its upper end is carried forward to its limit, the gangs will be in a straight line for removal to and from the field; that when it is set perpendicularly the gangs are ready for pulverizing soft soil; and when it is set at its backward limit they are ready for the harder clay soil." It need not be supposed, however, that he had no conception of the advantage, when practicable, of making such adjustments when the harrow or cultivator should be in motion rather than when it was at rest. There was common knowledge in that direction. Every intelligent plowman who, in order to regulate the depth of his plowing or the width of his furrow, had stopped his team to shift the whiffletree to a higher or lower notch of the clevis, or to adjust the front end of the clevis to one side or the other of the middle line of the plow beam, had perceived that the exact adjustments needed would be more readily attained if they could be made gradually while the plow was in motion; and more modern implements, in which levers are shown to have been employed for the purpose of controlling and adjusting their movements, have long afforded illustration of results corresponding in some measure to that now claimed to be new. If it was a part of Corbin's conception that the desired adjustments could be illustrated and more readily effected in the way stated, it was no more than men of ordinary experience in such matters, or of ordinary knowledge of the laws of mechanics, would have apprehended as the probable, and indeed necessary, result.

But the entire argument for the appellants proceeds on the erroneous assumption that a machine or mechanical combination which in itself contains no novelty amounting to invention may be patentable because of some new use or result which is accomplished; a proposition which, as we have seen, leads to the inadmissible conclusion that for one use or purpose a device may be public property and for another use may be the subject of a patent. On the contrary, it is well settled, we suppose, "that a patent for a machine covers its use for all purposes, whether anticipated by the patentee or not, and that the functions or methods of operation of me-

chanical devices are not patentable." *Appleton Manuf'g Co. v. Star Manuf'g Co.*, 60 Fed. 411. "The invention is in the device, which may have one, two, or more functions, one of great and another of trifling worth; it may be supposed to have a function which it has not; the patent is upon the device, and not upon the functions, real or supposed." *Western Electric Co. v. Sperry Electric Co.*, 7 C. C. A. 164, 58 Fed. 186. "A mistaken description, or even misconception of the operation of a device, which is itself fitly described and claimed, does not vitiate a patent." *Temple Pump Co. v. Goss Pump, etc., Manuf'g Co.*, 7 C. C. A. 174, 58 Fed. 196. By the decision of the supreme court in *Collar Co. v. Van Dusen*, 23 Wall. 530, 563, "new articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production." And by the same principle a machine, apparatus, or mechanical combination, the conception and construction of which involved no invention, cannot be patentable by reason of any new effect, result, or product obtained by its employment. In *Fuller v. Yentzer*, 94 U. S. 288, it is said: "Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the patent act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation, independent of the mechanical devices employed; nor will a patent be held valid for a principle or for an idea, or any other mere abstraction. *Burr v. Duryee*, 1 Wall. 531." And in *Roberts v. Ryer*, 91 U. S. 150, 157, is this expression: "It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not." To same effect see *Stow v. Chicago*, 104 U. S. 550; *Heald v. Rice*, Id. 755; *Stimpson v. Woodman*, 10 Wall. 117; *Tucker v. Spalding*, 13 Wall. 453. If, therefore, it be conceded that Corbin was first to mount a lever upon the tongue of a wheel harrow, and that thereby a new result or advantage incident to the operation of the harrow was gained, yet the decree below was right, because, the use of the lever in similar machines for corresponding purposes being familiar, its introduction into Corbin's combination involved no possible measure of invention. The decree of the circuit court should be affirmed, and it is so ordered.

THE ADVANCE.

BRONSTED v. THE ADVANCE.

(District Court, S. D. New York. March 16, 1894.)

COSTS AND FEES—EXTRA ALLOWANCE TO COURT OFFICERS.

A United States district court has power to make an allowance to the clerk of the court for services rendered beyond what are required by law. Such compensation allowed in the case of a transfer by him of a

large fund from the depository of court to a trust company; a change made by order of court on application of the proctors in interest, and for their pecuniary benefit, and imposing on the clerk additional cares, responsibilities, and duties.

In Admiralty. On motion by the clerk for extra allowance.

Carter & Ledyard, for claimants.

Samuel H. Lyman, pro se.

BROWN, District Judge. The removal of the deposits in these cases from the depository prescribed by law and the regulations, imposed upon the clerk additional cares, responsibilities and duties beyond those previously existing. The change was made by the order of the court, upon the application of the parties in interest, and for their pecuniary benefit; it has resulted to their considerable pecuniary advantage. It was made at a time of great uncertainty in financial matters, and to the threatened prejudice of the registry account in the lawful depository. It could not have been supposed that these additional duties and responsibilities would have been imposed upon the clerk without compensation. As said by Mr. Justice Blatchford, in the case of *The Alice Tainter*, 14 Blatchf. 225, Fed. Cas. No. 196:

"It is not reasonable that the service should be without compensation. As it is for the benefit of suitors, it is reasonable that suitors should pay for it."

The right of the court to make such allowances for extra services beyond what are required by law has been long exercised under the deliberate judgment of Mr. Justice Nelson and Judge Betts, as expressed in the rule of May 28, 1859. See former District Court Rules, pp. 46, 47, where it is said, that—

"Upon the usages and doctrines of courts of the United States, officers called upon to render services in those courts, according to their rules and modes of practice, for which no specific fees or costs are appointed by statute law, will be awarded compensation therefor by the courts respectively in which the services are performed, corresponding in amount to that allowed by law in the state, for similar services rendered by state officers, in a like capacity, particularly in chancery procedure. 1 Blatchf. 652; *Hathaway v. Roach*, 2 Woodb. & M. 63 [Fed. Cas. No. 6,213]."

An extra allowance of one-half of 1 per cent. is in accordance with the rule thus indicated. It is as small as would, I think, be anywhere recognized as appropriate in financial transactions; and it is, therefore, allowed in this case as a reasonable compensation.

THE PHILADELPHIAN.

LEWIS et al. v. TRANT.

(Circuit Court of Appeals, First Circuit. February 23, 1894.)

No. 66.

1. ADMIRALTY APPEALS — METHOD OF REVIEW IN CIRCUIT COURTS OF APPEAL.

The provision of the judiciary act of February 16, 1875, which took from the supreme court the power to review the findings of fact on admiralty

appeals, does not apply to the circuit courts of appeal, at least in so far as they receive such appeals from the district courts. The *Havilah*, 1 C. C. 177; 48 Fed. 684, followed.

2. SAME—PROOFS BELOW REDUCED TO WRITING.

Unless the proofs in instance causes in the district court which are intended for review in the circuit court of appeals are in some form reduced to writing, or an equivalent therefor is found in the record, the court will decline to try the facts anew.

3. SAME—AMENDMENTS ON APPEAL.

Amendments in matters of substance on appeals in instance causes cannot be allowed in the circuit courts of appeal. The *Mabey*, 10 Wall. 419, followed.

4. SAME—EVIDENCE IN COURT OF APPEALS.

Touching further proof in the court of appeals in instance causes.

Appeal from the District Court of the United States for the District of Massachusetts.

These are two admiralty cases brought to recover damages arising from a collision in Boston harbor April 27, 1892, between the steamship *Philadelphian* and the schooner *Lizzie Williams*. The libel in the first case was filed May 31, 1892, by the members of the crew of the *Lizzie Williams* and one Joseph Welch, also on board the *Lizzie Williams* at the time of the collision, to recover for loss of personal effects and for other damages resulting from the collision; and the libel in the second case was filed June 1, 1892, by Otis H. Wiley and others, owners of the *Lizzie Williams*, to recover loss of vessel and other damages resulting from the collision. The two cases were consolidated by order of the district court, and on February 8, 1893, the libels were dismissed with costs. The libelants jointly appealed to the circuit court of appeals, and duly entered their appeal, March 24, 1893. December 7, 1893, the appellants filed this motion to introduce additional evidence, and the same has been heard on briefs and oral argument.

Frederic Dodge, for appellants.

L. S. Dabney and F. Cunningham, for appellee.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This is an application for leave to take and file further proof in this court on an admiralty appeal.

Section 11 of the act establishing this court directed that all provisions of law in force, regulating the methods and system of review through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in that act in respect to this court. The act of February 16, 1875, (18 Stat. 315,) took from the supreme court the review of findings of fact in admiralty appeals; but it was necessarily limited to appeals from the circuit courts, as those courts alone were directed by that statute to find the facts in such way as would render it practicable for the supreme court to dispose of questions of law only. Therefore, it is not applicable to this court, at least in so far as it receives appeals in admiralty from the district courts; and such has been its uniform practical construction, not only with reference to such appeals,

but also with reference to those from circuit courts. *The Havilah*, 1 C. C. A. 77, 48 Fed. 684.

Section 30 of the act of September 24, 1789, (1 Stat. 89,) contemplated that, on appeals in admiralty from the district to the circuit courts, the same witnesses who were examined in the former might be re-examined in the latter. It enacted that the testimony of any witness might be taken down by the clerk of the district court, to be used in the circuit court, unless it should appear that, for the reasons therein stated, the witness could not attend the trial on appeal. This provision of law was omitted in the revision of 1874; but there is nothing in its omission to indicate any change of legislative intention in the particular referred to. It was probably regarded as rendered unnecessary by Rev. St. § 862, although the commissioners are silent on this point. See *Blease v. Garlington*, 92 U. S. 1, 6. The supreme court has promulgated anew, since the Revised Statutes, rules of practice in admiralty Nos. 49 and 50, containing the same recognition as the act of 1789 of the right to take proofs de novo in admiralty appeals in the circuit court.

The counsel have cited many authorities touching the proposition that formerly an appeal was to be regarded in the circuit court as a proceeding de novo, in which new proofs might be taken ad libitum, without reference to the proceedings in the court appealed from, unless so far as the proofs there had been preserved and transmitted to the appellate tribunal. We think the proposition is established in its general aspects, not only by the statute of 1789, already referred to, but otherwise. This result necessarily flows from the fact that there has never been any statute, nor any rule of the supreme court, providing for the preservation of the proofs taken viva voce in the district court, except the statute of 1789, and in most circuits there has been no rule of either the district or circuit courts for that purpose. Therefore, notwithstanding some apparent expressions of Judge Story otherwise, through a recognition of the rules of the civil law, we accept for this, in its fullest sense, the language used in *The Lucille*, 19 Wall. 73, and repeated in *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172: "A new trial, completely and entirely new, with other testimony and other pleadings if necessary, or if asked for." If *The Saunders*, 23 Fed. 303, and *The Stonington and The Wm. H. Payne*, 25 Fed. 621, hold otherwise, it must be attributed to the fact that in the southern district of New York there has existed, since 1838, a system of rules providing carefully for the preservation of proofs in the district court, and touching their use on appeal, and to the further consequent fact that under these rules the practice, in that district, of preserving the proofs in the court of first instance, is so uniform that the possibility of their not being preserved would not be likely to impress itself on the court.

In *The Stonington and The Wm. H. Payne*, Mr. Justice Blatchford merely followed *The Saunders*, without approving it. He necessarily disapproved it in the following, which is found in *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1177:

"The claimants not having appealed to the circuit court, it is suggested that they are liable for at least the amount awarded by the district court, and that the circuit court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the district court to the circuit court vacates altogether the decree of the district court, and that the case is tried de novo in the circuit court. *Yeaton v. U. S.*, 5 Cranch, 281; *Anon.*, 1 Gall, 22, Fed. Cas. No. 444; *The Roarer*, 1 Blatchf. 1, Fed. Cas. No. 11,876; *The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton*, 1 Woods, 75, Fed. Cas. No. 12,356; *The Lucille*, 19 Wall. 73; *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172. We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

It follows, therefore, that, whatever may be the rule in prize causes, the necessities of the position, while admiralty appeals were by law taken from the district to the circuit courts, rendered inapplicable, in the latter courts, the peculiar principles of the civil law touching new proofs on appeal. Neither do we find any reference to the civil law in the later adjudications of the supreme court, concerning new proofs on appeal to that tribunal in admiralty causes on the instance side. No conclusions were drawn from it in *The Mabey*, when first reported in 10 Wall. 419. So, the practice of the supreme court in refusing substantial amendments in that court in instance causes in admiralty, as further stated in *The Mabey*, (page 420,) was certainly not in harmony with the civil law, which was liberal in that respect on appeal. *The Marianna Flora*, 11 Wheat. 1, 38. The reluctance of the supreme court in regard to each particular no doubt grew out of the contemplation of the practical difficulties which would otherwise surround it and its litigants, though in the second report of *The Mabey*, 13 Wall. 738, it was further said that, if parties were induced to keep back their testimony in the subordinate courts, the effect would be to convert the supreme court into a court of original jurisdiction. Therefore, the substantial questions which we have now to consider are whether that part of the act establishing this court which directs that certain provisions of law regulating appeals shall apply to appeals to it, adopts, for the purposes now under consideration, the methods and system relating to appeals to the supreme court, or those relating to appeals to the circuit courts, and; if the former, whether we should, for convenience, adopt rule 12 of the supreme court, touching further proof, or what, for convenience, we should promulgate in lieu thereof.

As the appeals which we have to consider come in large part from the circuit courts, it is to be presumed that our proceedings touching them are, so far as practicable, regulated by the provisions of law concerning appeals from that court, and not those to it. Rule 8 of this court, framed with the approval of the justices of the supreme court, conforming our practice to that of the latter court, so far as applicable, carries a strong implication in that direction; and we have no doubt on the point. Neither have we any doubt that the closing paragraph of Rev. St. § 698, prohibiting the recep-

tion of new evidence in the supreme court on appeal, except in admiralty and prize causes, and the implication which it contains, apply to this court. The act of February 16, 1875, already referred to, rendered that paragraph inapplicable to appeals from the circuit courts to the supreme court, but left it in force with that exception, and did not repeal it. Neither have we any doubt that the act of March 3, 1803, (2 Stat. 244,) now Rev. St. § 698, and elsewhere, applies to appeals to this court. In 1833, Judge Story held in *The Boston*, 1 Sumn. 328, 332, Fed. Cas. No. 1,673, that this statute required proofs in the circuit court, in cases intended for appeal, to be reduced to writing; and accordingly, June 8, 1846, several years before the supreme court promulgated its admiralty rules 49 and 50 on the same topic, he directed as follows: "In all causes in admiralty the testimony shall be in writing, unless, for special cause shown, the court shall allow witnesses to be examined orally upon the stand." This is now known in the rules of the circuit court for this circuit as "Additional Rule 10."

Conk. Adm. Pr. (2d. Ed.) p. 422, and sequence, criticises Judge Story in this particular; but the criticism is practically limited to his requirement that the new proofs should be by depositions, as on page 425 the work cites without disapproval—indeed, with qualified approval—a rule of long standing, in fact since 1838, in the second circuit, requiring proofs in the circuit court to be reduced to writing from the notes of the trial. Moreover, it appears by the Addenda to the treatise under consideration (page 608) that the learned author omitted to consider in the proper place the supreme court rules in admiralty Nos. 49 and 50. As these were adopted in 1851, they must have found their support in the act of 1803, because so much of the act of 1789 as required the examination of witnesses in open court was not expressly repealed until the revision of 1874, § 862 *Blease v. Garlington*, 92 U. S. 1, 6.

We are therefore satisfied that the act of March 3, 1803, in its revised form, (Rev. St. § 698,) with the practical construction put on it by Judge Story and by the supreme court rules in admiralty Nos. 49 and 50, so far as it required that the proofs in the court of the first instance be in some way reduced to writing in cases intended for a review of the facts on appeal, applies to appeals to this court. We have, however, no power to prescribe rules for the district courts, as Rev. St. §§ 862, 913, vest this in the supreme court, and it has in no part been transferred to us. We will notice that matter in the rules which we intend to promulgate with this opinion; but in any case in which all the proofs are not reduced to writing in the district court, and no equivalent is found in the record, we have no power except to decline to try the facts anew. Moreover, the rules to be promulgated herewith must not be construed as permitting taking anew oral proofs taken in the district court, and not preserved in the record.

We agree fully with the court of appeals in the second circuit that the power given by the second section of the act creating this court, to establish rules and regulations for the conduct of its business, authorizes us to promulgate rules covering this topic, to stand

for this court as the supreme court rule No. 12, touching further proof in that court, stood for it. The history of this rule, and of the practice of the supreme court out of which it arose, and also the history of its application with reference to the discretion which that court has used in regard to the authorization of further proofs in particular cases, show that the whole subject-matter is flexible, and molds itself to the peculiar necessities of the appellate tribunal and of its suitors, as they change from time to time. The rule was not adopted till 1817. 2 Wheat. vii. Prior thereto, witnesses were sometimes examined viva voce in the supreme court. U. S. v. The Union, 4 Cranch, 216; The Samuel, 3 Wheat. 77. The general principle requiring some "excuse satisfactory to the court" for not taking, in the court below, the proofs asked to be taken in the supreme court, is sufficiently stated in The Mabey, 10 Wall. 419, 420. It is also well expressed by Judge Story in Coffin v. Jenkins, 3 Story, 108, 120, Fed. Cas. No. 2,948, to the effect that the appellate tribunal ought to be "very cautious in admitting any new matters." The amount of business in this court does not require that in the rules to be promulgated on this topic we should do more than protect the spirit of these citations, and guard litigants from delays in the trial of appeals.

Following The Mabey, 10 Wall. 419, amendments in matters of substance on appeals in instance causes cannot be granted in this court, and with reference to that topic we must follow the practice laid down in that case. Page 420.

In consideration that the practice touching the subject-matter of this opinion has not been settled heretofore, we have not particularly scrutinized the circumstances of this application. The Mabey, 13 Wall. 738, 741.

The motion to introduce additional proofs, filed December 7, 1893, is allowed.

In re HUMBOLDT LUMBER MANUFACTURERS' ASS'N.

(District Court, N. D. California. February 21, 1894.)

No. 9,162.

1. DEATH BY WRONGFUL ACT—JURISDICTION—HIGH SEAS.

Code Civ. Proc. Cal. § 377, provides that, where the death of a person is caused by the wrongful act of another, the heirs or personal representatives of the deceased may maintain an action for damages against the person so causing the death. The constitution and Political Code of California fix the western boundary of the state, and of its counties, on the Pacific ocean, three miles west of the shore line. *Held*, that the territorial jurisdiction of the state extends over this three-mile belt, and such section 377 gives a right of action for wrongful death occurring on the high seas two miles from the shore.

2. ADMIRALTY—LIMITING LIABILITY—DEATH BY WRONGFUL ACT.

The death of a person was caused by the capsizing of a schooner two miles from the shore line of Humboldt county, Cal. The crew were drowned, and the personal representatives of some of them brought actions in the state court against the owners of the tug which had the schooner in tow at the time of the accident. *Held*, that the admiralty court for the proper district has jurisdiction to stay such actions, to de-

termine the liability of such owners under the limitation of liability act, and to enforce the rights that accrued to such representatives under the laws of California by reason of the acts complained of.

3. SAME—NEGLIGENCE—EVIDENCE.

The schooner *Fidelity*, in tow of the tug *Printer*, was capsized while crossing Humboldt bar, and all hands drowned. This bar is so shifting, and the channel in consequence so uncertain and dangerous, that it cannot be navigated without a skillful pilot. At the time of the accident the tide was strong ebb, running four knots or more an hour, and there was an adverse wind, blowing about nine knots, which was strong enough to back the ebb tide. The bar was extremely rough, the sea breaking in six or seven fathoms of water. The captain and mate of the tug testified that the schooner was capsized by an unexpectedly heavy swell, because she had no ballast, but they did not pretend to have discovered this when they took her in tow; and she had made a voyage of 500 miles before reaching the bar, in a stormy season. A number of pilots and seafaring men testified that the condition of the bar at the time made it unsafe to attempt to tow across it, and the lifeboat was unable to reach the capsized vessel. *Held*, that the accident was due to gross and inexcusable negligence on the part of the master of the tug.

4. SAME—LIMITING LIABILITY—PRIVITY OF OWNER.

On a libel for damages, the question whether there was not such privity between the owner and the master in the negligence of the latter as to take the case out of the provisions of the limited liability act will not be considered when the amount of damages proved is less than the stipulated value of the vessel.

5. SAME—MEASURE OF DAMAGES.

Under Code Civ. Proc. Cal. § 377, which provides that for the death of a person by the wrongful act of another "such damages may be given as under all the circumstances of the case may be just," \$7,000 is just compensation for the death of a shipmaster, aged 35 years, whose wages were \$100 per month, and who left a widow and two children; and \$5,000 for the death of a ship's cook, aged 39 years, who received \$50 per month, and left a widow and three children.

In Admiralty. Petition of the Humboldt Lumber Manufacturers' Association, charterer of the steam tug *Printer*, for limitation of liability under sections 4282-4289, Rev. St. U. S. Claims interposed by Olivia Christopherson et al. and by Mathilda O. Pederson et al. for loss of life, and by George W. Rager et al., part owners of 9-32 of the schooner *Fidelity*, for the loss of said vessel, alleged to have been caused by the gross negligence and unskillfulness of the master of the steam tug *Printer*, in towing the *Fidelity* over Humboldt bar on November 16, 1889.

S. M. Buck and Milton Andros, for petitioner.

J. N. Gillett, L. M. Burnell, Henry L. Ford, H. W. Bradley, and J. F. Coonan, for respondent.

MORROW, District Judge. On the 16th day of November, 1889, the schooner *Fidelity*, while being towed from the Pacific ocean into Humboldt bay by the steam tug *Printer*, was capsized on Humboldt bar. The captain and all hands on board the schooner were drowned, and the vessel itself drifted away, and became a total loss. On March 17, 1890, the Humboldt Lumber Manufacturers' Association, charterer of the steam tug *Printer*, filed a petition in this court, setting forth the loss of the schooner *Fidelity*, and alleging

that three separate actions had been commenced against the petitioner in the superior court of Humboldt county by persons claiming damages aggregating \$75,000, charged to have accrued to plaintiffs by reason of the loss of the lives of the master and two of the employes of the schooner Fidelity. Petitioner also alleged that it was informed and believed that other persons would claim damages for the loss of life and property in said disaster, and that it desired to contest its liability, and the liability of the steam tug Printer, for the loss of the schooner Fidelity, her cargo, master, and crew, and also to claim the benefit of the limitation of petitioner's liability under the provisions of sections 4282-4289, inclusive, of the Revised Statutes of the United States. Thereupon an order was entered by the court citing all persons who had suffered any loss or damage by reason of the loss of the schooner Fidelity to show cause why an appraisalment of the tug Printer should not be made, and why the petitioner should not have such other and further relief in the premises as might be meet and proper, and, in the mean time, all persons who had brought suits against the petitioner were restrained and enjoined from the prosecution of the same, as were also the commencement and prosecution of all and any suits against the petitioner as owner or charterer of the steam tug Printer, and in rem against the steam tug Printer, for and on account of any loss or damage arising from the loss of the schooner Fidelity. On May 1, 1890, Henry Wolf, an administrator of the estate of one who had perished by reason of the disaster, and who, prior to the filing of the petition in this case, had commenced a suit in the state court for damages accruing to the estate by reason of such loss, filed his answer and exceptions to the petition of the Humboldt Lumber Manufacturers' Association, denying, in effect, the jurisdiction of this court, and claiming, further, that, if the court had jurisdiction, the petitioner was not entitled to the benefit of the limited liability act, because the tug Printer, as he alleged, was not engaged in interstate commerce, and therefore was not subject to the national, but to the local or state, law. The questions raised were argued before the late Judge Hoffman, and, on the 7th of May, 1890, the answer and exceptions were overruled. On July 29, 1890, the matter was referred to Southard Hoffman, to appraise the value of the tug Printer, and such proceedings were thereafter had that on August 22, 1890, the commissioner filed his report, appraising the value of the tug at \$22,500, which appraisalment was confirmed by the court on September 5, 1890. On October 6, 1890, an admiralty stipulation in the sum of \$22,500 was given and filed. On October 7, 1890, an order was made and filed that a monition issue against certain persons therein designated. "and against all persons claiming damages for any loss, destruction, damage, or injury suffered by them or any of them, or suffered by any decedent represented by them or any of them, by reason of the loss and destruction of said schooner Fidelity," citing them to appear before the court and make due proof of their respective claims on or before February 3, 1891. The monition was issued, published, and served as directed by the court, and returned and

filed on January 3, 1891. February 2, 1891, the following answers and claims were filed: Claim of Olivia Christopherson et al., damages for causing death of Capt. L. H. Christopherson, who was on the schooner Fidelity when she capsized, and was then drowned, \$25,000. Claim of Mathilda O. Pederson et al., damages for causing death of Hans. C. Pederson in like manner, \$25,000. Also, claims of part owners in the schooner Fidelity, as follows: George W. Rager, 1-16, \$1,200; William Wallace, 1-16, \$1,200; William F. McDaniels, 1-16, \$1,200; Henry Axton, 1-16, \$1,200; J. W. Freese, 1-32, \$600. No claims were filed by the other part owners, and no explanation is furnished why they have failed to do so.

The case having been tried upon the merits and submitted upon briefs, it is now before the court for determination on the questions of jurisdiction and the liability of the petitioner for whatever damages may have been sustained by respondents by reason of the disaster. In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, it was held that, in the absence of an act of congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being caused by negligence. The right of action in this case is claimed under the state law. The Code of Civil Procedure of this state provides as follows (section 377):

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The petitioner claims that in this case the alleged negligent act was on the high seas off the coast of California, and without the limits of any county of the state. The evidence shows that the place of disaster was on Humboldt bar, off the entrance to Humboldt bay. The master and mate of the tug *Printer* testify that they had nearly cleared the bar, were on one of the last swells, when an unusually and unexpectedly large swell suddenly arose behind the *Fidelity*, and lifted her stern out of the water, and she capsized. The master fixes the place of the catastrophe as "just inside the bar, about two miles off the entrance to Humboldt bay, on the Pacific ocean." Flaherty, employed at the life-saving station on North spit, Humboldt bay, which is in full view of the bar, fixes the distance from where the *Fidelity* capsized to the ocean shore at one mile and a quarter or a mile and a half. Robert Hennig, keeper of the life-saving station at Humboldt bay, says that the station is right in plain sight of the bar, and fixes the distance in a direct line from the station to the bar at one mile and a half or two miles.

From this testimony I find as a fact that the schooner *Fidelity* capsized on Humboldt bar; that the vessel was inward bound, and at the time was opposite to the entrance to Humboldt bay, and at a point not greater than two miles from the shore. The disaster occurred on the high seas, within the admiralty and maritime juris-

diction of the United States. Did it also occur within the territorial limits of the state of California?

In article 21 of the constitution of the state of California, the boundary of the state along the Pacific ocean is described as follows (section 1): " * * * thence running west and along said boundary line to the Pacific ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude." Section 33 of the Political Code of the state fixes the territorial jurisdiction of the state as follows: "The sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the constitution, * * *." The shore boundary of Humboldt county, as provided in section 3914 of the Political Code, is as follows: " * * * thence west, on said line, to the Pacific ocean; thence northerly, along the ocean shore, to the place of beginning." In section 3907 of the same Code, it is provided as follows: "The words 'in,' 'to,' or 'from' the ocean shore mean a point three miles from shore. The words 'along,' 'with,' 'by,' or 'on' the ocean shore mean on a line parallel with and three miles from shore." What is the effect of such constitutional and legislative provisions respecting the rights of parties, under the laws of the state, where the shore limits of the state are thus involved? In Wheaton's International Law (section 177) the maritime territorial jurisdiction of an independent nation is defined as follows:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."

In *Manchester v. Massachusetts*, 139 U. S. 264, 11 Sup. Ct. 559, it was held, under a state statute similar to that of California, that:

"The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the state."

The court say further:

"Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties."

This authority clearly establishes the validity of the constitutional and legislative provisions of the state of California fixing her boundary, and that of Humboldt county, along the Pacific ocean at a distance of three English miles from the shore. To this boundary extends the jurisdiction of the state. *U. S. v. Bevans*, 3 Wheat. 336. But does it follow that the laws of the state can create a liability in a marine case arising on the high seas within such boundary? In the case of *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, Mr. Justice Bradley suggested a doubt upon this question, but expressed no opinion. In the case of *The Corsair*, 145 U. S. 335, 12

Sup. Ct. 949, this doubt was in a measure removed. But in the recent case of *The City of Norwalk*, 55 Fed. 99, Judge Brown, of the southern district of New York, reviews this question in an elaborate opinion, in which he points out that in *Steamboat Co. v. Chase*, 16 Wall. 522, and in *Sherlock v. Alling*, 93 U. S. 99, the supreme court had substantially decided the question in favor of the authority of the state to create a liability of this character. He further determines that this liability may be enforced in admiralty by a libel in personam. The opinion contains a full discussion of the question in all its bearings, and the conclusion reached is supported by abundant authority. The case at bar is in the nature of proceedings in personam. The petitioner was being prosecuted in the state court for the loss of life and property. It has brought all these cases here, and asks this court to determine its liability by virtue of the limited liability act and the rules of the supreme court thereunder. The fact that it also seeks to limit its liability to the value of the tug employed in the service out of which the liability is charged to have arisen does not change the form or character of the action.

It has been further urged, as a ground for applying to this case the law of this state, that the petitioner was a corporation organized and existing under the laws of the state; that the persons who lost their lives in the disaster, and for whose death claims have been presented, were residents of California; that the tug *Printer* was registered at the customhouse at San Francisco, and that the *Fidelity* was enrolled and licensed at the customhouse at Eureka, Cal. None of these facts except the last appear to have any jurisdictional significance. In *Shearman & Redfield on Negligence* (paragraphs 124-140) the law relating to the remedy for injuries causing death is discussed. In paragraph 131 it is said that:

"It makes no difference in this respect that both parties to the injury were citizens of the state by which the statute was enacted, or that the wrongdoer was a corporation chartered by that state, or that the negligence causing the injury was a breach of a contract entered into in that state, or that the decedent was brought into the state while living, except in Michigan. But, if the accident happened upon a vessel at sea, the statutory action will lie if the vessel was at the time within the maritime jurisdiction of the state enacting the statute, or if the vessel was owned and duly registered there."

I am of the opinion that this court has jurisdiction to determine petitioner's liability in this case, and to enforce whatever rights may have accrued to the respondents under the provisions of the statute of the state; and I base this opinion chiefly on the fact that the vessel upon which the accident happened was, at the time, within the territorial jurisdiction of the state of California.

The *Fidelity* was a flat-bottomed schooner of light draught, built for the coasting trade. She was designed particularly for the lumber business, and her carrying capacity was in the neighborhood of 275,000 feet. She was constructed at Eureka, Cal., in 1881, at a cost of about \$19,000, and was enrolled at the customhouse in Eureka. At the time of her loss she was in good repair and sailing trim, and her value at that time was about \$12,000. For some

time prior to the disaster, she had been running regularly between Eureka and Santa Barbara; going down laden with a cargo of lumber, and returning in ballast. She usually carried about 20 tons of ballast. Her master was one L. H. Christopherson, who, at the time of the disaster, was making his second trip into Humboldt bay. The Printer is a steam tug of about 110 tons gross measurement (about 52 tons net). At the time of the loss of the schooner Fidelity, she was a new boat, or nearly so, being not quite a year old. She was well tackled and appareled, staunch and strong, and in thorough working order for the purposes of towing vessels to and from Humboldt bay. She was then under charter by the Humboldt Lumber Manufacturers' Association, and was commanded by Capt. R. J. Lawson. Humboldt bar, the place of the disaster, is off the entrance to Humboldt bay. It cannot be accurately described, because it was in 1889 undergoing almost constant changes. The entrance channel had been known to shift its course within 24 hours, and while its length might be at one time one-half a mile, at another period it might be a mile and a half, or more; while one day the passage would be tortuous, at another it would be almost straight. This was due to the almost incessant shifting of sand, and to the prevalence of shoals. For these reasons, the entrance was considered dangerous, and navigation over the bar and through the channel difficult and, at times, more or less hazardous. The dangers attending the passage over the bar depended, of course, in a great measure upon the state of the wind and tide and the incoming swells. But the evidence establishes the fact that an attempt to cross it and get into Humboldt bay was, to one unacquainted with its nature and peculiarities, and unassisted by a pilot, a reckless and daring undertaking, and reference is made in the testimony to attempts of a like character which had resulted in loss of both life and vessel. The ordinary dictates of prudence and of good seamanship would compel the invariable employment of an experienced and skillful pilot, one thoroughly conversant with the peculiarities of this bar, and ever on the alert to acquaint himself with its deflections, changes, and peculiar dangers. The witnesses all agree as to its dangerous character. Flaherty, of the life-saving station, says: "It is a very dangerous bar. * * * Shifting sand and shallow water." Bone, a bar pilot, says: "It is a rough bar, liable to change inside of twenty-four hours. * * * It is a dangerous bar, providing a man don't know his work." Buhne, a bar pilot of long experience, testifies that it is a dangerous bar, owing to shifting sands and shoals. Hansen, another bar pilot of long experience, says: "We sailors call it a treacherous bar." Smith, assistant United States engineer, says: "That year (1889) it was very shifting." The Pacific Coast Pilot, an official publication prepared and published by the United States coast and geodetic survey for the use of mariners, has this to say concerning Humboldt bar:

"Like the entrances to all the rivers and bays on this coast, this has a bar, which undergoes irregular changes, depending much upon the prevalence, direction, and strength of the wind and swell, upon the direction of

the ebb current through the entrance, and, doubtless, upon the volume of fresh water brought down by the streams entering the bay. The depth of water on the bar ranges from twelve to twenty-four feet at low water. The width, direction, and position of the bar vary irregularly. The north and south spits also cut away and re-form. From experiments made in 1854, we found the ebb current in the channel to run three miles per hour, with a maximum velocity of four and five miles between the north and south points of the entrance. Under the above varying conditions of the bar and channel, no sailing directions can be given, because changes may occur immediately after an examination. As the bar has always had the services of superior pilotage and towage, the best advice we can offer in regard to entering the bay is to wait for the pilot tug. When vessels are seen approaching the bar, a flag is hoisted on the flagstaff on Red bluff, and the tug goes out to tow them in; if the bar is heavy, and the tug cannot cross it, yet considers it safe for the vessel to cross, she lies close inside the bar, and sets a signal at the masthead for the vessel to run for. A stranger should not under any circumstances attempt to cross the bar without a pilot. There are several powerful tugs, with skillful pilots."

It is to be observed, however, that while the bar and channel are subject to these marked changes, and the entrance to the bay therefore shifting and dangerous under certain conditions, nevertheless a careful and skillful pilot, familiar with the locality and provided with a good tug, could, by selecting a proper state of wind and tide, tow a vessel either in or out of the bay without risk of disaster. The witness Bone, who had been on the bar 16 years, and for the last 5 years as a pilot, testifies that he never lost a vessel with a hawser on board. "This was the first time," he says, "that a vessel was lost with the hawser on board."

On the morning of the 16th day of November, 1889, at about 6 o'clock, the tugs Printer and Ranger, employed by the Humboldt Lumber Manufacturers' Association, and the tug H. H. Buhne, controlled by H. H. Buhne, who was running in opposition to the Humboldt Lumber Manufacturers' Association, proceeded from Eureka down to the entrance of Humboldt bay. The Printer was in command of R. J. Lawson; the Ranger, of one McKinnon; and the H. H. Buhne, of J. Hansen. The Printer and Ranger went down, intending to tow out two lumber-laden steam vessels, but they failed to make the attempt because, as the witness Tibbitts says, the bar was too rough. The tugs then gave their attention to crossing the bar, to tow in such vessels as might wish to come in. There is some testimony tending to show that the Ranger, in attempting to cross the bar that morning, at or near the entrance of the bay, was considerably damaged by shipping heavy seas, and was compelled to put back for Eureka. One man was lost from this tug on that occasion. This testimony was drawn from one of the petitioner's witnesses with some difficulty on cross-examination, in the face of objections. The H. H. Buhne, followed by the Printer, kept on, and crossed the bar between 7 and a quarter to 7. Both proceeded to look for vessels to tow in. A vessel was descried, which proved to be the Fidelity. The H. H. Buhne immediately made for her, but the services of this tug were declined, as, it seems, the schooner was required to take the Printer in preference to tugs of the opposition. Acting upon a suggestion from the captain of the schooner, the master of the Buhne proceeded northward in quest of a vessel, in the

expectation that his services might be required, and he did not return to Humboldt bar until between 2 and 3 in the afternoon. Meanwhile the Printer came up, for she followed very closely upon the wake of the Buhne, spoke the schooner, passed over the hawser, and thereupon proceeded to tow the Fidelity over the bar into the bay. At this point the facts attending the catastrophe become obscured by contradictions, and the credibility of the witnesses becomes important; and in this connection it may be well to observe that most of the witnesses for petitioner are not entirely disinterested, while those on behalf of the respondents appear to be without interest in the result. R. J. Lawson, the master of the tug on this occasion, certainly has interests at stake. His reputation as a competent navigator is directly involved, and to his gross carelessness, if not criminal negligence, the catastrophe has been attributed by the respondents; besides, the pecuniary interests of his employer are directly concerned. The only living eye-witnesses to the catastrophe who appeared and testified are Lawson and Johnson, respectively master and mate of the tug, and W. P. Smith, the assistant United States engineer, who was on the inside of, and very near, the entrance of the bay. One Pehrson, a steward on the tug Printer at the time of the capsizing, testifies to the condition of the bar at the time the tug started to tow the schooner over, but he was not asked whether he saw the schooner capsize, and he does not testify that he did.

Having determined that the schooner capsized on Humboldt bar, the next question to be examined, and that upon which the whole case hinges, is as to the condition of the bar at that time. And this, in turn, involves necessarily a consideration of the wind, tide, and swell. The respondents claim that the loss of the schooner and of those on board was caused and brought about solely by the gross carelessness and negligence of Capt. Lawson, as the servant of the Humboldt Lumber Manufacturers' Association, in towing in the schooner while the bar was in the condition in which it was on the 16th day of November, 1889, when the attempt was made. The petitioner, the Humboldt Lumber Manufacturers' Association, denies that the bar was in the state of roughness claimed by the respondents, but attributes the capsizing to a peril of the sea, in that, it alleges, an unusual and unexpected heavy swell lifted the stern of the schooner out of the water, and that she thereupon careened over. It further claims that the schooner was either not ballasted at all or insufficiently so, for, had she been properly ballasted, in its judgment she would have safely ridden the unexpected and heavy swell, which it terms a "peril of the sea." And, finally, it claims that, if Capt. Lawson was delinquent, it was not gross carelessness or negligence on his part, but simply an error of judgment, allowable under the circumstances, and, being in extremis, the law does not attach to such delinquency any pecuniary retribution. In this connection it may be observed that Capt. Lawson did not have a license from the pilot commissioners of Humboldt bay, as required by the laws of this state. He claims, however, to have had a license under the laws of the United States as master and pilot of tugboats

for the Pacific ocean and coastwise, issued by the United States inspectors. But it is urged by the respondents that this license was not sufficient; that, under sections 4285 and 4444 of the Revised Statutes of the United States, the regulation of pilot service at Humboldt bay was subject to the state law only; and it is contended that, as the tug Printer was in command of a person contrary to that law, there are no presumptions in favor of the tug or its master, but, on the contrary, it devolves upon the petitioner, under the circumstances, to prove that the misfortune was without negligence on the part of the pilot, and was unavoidable. *Phillips v. The Sarah*, 38 Fed. 252. It may not be necessary to resort to this rule in determining where the responsibility lies in this instance; nevertheless, the fact that the master of the tug was without the license required by the local law is a circumstance not, perhaps, without some significance in the case.

We will now proceed to consider the condition of the schooner Fidelity at the time the tug took her in tow. There is some testimony tending to show that the schooner usually carried about 20 tons of ballast, from which it may be inferred that she was so provided on this occasion. All hands on board having been lost, we are deprived of their testimony on this point; but, if she were not in sufficient ballast, is it likely that they would have undertaken the voyage of 500 miles from Santa Barbara to Humboldt bay at a season of the year when storms are not infrequent? It is true that both Capt. Lawson and Mate Johnson of the tug attribute the capsizing of the schooner to her total want, or insufficiency, of ballast. But their testimony is unsatisfactory in several particulars. Capt. Lawson swears that, in his opinion, the schooner could not have been properly ballasted. He bases this conclusion upon the fact that she did not settle back when her stern was lifted out of the water by the heavy swell. It was then, and only then, that he first noticed that she was either not ballasted at all, or insufficiently so. It is a peculiar fact that, as an experienced and skillful pilot, he should not have observed this condition of affairs when he took the vessel in tow. He testifies that they had very nearly crossed the bar, and yet, until the very time when she actually did capsize, he failed to observe either an insufficiency, or even a total absence, of ballast in the vessel. Is it not reasonable to suppose that, if the vessel were as he represents her to be, her movements would have betrayed her condition, and this before they had very nearly crossed the bar? Johnson, the mate of the tug, gives it as his opinion that the schooner was not properly ballasted, and he bases this judgment for the most part upon the assertion that, had she been properly ballasted, she would have survived the unusual and unexpected heavy swell to which reference has been made. But, if his testimony is carefully scrutinized, it will be found that he does not swear that he noticed, either before or at the time the schooner capsized, that she was insufficiently ballasted, or not at all. The captain testifies:

"As I was watching her, and saw her stern lifted out of the water by a big swell or wave, I expected her stern to settle back again as the wave came on, but I soon saw that she was acting like an empty vessel, without

ballast. She appeared to be as light as cork. There seemed to be nothing in her to hold her down. She seemed to be at the mercy of a swell which she ought safely to have ridden."

If this condition of things was so apparent to the captain, would not the mate have also observed this? The captain seeks to strengthen his theory by stating:

"Indeed, until after the loss of the *Fidelity*, and discovering that she had no ballast, or not sufficient, I did not learn that shipmasters running to Humboldt bay were accustomed to throw their ballast overboard while lying in the offing, awaiting the arrival of a tug to tow them into Humboldt bay."

But this testimony on the captain's part is confessedly mere hearsay, and it is strange that, if such were the custom of shipmasters, not one witness was called to substantiate that isolated statement. Such proof would have had the effect, if nothing more, of corroborating the captain in an important particular. Johnson, who testified to having been a mate of tugboats for six years, of which one year was spent on Humboldt bar, does not state that any such custom prevailed. It is curious that the captain himself, who had navigated the bar from July preceding, was not aware of this practice. Such testimony, while it may not be absolutely false, is calculated to create distrust in the credibility of a witness, especially when he is contradicted in other important and material particulars. It is obvious that the court cannot, upon such meager and unsatisfactory testimony, find that the capsizing of the schooner was due to either an entire absence, or to an insufficiency, of ballast.

We come now to the question as to the condition of the bar. The time at which the *Fidelity* capsized is variously fixed by the witnesses. They range all the way from about 8 o'clock to 9:30 of the morning of November 16, 1889. Lawson and Johnson do not fix accurately the time when the *Fidelity* capsized; the latter states that it was about 8 o'clock when they first crossed in, while the former would seem to imply from the context of his statements that it was about 8 o'clock when he first gave the *Fidelity* his hawser. All the other witnesses fix the time at from 9 to 9:30 o'clock. Flaherty puts it at 9:30, or thereabouts. Hennig says about 9:30. Nelson states it was some time from 9 to 9:30. Perhaps the most satisfactory witness is W. P. Smith, the assistant United States engineer, who saw the *Fidelity* capsize. He fixes the time at a little after 9, or a quarter past 9. He afterwards timed the life-saving employes in getting out their lifeboat, and thus had occasion to note particularly the time. Tibbitts was advised of the capsizing some time after 9 o'clock. The preponderance of testimony shows that she capsized after 9, and not, as Lawson and Johnson would seem to imply, before 9 or some time after 8 o'clock. It was probably about a quarter past 9. As to the condition of the tide, all the witnesses agree that it was an ebb tide. But as to when the tide turned that morning, or how long it had been ebbing at the time of the catastrophe, cannot be determined with accuracy. Capt. Lawson says: "The tide had turned about an hour before the *Fidelity* capsized, but there was no perceptible ebb of the tide at that time. It was what I would call high water slack." Johnson

says: "We left the dock at Eureka, Humboldt bay, at 6 o'clock a. m., and proceeded to sea. The bar at that time was in fair condition, about an hour and a half before high water." That would make high water at about 7:30. Flaherty testifies: "She capsized, I suppose, about half past 9. At that time the tide, I should say, had been ebbing about an hour and a half." That would make high water about 8 o'clock. Hennig also fixes high water at about 8 o'clock. Nelson says: "It was high tide about 8 o'clock in the morning, and it was about half past 9 o'clock when it happened. It was about an hour and a half; something like that." Hansen, in answer to the question, "Do you know at about what hour the tide began to ebb that morning?" said: "I think about 8 o'clock; somewhere about that; in the neighborhood of 8; maybe a little before,—between half past 7 and 8." These witnesses, and others to whom it is unnecessary to refer, fix high water at any time between half past 7 and 8 o'clock, or thereabouts. As against this testimony, that of W. P. Smith, the assistant United States engineer, who has local charge of improvements which the government has been making in the entrance to Humboldt bay, stands alone. He fixes higher water at exactly 7:05 a. m. This he does by means of a government tide gauge at the entrance of Humboldt bay. It is a self-registering tide gauge, run by clockwork. Smith testified to its being in perfect working order at that time. He says: "At 9 o'clock, the time the vessel went over, the tide had been running out two hours, and in that time it had fallen eight-tenths of a foot." He gives in his testimony what purports to be an accurate record, as shown by the United States official tide gauge, of the various phases of the tide on November 15th, 16th, and 17th. There is, therefore, all the way from a half an hour to an hour's difference between Smith's estimate and those of the other witnesses. Smith speaks from the record; the others testify from their opinions. Smith fixes it exactly and positively. The number of witnesses as against the record is immaterial; that fact alone does not impeach the accuracy of this United States official tide gauge. In view of the fact that no such glaring discrepancy which would arouse misgivings as to the accuracy of its registrations has been divulged, and no attempt made to show that on this occasion, or, in fact, on any occasion, it has erroneously registered when in perfect working order, and since Smith testifies that on the day in question it was in perfect working order, the court, in the absence of evidence to the contrary, feels compelled to recognize such record as more satisfactory and preferable to the more or less conjectural approximations of the witnesses. By the Pacific coast tide tables, published by the United States coast and geodetic survey, high water at Humboldt bay on the morning of November 16, 1889, occurred at 5:54 a. m. What elements may have interfered to set the tide back more than an hour, as indicated by the record of the official tide gauge, does not appear. The tide tables have not been referred to by either side, and will, therefore, not be considered now except in so far as they tend to show that high water on that morning did not occur later than the time shown by the tide gauge. Taking that record as true, it was high

water on November 16, 1889, at 7:05 o'clock a. m., and, assuming that the schooner capsized about 9 or a quarter past, the tide would have been running ebb about two hours, and, under the law of tidal currents, it was approaching its maximum velocity for that tide.

There is some conflict as to the actual speed at which the tide was running out. Some of the witnesses term it an ordinary tide; others, a swift tide. The former fix the speed at about two knots; the latter, at from four to seven knots an hour. Lawson says that the tide was high water slack. But this statement is plainly untrue, and requires no further comment. Johnson speaks of the tide as being favorable to tow in. Flaherty speaks of its being a strong ebb tide. "It was a rainy season, and a big freshet out of the water courses, which would strengthen the tide as it ran out." He concludes that "the tide was ebbing about seven miles an hour; down there at the entrance it must have ebbed about that." Hennig says, in answer to the question, "About how fast was the current running at the entrance there?" A. Well, I should judge about four knots an hour; something like that; probably more, or perhaps a little less. It was a pretty swift current we had to contend with in returning." This witness had been out in the lifeboat from the life-saving station in an unsuccessful effort to reach the wreck. As to his knowledge of the current, he was asked: "Q. You found that out upon trying to go back?" A. It was a long time, even after we got into smooth water and we had but the current to contend with, before we got around. There was quite a fresh breeze, and that was something against us, too. We had to pull considerable to make it." Hansen says that, if there was a two-foot fall from high to low tide, it would mean a current of about two knots. Smith, who was not on the bar, but in a small boat, coming towards the entrance along the inside of North spit, and about 100 yards from the shore, says: "It was ebb; what we call a small ebb." He says he could not tell the rate at which the current was running out at the time of the capsizing, but he states that it was very light. He does not know the rate of speed of the current on the bar, but approximates it at the entrance of the bay as about two miles an hour in the strongest current. He states that on the bar the current would not run as fast, but admits that he has never measured the strength of the current on the bar. On cross-examination, he admits that he was drifting in a small boat with the tide for the greater part of the distance. Admits that currents on the bar are very swift at times, but has never tested their strength. Also states that a southeast wind was blowing, and that that always backs the ebb tide. There is no direct evidence of the speed of the tide on the bar at the time of the capsizing. As to the rate on the inside, and at the entrance, of Humboldt bay, there is a conflict between Smith and the other witnesses. Flaherty, in saying that it ran seven miles an hour "down there at the entrance," simply made an assumption as to the probable force of the current on the bar, separated from it by a distance of about a mile and a half, and therefore his estimate should be taken with that qualification. Hennig fixes it as about four knots. This he bases upon the strength of the current encountered

in returning from the bar, which was some time after the vessel capsized. Smith, it should be remembered, did not get out of the entrance onto the bar, as Hennig did, but rode with the current for the most part, on the inside of the bay. The inconsistency between these last witnesses, discarding Lawson's uncorroborated statement as to its being high water slack, is probably reconcilable in view of the fact that all are approximations under somewhat different conditions. The tidal current was probably running out through the channel at the rate of about four knots an hour. On the bar the force of the current was perhaps somewhat less, but its exact velocity cannot be determined from the testimony.

M. Connell, an observer in the United States weather service, stationed at Eureka, gives the official record of the direction and velocity of the wind on November 16th, 1889, at Eureka, as six miles per hour from 8 to 9 o'clock a. m. and at eight miles from 9 to 10 o'clock. The direction of the wind varied from south to south-east. It was stipulated that from the city of Eureka to the bar, in a direct line, was about five miles. The witness admitted that on the ocean—on the bar—the wind might be a mile or two faster, which would make the velocity of the wind on the ocean about nine miles an hour. Lawson says: "A scarcely perceptible breeze was blowing from the south,—nearly a calm." This statement is so palpably false, in view of the testimony of the other witnesses, that it can be passed without further comment. Aside from Connell's official registrations, Hennig, speaking of the wind they had to contend with in returning from the bar, after futile attempts to go out to the drifting schooner, says: "There was quite a fresh breeze, and that was something against us." Smith states: "It was blowing a little from the southeast; not very heavy." Bone testifies that there was "quite a little wind." He judged so from his observations some four miles away from the bar. Flaherty, in response to the question, "What kind of a day was that?" said: "The wind was from the southeast; coming in about fifteen miles an hour, I suppose; kind of rainy,—not exactly rain, but drizzling." Fifteen miles an hour for about the time when the *Fidelity* capsized is undoubtedly a mistake. The wind did reach that velocity in the afternoon, and, as the question of the interrogator was rather general, the answer may be explained in that way. Taking Mr. Connell's official estimate, and allowing for an increase on the bar, a fair conclusion as to the velocity of the wind on the bar at 9:15 would be between eight and nine miles an hour. It was strong enough to back the ebb tide.

That the bar, with all these turbulent elements combined, was very rough, and dangerous for vessels to cross, on the morning in question, is established by the witnesses Flaherty, Hennig, and Nelson, of the life-saving station, who had occasion to know its character, and particularly to observe its condition at the time of the disaster, and for an hour or more after, while they were attempting to force their way with the lifeboat to the place on the bar where the schooner was then drifting. Flaherty testifies that there was a high sea running; about as high as he had seen it since he had been in the

service; that the bar was terribly rough. In speaking of their attempt to reach the wreck in the lifeboat, he says that they could not manage the lifeboat there; they tried to get out, but were driven back. Hennig testifies that the bar, on the day the Fidelity capsized, was as bad as he ever saw any bar anywhere. He judged that the sea was breaking in nine or ten fathoms of water. He never saw the bar rougher. He narrates the efforts made to reach the scene of the disaster, and the unsuccessful result because of the roughness of the bar, and he tells of the refusal of Capt. Lawson to tow the lifeboat out to where the Fidelity capsized, because the bar was too rough to cross. This witness had been a sailor, fisherman, and surfman all his life. Nelson testifies that it was a rough bar all that morning; the sea was breaking further out than he had ever seen it before or after. Pehrson, the steward on the tug Printer, testifies that the bar was rough by spells, and, when the Printer started to tow the Fidelity, he asked Capt. Lawson if he was going in, telling him that the bar was rough. The captain told the witness to mind his own business. Peter Bone, who observed the condition of the bar from a lookout at the Occidental mill, a distance of about four miles from the ocean shore, testifies that the sea was breaking in seven fathoms, and that it was too rough to tow a vessel in across the bar after the tide had been running ebb for an hour or an hour and a half. The witness Buhne explains the danger of these conditions to a light or ballasted vessel as follows:

"When you take a light vessel in on a heavy breaker, it is very dangerous, on account of the two forces working against each other. The heavy sea or breaker that rolls in forces your vessel in; and the ebb tide runs out, and draws the vessel out. Now, when your vessel runs in on the ebb tide, the breaker brings it in a certain distance, and then it falls off, and tumbles down by the nose. That nose strikes the ebb tide, and the heavy breaker forces your vessel ahead, and, consequently, it is just like a leverage. The strain goes one way, and the tide another way; and, if the sea is heavier than the tide,—has more power upon the vessel,—it will turn it over, capsize it, or 'pitchpole' the vessel, as we sailors call it."

The witnesses Flaherty, Bone, Hennig, Nelson, and Hansen express the same general view as to the danger of attempting to cross Humboldt bar with heavy seas rolling in against an ebb tide, and the lack of care and skill on the part of a pilot who makes such an effort. It will not be necessary to review this testimony in detail. It is sufficient to say that, taking it all together, and giving to the witnesses such consideration as their character, intelligence, situation, and opportunities for observation seem to justify, the conclusion is reached that at the time, and before and after the disaster, the bar was in an exceedingly dangerous condition, and that a careful and skillful pilot would not have attempted to tow the Fidelity over the bar under the conditions prevailing at that time. The master of the tug was bound to know the state of the sea, wind, and tide, and whether, under the circumstances, it was safe and proper to make the attempt to tow the schooner across the bar. His sufficient knowledge of the bar and its shifting dangers, and his skill as a navigator in avoiding or overcoming those perils, were precisely the character of services he assumed to offer when he proposed to take

the schooner in tow. Concerning the qualifications of pilots whose employment is to guide vessels in and out of ports, the supreme court, in *Steamship Co. v. Joliffe*, 2 Wall. 462, says: "For the proper performance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents, and tides, and its bars, shoals, and rocks, and the various fluctuations and changes to which it is subject." Such being the law, how can Capt. Lawson excuse himself now by saying that he encountered a peril of the sea, or that the catastrophe was the result of an error of judgment while acting in extremis? He did indeed encounter a peril of the sea; but of what character? He says: "An unusual and unexpectedly large swell suddenly arose behind the *Fidelity*, and lifted her stern out of the water. * * * The swell that lifted her was one of those unexpected heavy seas the origin of which is some disturbance at a distant point of the ocean." Capt. Lawson may be correct in saying that this heavy swell had its origin at a distant point of the ocean, but that it was unexpected does not appear. It was not unexpected, and should not have been, to those who were familiar with the bar. Such is the testimony of a number of witnesses. To them, heavy seas rolling in against an ebb tide, and breaking in six or seven fathoms, was a sufficient warning of danger, and they did not consider it safe to tow in under such conditions. Capt. Lawson ignored the warning that was before his eyes, and deliberately plunged into a peril when it should have been avoided. The undertaking being reckless in its inception, nothing was left for the judgment to act upon in its prosecution. What induced him to take such a risk it is perhaps difficult to determine. It may have been the influence of the spirit of competition and rivalry in which the pilotage business was then involved at that port. In any event, his conduct was more than an error; it was a fault. The law of responsibility of a tug, in a somewhat similar situation, was declared by the supreme court, in the case of *The Margaret*, 94 U. S. 496, as follows:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences. *Brown v. Clegg*, 63 Pa. St. 51; *The Quickstep*, 9 Wall. 665; *Wooden v. Austin*, 51 Barb. 9; *Wells v. Navigation Co.*, 8 N. Y. 375; *The New Philadelphia*, 1 Black, 62; *The Cayuga*, 16 Wall. 177; *Cushing v. Owners of John Fraser*, 21 How. 184. The port of Racine was the home port of the tug. She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning. If what occurred was inevitable, she should have forecasted it, and refused to proceed."

Applying this law to the situation of the tug *Printer* as disclosed by the testimony on the occasion in controversy, the conclusion is inevitable that, in venturing to cross the bar with the *Fidelity* in tow under the prevailing conditions, the tug was guilty of gross and

inexcusable carelessness and negligence. But the respondents go further, and make the claim that there was such privity and knowledge between the owner and master of the tug in the negligence and unskillfulness of the latter as to take the case out of the provisions of the limited liability act. In the view I take of the amount of damages proven to have been sustained by the respondents, this question does not become important. The value of the *Fidelity* was \$12,000, but the claims of the part owners to the amount of only 9-32 have been presented. The court is therefore only concerned with these interests which, upon the valuation found, have sustained damages to the amount of their interest, to wit, \$3,375. L. H. Christopherson was the master of the schooner *Fidelity*, and was drowned at the time she was lost. He was 35 years of age, and was in receipt of wages to the amount of \$100 per month. He left a widow and two children. Hans C. Pederson was the cook on board the schooner, and was drowned. He was 39 years of age, and was in receipt of wages to the amount of \$50 per month. He left a widow and three children. The amount of pecuniary damages sustained by a family in the loss of one who has provided for its support is a difficult question for determination. The verdicts of juries in such cases take a wide range, unless restrained by a limitation in the law or by the interposition of the court. In some of the states the amount that can be recovered in such a case is limited to \$5,000. In two states the limit is \$10,000. In California the only legislative provision upon the subject is that contained in section 377 of the Code of Civil Procedure, which provides that "such damages may be given as under all the circumstances of the case may be just." As was said by Justice De Haven in *Morgan v. Southern Pac. Co.*, 95 Cal. 521, 30 Pac. 603, this means "that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff." Consideration should therefore be had of the uncertainty of continuous or regular employment, and the probable physical capacity to continue to earn wages for any certain number of years. Moreover, the gross earnings of the head of a family do not always indicate his value in providing for the support of others. His calling may require personal expenditures, or his habits or mode of life may be extravagant. These and other elements that might be mentioned make the productive value of a man's life extremely uncertain, and beyond any estimate contained in the annuity tables. *Kelley v. Railroad*, 48 Fed. 663; *Cheatham v. Red River Line*, 56 Fed. 248.

In view of all the facts in the present case, I will fix the damages caused by the death of L. H. Christopherson at \$7,000, and the damages caused by the death of Hans C. Pederson at \$5,000. The damages awarded to the owners who have presented their claims will be proportionate to their respective interests. A decree will be entered in favor of the respondents for the amounts named.

LAWLESS et al. v. MEYNIER.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1893.)

No. 140.

SEAMEN—WAGES—CONTRACT OF HIRING—PILOT—TERM.

Where the contract under which libellant entered the service of the respondents as a steamboat pilot specified nothing as to the term for which he was employed, it is a hiring for an indefinite period, so long as it shall be satisfactory to both parties, notwithstanding that respondents stated that the work of the steamboat was expected to be continuous, varying in kind with the season; and libellant, on being discharged, is only entitled to wages for the time that he served.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. This was a libel by Charles Meynier against T. C. Lawless and William Kyle for wages. There was a decree for libellant, and respondents appeal.

J. D. Grace, for appellants.

Richard De Gray, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The libellant had quit the steamer Barmore, and wrote the appellants, who were then building a small steamer to work "on and about the Teche," with a view to making arrangements with them as pilot on their boat. Some time after this they wrote him:

"Franklin, La., September 26, 1891.

"Mr. Chas. Meynier, Patterson, La.—Sir: We will need the services of a steamboat pilot about Oct. 15th. Our boat will be employed in towing syrup barges, &c., but the job will be permanent, as we intend to use the boat jobbing in the bayou. As you once offered us your services, we now write to learn what salary you will come for. An early answer will oblige,

"Yours, truly,

Lawless & Kyle."

To which he replied:

"Patterson, September 27th, 1891.

"Messrs. Lawless & Kyle, Franklin, Louisiana—Dear Sir: Your welcome epistle is at hand, in which you informed me that you will be in need of a pilot for your boat in about October 15th, and you wished to know my terms. In answer, I will inform you that I am idle at present, and am open for employment. I have a few places in view, but not very positive so far. Should you wish my services as pilot on your boat, I would be glad to accept your offer at the rate of sixty dollars per month. I am a competent master and pilot, and therefore will offer you first-class work in every respect. I am a sober man, and steady habits, and hope to give you satisfaction, should you give me a fair trial. Hoping to hear from you soon, I am,

"Yours, obediently,

Chas. Meynier."

The parties were not personally known to each other. About three weeks after the date of these letters, they met at Franklin and were introduced. The libellant, in his testimony, says:

"I commenced at once speaking to him about my letter I wrote to him, and in reference to his letter, which I told him I had accepted, and asked him if it would be all right, and he told me, 'Yes,' that it would be all right; and he

told me to take charge of this boat. He said: 'I want you to tow syrup tanks in barges, and after that I want you to go and deliver my lumber to the sawmill, and then you can pick up all jobs you can find in the summer.' I then said: 'How is it about the engineer of the boat? Should he be without work?' And he said: 'I can always find work for the engineer at the sawmill at any time the boat will be idle.' I said: 'I accept this place at sixty dollars a month, because I prefer to work this way, and be sure to support my people. It was better than to run chances at one hundred dollars, and probably get out of work in summer.'"

T. C. Lawless testifies:

"Meynier was hired by me verbally at Franklin, Louisiana, on October 4th. Nothing was said or done in regard to permanent employment of Charles Meynier. I saw Charles Meynier personally, and, as we [Lawless & Kyle] needed a competent master and pilot for our steam towboat, Ouida, I told him [Meynier] so. I said to him that the towboat Ouida would be employed during the sugar season to tow barges of syrup and tanks to Alice C. and Franklin refineries, and that we proposed to use the Ouida as a regular towboat in and about Bayou Teche; that we were just then in need of a good master and pilot for the Ouida. He [Meynier] then offered to furnish us his services as master and pilot of the towboat Ouida, saying that he would give us satisfaction, as he was first class in every respect. I requested him to state what wages he would come for, and he said he would furnish us first-class service as master and pilot of towboat Ouida at wages at the rate of sixty dollars per month. I then said to Charles Meynier that unless he [Meynier] suited us, and could do the work for which he would hire to us, that I would not have his services at any price. He still claimed to be a first-class master and pilot of towboats. This being satisfactory, I, as business manager of the firm of Lawless & Kyle, engaged Charles Meynier to serve us as master and pilot of steam towboat Ouida, and informed him that I would notify him when we would need him."

Some time after the personal interview, the appellants wrote libellant:

"Franklin, La., October 24th, 1891.

"Mr. Chas. Meynier—Dear Sir: As we will commence towing syrup to Alice C. refinery on Monday, October 26, will like to have you come up on Sunday, and fill the position of pilot, as per our agreement with you some time ago. We did not succeed in getting the Ouida ready, but will use the tug L. W. Brown for a few weeks, until we get the machinery fitted on our boat. Mr. Lawless will accommodate you with board and lodging for us until the Ouida is ready. Therefore please call on him on Sunday when you come. Hoping that you will cause us no disappointment, we are,

"Yours, truly,

Lawless & Kyle."

The libellant commenced work as requested on 26th October, and continued to work for the period of one month and twenty-two days, when he was discharged. He alleges that he was discharged without cause. He had been paid one month's salary, and, on his discharge, was tendered \$44 in full pay for his services, which he declined to take as tendered, but afterwards did receive, protesting that the balance of a year's salary, at \$60 a month, was due him, because of his discharge without cause. To recover that balance, this libel is exhibited.

From a careful consideration of all the testimony in the record, we conclude that it does not show an employment of the libellant for any definite period. The work was to be permanent or continuous through the year, differing in kind with the season. This was a feature natural and proper to be considered and mentioned

in their negotiations. They might, of course, have made an express contract for a year or other definite period. It is evident to us that they did not make such an agreement; that the employment was to continue indefinitely, as long as it was satisfactory to both parties. In this view of the proof, the libellant having been paid for the time he worked, his libel should have been dismissed. The judgment of the district court must be reversed, and the libel dismissed, at the cost of the libellant.

AKTIESELSKABET BANAN v. HOADLEY et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 67.

CHARTER-PARTY—SUBCHARTER—EVIDENCE.

The owner of the steamship Banan claimed that, when her charterer had become unable to fulfill the terms of the charter, respondents entered personally into a verbal charter of the ship from month to month, in substitution of the original charter. The respondents asserted that they had subchartered the vessel from the original charterer for one month only, for which time they had used her, and the hire for which they had paid, and that their connection with the ship had thereupon ceased. The shipowner presented a bill for charter money for the succeeding month, which remained unpaid, and on which this suit was founded. *Held*, on the evidence, that the verbal charter alleged by the ship had not been proved, and that the libel should be dismissed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the Aktieselskabet Banan against Russell H. Hoadley and others to recover charter money under a charter of the steamship Banan. The district court dismissed the libel, and the libellant appeals.

In the court below, Brown, District Judge, delivered the following opinion:

The libellant contends that when the Honduras Company became unable, after two months, to continue to fulfill the terms of its charter of the steamship Banan, by paying the monthly hire in advance, the respondents agreed to take the vessel by a substitution of themselves in place of the charterers, except that the hire should continue from month to month only, with a further agreement to give Mr. Holmes, the owners' agent here, a reasonable notice before stopping the hire; i. e. about a week, as Mr. Holmes states his understanding to have been. The respondents deny any such contract. The defendant Monroe, though admitting much of the alleged conversation with Mr. Holmes, testified that he made no agreement to hire the vessel at all from Mr. Holmes, that he refused to take any charter from him, but that he proposed only to take a subcharter from the Honduras Company. This accords precisely with what was actually done, and Mr. Bowron confirms Mr. Monroe in his statement that he refused to sign any charter from Mr. Holmes; and Mr. Spitzer says, in one passage of his testimony, that Mr. Monroe did speak of a subcharter.

The evidence leaves no doubt that the respondents, on the next day, March 11th, by their house in New Orleans, where the ship then was, took from the Honduras Company a subcharter for one month; and on notice thereof, by telegraph from New Orleans, Mr. Monroe, on the following day, March 12th, paid to Mr. Holmes the hire of the ship for one month from March 11th. The receipt of the bill for that month's payment was signed by Mr. Holmes in

person, and that bill described the charge as for the "third month's hire of SS. Banan from March 11." The bill rendered to Mr. Monroe on April 11th,—the one in suit,—in like manner described that charge as for the "fourth month's hire of SS. Banan to the Sr. Honduras Trading Co. (April 11—May 11)." Had these two bills been regarded at the time as accruing upon an independent letting of the vessel by Mr. Holmes to the respondents, the bills could not properly have so described the hire as they did, and they would not naturally have been so drawn; and there was no discharge or release of the original charterers, nor any intent to discharge them. There is an entire absence, also, of any written evidence, or any memoranda, to sustain Mr. Holmes' version, such as might naturally have been expected in so important a negotiation, if there was, as he states, any new letting of the vessel from him to Mr. Monroe for Hoadley & Co. On the contrary, the written memoranda made by both parties, viz. the bills rendered by Mr. Holmes here, and the subcharter from the Honduras Company, in New Orleans, precisely confirm Mr. Monroe's version, and are incompatible with the libellant's contention.

By the subcharter, Mr. Holmes lost nothing, but made at least one month's additional hire, and had the possibility of renewals of the subcharter from the Honduras Company. The payment and receipt for both March and April were made expressly "for the 3d month's" and "for the 4th month's hire." This shows a payment and an acceptance on account of the original charter, as Mr. Monroe testifies, and not upon any new bargain. Mr. Monroe denies positively that he made any promise as to a renewal; but, if anything was said, it was no part of any bargain with Mr. Holmes, and was a matter of courtesy only. It was without consideration, and not of any legal obligation. It was not material to anything done, as between Mr. Holmes and Mr. Monroe. Mr. Holmes parted with nothing on the faith of it. The libellants, on the 11th of April, were in no worse condition for want of prior notice than on the 11th of March, when the original charterers became unable to continue the charter. The charter did not require any prior notice of discontinuance, and, as I have said, was not released. The confirmation of the respondents' version by all the contemporary written memoranda, and the absence of any writing showing any such terms as the respondents allege, satisfy me that there was no substitution or new bargain made. *The City of Alexandria*, 40 Fed. 697, 701; *Wheelwright v. Walsh*, 42 Fed. 862. The libel must therefore be dismissed, with costs.

George Bethune Adams, for appellant.

George Walton Green, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. We are not inclined to give as much weight to the various items of documentary evidence as did the learned district judge. Upon the oral testimony of the witnesses, however, who were all examined before him, there was such conflict on the single issue of fact involved in the case that his decision thereon should not be reversed, in the absence of any new proof or of manifest error; neither of which is shown here. Decree affirmed, with interest and costs.

WENCKE et al. v. VAUGHAN.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1894.)

No. 164.

CHARTER PARTY—NOTICE OF READINESS FOR CARGO—WAIVER OF OBJECTIONS.

The master of a chartered vessel gave notice of readiness for cargo seven days before the time when the charterers would be entitled to cancel the contract for failure to arrive and give such notice. He failed,

however, to furnish a surveyor's certificate of readiness, as required by the charter party. The charterers made no complaint on this or any other ground, but told the master that a certain person had been selected as stevedore. They stated from time to time that they were not ready to furnish cargo, and on the expiration of the time gave notice of cancellation, on the ground of want of readiness. It appeared that there was some dunnage in the hold, which could have been removed in a short time, if complaint had been made. *Held*, that both this objection and the want of the surveyor's certificate were waived by the conduct of the charterers, and that they were liable for failure to furnish cargo.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a libel by Frank Wencke and Heinrich Wencke, partners as Wencke Soehne, against G. Vaughan, individually, and as surviving partner of the firm of G. Vaughan & Co., to recover damages upon a charter party for failure to furnish cargo to the steamship Etna. The court below dismissed the libel, and libelants appeal.

E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, for appellants.
James McConnell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. This is a suit upon a charter party, brought by the owners of the steamship Etna against the charterers for damages for not furnishing cargo. The case was submitted in the district court upon the question whether the charterers are liable for damages. The charter party was executed in London, on October 11, 1888. The vessel was to proceed to New Orleans, and there receive a cargo of cotton. Lay days were not to begin before November 1, 1888. The eighth stipulation in the charter party provided:

"The master to give written notice to charterers when his vessel is ready in loading berth, with clean-swept holds, to receive cargo, with surveyor's certificate of readiness for cargo (as specified by charterers) attached, before 12 m., and the lay days to commence on the following morning."

The tenth stipulation provides:

"Should the steamer not arrive at the port of loading, and be entered at the customhouse, and be ready to receive and stow cargo before noon on the 30th November, 1888, charterers to have the option of canceling this charter party."

The vessel arrived at New Orleans November 22, 1888. The master called on the charterers that evening, told them the ship had arrived, and asked them where she was to be berthed to take in her outward cargo. The charterers could not designate a berth that evening, and the master was directed to come back to them in the morning. He did go back on the morning of the 23d, and the berth was designated. The master telephoned orders for putting the steamer in the berth designated. He waited till he learned that the ship was being moved in accordance with his orders, and a sufficient time in his judgment for the movement to be completed, and then served the notice of readiness to receive cargo. There

is conflict of testimony as to the exact hour of giving this notice. There is no dispute that it was given before 12 m., and that, if the vessel was not at that instant in her berth, she was in it before 12 m. The notice bears date 22d November, but that is manifestly a clerical error; and is satisfactorily explained in the testimony of the master. The body of the notice reads:

"Sirs: I beg to inform you that the Germ. S. S. Etna, under my command, has arrived, discharged her inward cargo, and is ready to receive her outward cargo of cotton, according to charter, dated the 11th Octbr., 1888, London."

No surveyor's certificate accompanied this written notice. In reference to the giving of this notice, and what then and immediately thereafter occurred, the respondent G. Vaughan testifies:

"I got to the office of G. Vaughan & Co. about a quarter past 10 o'clock on the morning of the 23d of November, 1888. The captain was sitting there, and the first thing I did was to sign a check to get money to pay his entrance fees. When the clerk came back, I said to the captain, 'Captain, if you are ready, you can go down and enter the ship;' and he got up, and then put a note on the desk. I said, 'What is that?' And he said, 'That is my notice.' And I said, 'What notice?' And he said, 'The notice of readiness to receive cargo.' And I said: 'Captain, you are rather previous with that. Your ship is not ready for cargo.' And he said, 'How is that?' And I said: 'Your ship is not in her loading berth. Your ship is not entered at the customhouse, and she has not finished discharging cargo.' And he said: 'I asked you for a loading berth last night, and you did not give me one.' And I said: 'I cannot give you a loading berth until your cargo is discharged.' He said: 'My cargo is discharged now.' I said: 'Captain, I doubt that very much, but I will take your word for it. You can take your ship up alongside Viola at the head of Jackson street.' He then went out with my clerk to enter his ship at the customhouse, and that is all I saw of him that day."

The master called at the office of the respondents every day except Sunday from the 23d to the 30th of November. He saw the respondents, each of the partners, several times. Was told by them at one of his first interviews that Clague was selected as stevedore, and was told from time to time that they were not ready to furnish cargo. The stevedore named went aboard the ship, and took breakfast there with the officers. Clague's partner, Gilmore, also went aboard the steamer. After what occurred when the notice was given, no suggestion was made to the master by either of the respondents or by either of the stevedores or by any one else that the ship was not ready to receive cargo. After 12 m. on November 30th, the respondents gave the master this notice:

"New Orleans, Nov. 30th, 1888.

"2 P. M.

"Captain Pape, S. S. Etna—Dear Sir: Your canceling date expired at 12 m. to-day. Not having received notice of readiness to receive cargo in accordance with charter party, dated London, October 11th, 1888, we hereby notify you same is canceled.

"Yours, very truly,

G. Vaughan & Co."

The district judge correctly held:

"By receiving the within notice without the certificate, and, when subsequently questioned by the master as to cargo, remaining silent about the absent certificate, the respondents must be considered to have waived that condition."

He further held that to make the notice in question effective in law the vessel must, at or near the time of the service, as matter of fact have been ready according to the terms of the charter party. He found from the proof that the vessel was not in fact ready at or near the time when the notice was given, and therefore he rendered judgment dismissing the libel. We cannot concur in his finding of fact just indicated, but our view of the question of law to which this finding of fact is applied to support the judgment is such that it is unnecessary for us to review the testimony on that point.

If the matter of the surveyor's certificate must be held to have been waived by the conduct of the respondents, it can only be so held on the ground of estoppel, for the respondents did not expressly waive it, and it is manifest that they did not intend to waive anything, but to stand on the letter of their bond. The reason for holding the certificate waived is well stated by the district judge:

"Where time is running against the party, and the notice of defect is so easily given of a document which might be easily supplied if the party receiving the notice wishes to rely on the omission, he must, in fairness, be required to signify it to the other party."

In our own view, this sound reasoning will extend the application of the rule to the want of readiness in the ship, if any existed in this case. If any did exist, there is certainly proof of none that could not have been remedied in a short time, much within the seven days the ship lay in her berth awaiting cargo. As suggested above, the proof satisfies us that the ship was in substantial readiness to receive cargo by 12 m., 23d November. By the terms of the charter party, lay days commenced on the following morning.

Giving the utmost credit and weight to the testimony of the respondents' witnesses, Clague and Gilmore, three men could have put the vessel in readiness in two days. The libelants' witnesses say that the dunnage, the presence of which is the only unreadiness suggested by the proof, could have been removed in a few hours. The law does not favor forfeitures, and it is not so bound and helpless that it must suffer such a defense as that offered by the respondents to avoid the contract on which libelants sue. The decree of the district court should have been in favor of the libelants. The attention of the district court on the trial below, and of the parties while the case was pending in that court, having been engrossed with the question as to the respondents' liability, and that court having held they were not liable, we find the condition of the case and of the proof as to the extent of the damages to be now such that we cannot satisfactorily render the decree for damages which the district court should have rendered. It is therefore

Ordered that the decree of the district court is reversed, and this cause is remanded to said court, with direction to enter a decree in favor of libelants, with a reference to a commissioner to find and report the damages.

THE E. E. SIMPSON.

ROGERS v. MOORE.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 184.

TOWAGE—GROUNDING OF TUG—NEGLIGENCE.

A tug with a tow was going out of Mobile bay at night, where the channel is about a mile wide. The mate, who had no knowledge of the channel, suggested that they were too near Sand island on the west, and the master authorized him to hold off until the lights at Ft. Morgan were nearly on. This was done, but shortly after resuming her course the tug grounded. The master at first thought that they had struck on the west side, but on going to the wheelhouse he discovered, by the compass and the lights, that they were on the east side, whither the wind and tide both strongly tended to carry them. *Held*, that the ability to thus discover his position was proof of negligence in not using the compass and lights before, and the tug was liable for the consequent loss of the tow.

Appeal from the District Court of the United States for the Southern District of Alabama.

This libel was filed by Rittenhouse Moore against the steam tug E. E. Simpson (Isaac H. Rogers, claimant) to recover for the loss of the dredge boat Lutin, which resulted from the alleged negligent grounding of the tug in Mobile bay. There was a decree for the libellant in the court below, and the claimant appeals.

The following opinion was delivered below by TOULMIN, District Judge:

There is no conflict in the evidence as to the material facts of this case; and the admitted law being that the tug was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished, the question is whether the master of the tug was guilty of a want of reasonable care and skill in the management of his tow in any respect, as charged by the libellant. The want of reasonable care and skill is the want of ordinary care and skill,—such as would be exercised by a person of ordinary prudence under like circumstances. The want of either is a gross fault, and the tug would be liable to the extent of the full measure of the consequence. *The Margaret*, 94 U. S. 496. If the proof establishes that in what was done there was a lack of the usual care and skill, and that what was omitted to be done was within the power of the tug to do, and should have been done by any master of competent skill and experience, and that different conduct would probably have prevented the disaster, then the tug would be liable. "An engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show, either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." *The Burlington*, 137 U. S. 386, 11 Sup. Ct. 138; *The Isaac H. Tillyer*, 41 Fed. 477. The burden of proof is upon the libellant to establish a case of negligence against the tug; but in some cases the facts may constitute a prima facie case of negligence which will impose on the tug the duty of explanation and exoneration. *The L. P. Dayton*, 120 U. S. 337-351, 7 Sup. Ct.

568; *The Webb*, 14 Wall. 414. If a tow is grounded, while in charge of a tug, without any fault of her own, and it was at a place which was known to be dangerous, the burden of proof is on the defense to show that it occurred without negligence or want of skill on the part of the respondent. *The James H. Brewster*, 34 Fed. 77; *Bouker v. Smith*, 40 Fed. 839. "The presumption of negligence originates from the nature of the act, not from the nature of the relations between the parties. It is indulged as a legitimate inference whenever the occurrence is such as, in the ordinary course of things, does not take place when proper care is exercised, and is one for which the defendant is responsible." *Transportation Co. v. Downer*, 11 Wall. 129.

In this case the tow was grounded while in charge of the tug, and without any fault of the tow. It was at a place which was known to be dangerous to all navigators of Mobile bay who were familiar with the channel, and the east side of the channel was known to the master of the tug to be dangerous, although he may not have known of the danger of the particular place where the tow grounded. The government chart issued in the year 1877, and which was familiar to the master of the tug, showed from $3\frac{1}{4}$ to $4\frac{1}{4}$ fathoms of water at this point; but the evidence in the case was that in the last 15 or 18 months the particular shoal had formed there, and that there was now only from four to six feet of water, but that this was well known to the pilots and other regular navigators of Mobile bay. The occurrence was such as, in the ordinary course of things, does not take place when proper care is exercised. There was a departure from the true course when the tug was held off south by east from Sand island, when the mate suggested that they were too close to that beach. The master did not think so, but nevertheless made the departure. It will be borne in mind that the mate knew nothing of the channel, shoals, courses, or currents. It is true, the departure was not great, but I think it was enough to devolve upon the tug the duty of explanation. They say they kept this course but two or three minutes, running from 200 to 400 yards, and then held south again, and in a very short time grounded on the east shoal. At the rate of speed they were going, it could not have been more than thirteen to fifteen minutes from the time they took the departure from Sand Island beach, on the west of the channel, to the time of the grounding on the east shoal, and the channel is shown to be three-quarters of a mile wide. Certainly, there is enough to impose upon the tug the necessity of explaining how she came to be so far off her course in running so short a distance. In order to excuse her, I do not think it must be shown that the accident was inevitable, but it ought to appear that such a deviation from her correct course, and her grounding so soon thereafter, were consistent with cautious and skillful management. The explanation given is that the tide and the current carried the tug and tow to the shoal, and that the master miscalculated in the allowance made for their effect. If the tug held south by east from Sand Island beach for only two or three minutes, running a distance of from two hundred to four hundred yards,—say four hundred yards,—and then turned back south, she was at that time about eight hundred yards from the east side of the channel. Is it likely that in going south a distance of about a mile she could have made such leeway as to have carried her eight hundred yards (half mile) to the east side of the channel? But the evidence tends to prove that the vessel could tell by her compass whether she had sheered or not, and could tell by the Ft. Morgan lights whether the current was carrying her towards the eastward. The master of the tug says as soon as he struck bottom he "got his eye on the compass and light," and saw he was on the east side; that when the tug first took bottom he supposed he had held her up too much, but, when he "put his eye on the compass and light," then he saw how it was, and that he was not where he intended to be, although the chart might have misled the master of the tug, if he had been guided by it at that time. The fact that he did not intend to go where he found himself aground shows that he was not misled by the chart in this instance, and tends to show that he knew what was generally known by other navigators of Mobile bay.

From his undertaking of this towage service, it is to be presumed that he

knew the channel and its difficulties and dangers. The *Henry Chapel*, 10 Fed. 777; *Pettie v. Towboat Co.*, 1 C. C. A. 314, 49 Fed. 466. If, when the tug struck bottom, the master could tell by looking at the compass and light where he was, and that he was on the east side, why is it he could not have made the same use of the compass and light before he struck bottom, and thus ascertained where he was, and whether the current was carrying him towards the east? Timely use of the compass and lights would, in all probability, have prevented the disaster, and, it seems to me, would have been an act of ordinary prudence. The mate testifies that after they got the ranges, and the master ordered him to hold south, he did not see him again or receive any instructions from him until the tug struck, and that he (the mate) never noticed the Ft. Morgan lights after he saw he was on the ranges, and steered south; that he did not notice to see whether those lights opened or not. As soon as the tug struck, the master put his eye on his compass and the light, and at once saw that he was out of his correct course. I agree with the master when he says that the only way to account for the disaster is that he must have lost his bearings. He certainly had lost his bearings if, at the time he went ashore, he supposed he was on the west side of the channel, when a look at his compass and the lights showed him he was on the east side. But when and how did he lose his bearings? Was it before the mate suggested to him that they were too close to Sand Island beach? The master did not agree with the mate, but yet directed that he keep off south by east until the Ft. Morgan lights closed on. In this difference of opinion, did no doubt arise as to the true locality, and if so, were there no means at hand to determine the matter? Would soundings have done it? Would sounding not have been an act of ordinary prudence? It seems to me that it would have been. The result has shown that the master was nearer right than the mate, and the circumstances tend to show that when the tug held south by east, on the suggestion of the mate, she was already too far east, or that she held to that course a much longer time than the master and mate supposed she did. How else could she have grounded so soon after bearing south again? Or did the master lose his bearings after steering south by failing to observe his compass and the lights, by which, it seems, he could have told whether he was heading south, was making much leeway, and whether he was on the east or west side of the channel? He knew that it was important to keep well to the westward on account of the wind and current that was prevailing. I think it is apparent that there must have been some mismanagement, or want of adequate care and skill in the management, of the tug. If some unusual cause operated to produce the disaster, a cause against which ordinary prudence was not bound to guard or could not prevent, the evidence, in my opinion, fails to show it. My conclusion is that the libellant is entitled to recover. The case will be sent to a commissioner to assess the damages.

H. Pillans, for appellant.

Gregory L. Smith and H. L. Smith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. We have carefully examined the evidence in this case, with the aid of the able brief and oral arguments submitted by the learned proctors, and the well-considered opinion of the judge who heard the case in the district court, and we conclude that the decree appealed from should be affirmed. There is small room for question as to the law applicable to such a case as this. It is settled that a tug is not liable to its tow as an insurer or as a common carrier. The burden is on the libellant to show negligence or unskillfulness in the towage service. In some cases the undisputed circumstances of the disaster may constitute a *prima facie* case of negligence, and put on the tug the

duty of explanation. *The Burlington*, 137 U. S. 386, 11 Sup. Ct. 138; *The L. P. Dayton*, 120 U. S. 337, 7 Sup. Ct. 568; *The Webb*, 14 Wall. 406.

In this case the tow was being carried from Mobile to Pensacola in the night. The weather was not ugly. The wind was from a westerly direction. There was a strong ebb tide. The state of the tide and wind were such as produced, and were known to produce, a strong current towards the east. Due allowance had to be made for these conditions in running south, which is the chartered course in the channel to a certain point below Sand Island light. The channel abreast of Sand island, which bounds it on the west, is not more—perhaps is a little less—than a mile wide. It was incumbent on the master to watch well the action of the wind and current on the vessel, to hold her up against this action, to guard against drifting, to discover, and seasonably arrest and counteract, the tug's drifting or making too much leeway. The safe track lay close to Sand island; not too close, for there was a shoal on that side as well as on the opposite side. There had been range lights on Sand island, but they had been taken down, and only a single light left. The tug and her tow had passed Sand Island light. The range lights at Ft. Morgan were still visible. The wheelman was steering south,—the customary course. The master of the tug says: "We passed close up to the Sand Island beach, on the west side of the channel,—so much so that the mate, who was at the wheel, said, 'Aren't you too close to this beach?'" to which the master replied, "No, I don't think so. We ought to be close. However, you can keep her off south by east until we get those ranges at Ft. Morgan nearly on." They kept her off south by east a very few minutes, till the range lights were nearly closed on, then resumed the customary course, and in a very few minutes more the tug struck bottom on the east side of the channel. The master was not in the wheelhouse at the time the tug struck on the shoal. The man at the wheel had not seen the captain after he saw the ranges were nearly on, and the tug was put on her south course again.

When the vessel struck, the captain's first impression was that they were on the west side. He went into the wheelhouse, and, he says, got his eye on the compass and light, and saw that he was on the east. In speaking of the occurrence afterwards with the appellee, the captain being asked to explain how it happened, "he sorter shrugged his shoulders, and said: 'I must have lost my bearings is the only way I can account for it.'" The district judge asks, with unanswerable force: "If, when the tug struck bottom, the master could tell, by looking at the compass and light, where he was, and that he was on the east side, why is it he could not have made the same use of the compass and light before he struck bottom?"

We concur with the district judge that a timely use of the compass and lights would have been an act of ordinary care. The master's answer and direction to the mate at the wheel show that he was then in doubt as to his position in the channel. The mate was not acquainted with the harbor, the channel, the shoals, or

the currents. He was an experienced seaman, but had no particular knowledge of these waters. It does not appear that any use of the compass in connection with the lights was made until after the vessel struck bottom. No soundings were made. It is apparent to us, as it was to the district judge, that there must have been some mismanagement or want of adequate care and skill in the navigating of the tug. When the tug struck, the tow drifted on the shoal, could not be got off, became a complete wreck, and a total loss to appellee.

The decree appealed from is affirmed.

FIREMEN'S CHARITABLE ASS'N v. ROSS et al.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1893.)

No. 146.

SALVAGE—CITY FIRE DEPARTMENT.

The company which furnished the men and equipment that constitute the fire department of New Orleans is required by ordinance and by contract to take all proper measures to extinguish fires and to preserve order, while a further ordinance provides that "in no event shall the fire department be permitted to charge for services rendered in extinguishing fires on shipboard, or to claim salvage." After a ship had loaded at New Orleans, and had begun her voyage to Europe, fire was discovered in her cargo, and she put back to the city, where, at the request of her agents, the fire department, by the use of its engines, extinguished the fire. *Held*, that the fire department could make no claim for salvage.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by Firemen's Charitable Association against Wm. Ross & Co., owners of the steamship *European*, for salvage. The lower court dismissed the libel, and libellant appeals.

The steamship *European*, having taken on board a cargo of cotton and grain at the docks of New Orleans, left that city on the 27th of May, 1891, for a voyage to ports of Europe. Within a few hours after leaving the dock, and when about 90 miles down the river, a fire was discovered in the cotton between decks, upon the discovery of which the master turned his vessel up the river towards the city, and at the first opportunity sent a boat ashore to the telegraph office and notified his agent that the ship was on fire, and would return to the city, requesting him to make such arrangements as he considered necessary. In accordance with this request the agent of the vessel saw a representative of the underwriters, and these two gentlemen telephoned the chief of the fire department, and requested that he have one or two engines at the wharf when the ship should arrive, in order to render assistance if needed. The chief of the fire department replied that he would have them there promptly. The ship arrived at the wharf at about half past 3 o'clock a. m., where the chief of the fire department had in readiness two steam fire engines, and the companies, ready to go to work. The master of the vessel, hoping to be able to extinguish the fire by the use of his own steam, continued using that some six hours after the arrival of the vessel at the wharf in endeavoring to subdue the fire, but finally, finding it impossible, and being informed that the fire department would make no charge for salvage for services rendered the vessel in extinguishing the fire, permitted them to go to work. Two more steam engines were subsequently employed, and they worked alternately two at a time for about twenty hours, when the

fire was fully extinguished. The agent of the ship offered the fire department as a gratuity the amount of \$200, which, being refused, was increased to \$400. This they also refused, and brought their suit by libel for salvage in the United States district court. Upon the hearing the libel was dismissed at the cost of the libellant. From this decree an appeal has been taken to this court.

W. S. Benedict, for appellant.

J. McConnell, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) The question in this case is whether the service rendered by the Firemen's Association exceeded the duty imposed upon it by its employment in the public service. In determining this question it is necessary to examine the relation existing by contract and agreement between it and the city, and ascertain what that duty was. The ordinances of the city of New Orleans in regard to the employment of a fire department consisted of a General Ordinance No. 7,346 of the Administration Series, enacted September 28, 1881, providing for the obtaining of bids from different companies for providing the city with the apparatus and the service of employes for the protection of the city from fire. After enumerating the different officers and men for such employment, and the different engines, horses, hose, and other apparatus that shall be employed, it provides that they shall take all proper measures for the extinguishing of fires and preservation of order and laws according to ordinance regulation respecting fires. Subsequently, on the 10th of August, 1883, Ordinance No. 7,346 was amended by Ordinance No. 396, which, among other things relating to the duty of the department in event of a fire on shipboard, provides that "in no event will the fire department be permitted to charge for services rendered in extinguishing fire on shipboard or claim salvage." On the 11th of August, 1886, there was enacted Ordinance No. 1,890, Council Series, re-enacting Ordinance 7,346 with some alterations and modifications, and authorizing the mayor to enter into notarial contract with the Firemen's Charitable Association in accordance with the provisions of Ordinance 7,346 as amended. Under these ordinances, on the 14th of September, 1886, the mayor of New Orleans entered into a formal contract with the Firemen's Charitable Association, appellant herein, that for the amount of \$160,000 per annum said Firemen's Association would provide such equipment and apparatus, and insure a prompt and efficient service in the extinguishing of fires in the first, second, third, and fourth districts in accordance with the provisions of Ordinance 7,346 as then amended. We find nothing that would directly or by implication repeal Ordinance 396, and consider that it must be recognized as in force at the time of this contract, and that such contract was made in contemplation of and in accordance with such amendment then existing. This amendatory ordinance shows plainly that fire on shipboard had been contemplated and provided for. In accordance with it, the Firemen's

Association was prohibited from charging or claiming salvage for such services. This view of the case we consider is sufficient to determine the questions at issue, and although unnecessary to review the general question of the rights of firemen who claim salvage for the performance of such duty, or to compare and review the numerous cases cited, it may not be amiss to examine briefly the circumstances of some of those cases in which salvage has been awarded for such services, and which have been relied upon in this case. In the case of *The European*, 44 Fed. 484, the fire was not within the city of Key West, nor did it expose any of the property or wharf of the city to danger until permitted to come to the dock upon a definite and positive contract and agreement that the firemen should be employed to render services for a compensation. The vessel in that case had in no way had any connection with the city as one of its commercial agencies. It had had no business connection in any way with it; nor was it, nor had it been, a source of profit or emolument in any way to the city, or any of the citizens. In that case the firemen received no compensation for their services as such from the city or from any individual, and they were under no contract, any more than was implied by their organization, that they would protect the property of the city and citizens from fire as far as they might be able. Without a contract for aid from the firemen the steamship would not have been permitted to come to the wharf. In that case it was not considered that it was the duty of the firemen as such, any more than it was that of private individuals, to render any service to the property. It was the same in the case of *The Huntsville* (Dist. Ct. S. C. 1860), Fed. Cas. No. 6,916. In that case Judge Magrath says:

"If the fire had occurred while the *Huntsville* was lying at one of the docks of the city, if she had been brought to the city by the authority of the mayor, without the addition of any other circumstance, the law in such cases created for the fire department a plain, positive duty, for the performance of which they were legally bound, and upon the performance of which they became entitled to certain compensation from the city of Charleston; but she had been brought to the city upon the express condition that the fire department would take under charge the burning vessel, protect the adjacent property, and surrender all claim to compensation from the city for the service they might render."

In the case at bar the steamer had taken in a cargo at the docks of New Orleans, had paid wharfage dues and large disbursements at the city, and was, for the time being, one of the commercial agencies by which the products of the country passing through that port were being exported. She had left the wharves a very few hours before, with probably the fire smoldering in her cargo. Had the steamship returned to the wharf without any notice being given to the fire department, or understanding had of her coming, could that have changed the legal duty of the firemen? We think not. It was the duty of the association under its contract to do all within its power within the districts mentioned to extinguish fires, and, had there been no positive enactment specifying its duty in regard to fires on board ships, the safety of the property of the city and its citizens, as well as the general principle that for all police pur-

poses a ship at the wharf is within the city, would bring this case within that duty. We consider the case comes plainly within the principle laid down in *Davey v. The Mary Frost*, 2 Woods, 306, Fed. Cas. No. 3,592, and declared in *The Suliote*, 4 Woods, 21, 5 Fed. 99, and not within that of *The European* and *The Huntsville*, and the decree dismissing the libel is affirmed, and it is so ordered.

THE ALLEN GREEN.

LAING v. THE ALLEN GREEN.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 60.

COLLISION—STEAMER AND SAIL—BROKEN RUDDER CHAIN—LOOKOUT.

A steamer meeting a schooner put her wheel over to avoid her, when the rudder chain broke. It appeared that the broken link was reduced one-third by wear, and the chain was open to inspection. The steamer immediately sounded danger signals; but these, owing to the absence of a lookout on the schooner, and a discussion going on between the master and crew, were not noticed by her in time to avoid collision, although there was ample time to do so. *Held*, that both vessels were in fault. 53 Fed. 286, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

These were cross libels filed by Arthur Laing and Arthur L. Nickerson, respectively, to recover damages for a collision between the steamer *Riversdale* and the schooner *Allen Green*. There was a decree below for divided damages (53 Fed. 286), and both parties appeal.

Edward L. Owen, for appellant.

Henry G. Ward, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On the afternoon of May 24, 1892, the steamship *Riversdale*, the property of libellant, was in collision with the schooner *Allen Green* a short distance below Liberty or Bedloe's Island, in the Bay of New York. For the damages resulting to the steamship, the district judge held both vessels in fault. 53 Fed. 286. The steamer sighted the schooner nearly ahead in ample time to avoid her, and the pilot gave the order to starboard. In the attempt to comply therewith, the rudder chain broke, and the steamer consequently lost the use of her helm. There is the usual conflict of testimony as to the velocity of the wind, and the navigation of the vessels. The evidence, however, abundantly sustains the conclusions of the district judge that shortly after the breaking of the rudder chain, and several minutes before collision, the steamer, which was proceeding under a slow bell, stopped and reversed, and had actually acquired sternway before the collision. She also repeatedly sounded danger signals to indicate that she was under

some disability, which would require other vessels approaching her to be upon their guard, and, if necessary, exert themselves to avoid collision.

The schooner had been towing on a hawser down the Sound, East river, and into New York bay. Just before the steamer's catastrophe, the towing hawser had been cast off; and thereupon the entire crew, who were afraid to continue the voyage, as the schooner was in a leaky condition, came aft to the captain, and entered into a discussion with him, asking to be paid off and discharged. No one was left on lookout, and, though the captain remained at the wheel, his attention was so engrossed by the discussion with his crew that neither by himself, nor by any one on board, were the movements of the steamer observed, nor her danger signals noticed, until just on the edge of the collision. The proximity of the steamer was in fact called to the attention of those on the schooner by the captain of the schooner's tug. There is nothing in the additional proofs taken in this court which will warrant a reversal of the decision of the district judge that, "if a proper lookout had been kept, there was abundant opportunity for the steamer's disability to have been recognized, and ample wind and space for the schooner to have kept out of the way."

Undoubtedly the breaking of the rudder chain was the primary cause of the collision; and the steamer was held in fault on the ground that she was responsible for "insufficient appliances and equipment, and neglect to keep her in a proper state of efficiency and repair." The further proofs taken in this court support this conclusion. The link which parted had been reduced, by attrition, one-third in cross section, at the point of fracture. There is no indication of any latent defect or flaw in the iron, which the expert testified was of medium quality, and broke altogether through the reduction of its area by wear and tear. The steamship, it is true, was just coming into port after a voyage from China, using the same chain; but, as the expert testifies, it had probably "been wearing pretty rapidly the latter part of its days." And though it may have been in good enough condition, when it left China, to bring the steamer over, it certainly was not in good enough condition, when it passed Sandy Hook, to bring her up the Bay of New York. It is a reasonable assumption that the chain was made of links of the original size, because, in the experienced judgment of those who made them, links of substantially that size were needed to meet the strains to which they would be exposed in such service. The chain was uncovered, and open to inspection. It was examined and oiled each day by the carpenter, who could easily detect so great a reduction in the size of this link. The ship is therefore chargeable with a knowledge of such reduction; and for a failure to replace the weakened link by a shackle (as was done after it broke), thus restoring the chain substantially to its original efficiency, the steamer must be held responsible.

Decree of district court affirmed, with interest, but without costs.

UEBERWEG v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Second Circuit. March 12, 1894.)

No. 63.

COLLISION BETWEEN STEAMERS—OVERTAKING VESSEL.

Two steamers were going on parallel courses, abreast of each other, and about 250 feet apart, when the faster of the two changed her course one point towards the other, and the two vessels collided about a minute later at an angle of about 15 deg. There was some evidence that the other vessel also deviated from her course, but this was not clearly proved. *Held*, that the collision was caused by the negligence of the faster vessel in thus changing her course.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Libel by Julius Ueberweg, master of the steamship Switzerland, against La Compagnie Generale Transatlantique, owner of the steamship La Gascogne, for damages caused by collision between the two vessels. The district court dismissed the libel, (38 Fed. 853) and this decree was affirmed by the circuit court. Libellant appeals. Reversed.

H. G. Ward and Wm. H. Stayton, for appellant.

Edward K. Jones, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The district judge, who tried the cause, hesitatingly inclined to the opinion that the weight of the evidence was on the side of the Gascogne. The findings of fact of Judge Benedict were as follows:

"These are cross actions arising out of a collision which occurred on the 21st day of January, 1881, in the harbor of New York, not far below the statue of liberty, between the steamship Switzerland and the steamship La Gascogne, two passenger steamers at the time bound out of the port of New York on a voyage to sea. The Gascogne was the faster vessel, and, having come up with the Switzerland, was passing her, on her port side, at a distance estimated by various witnesses at 150 to 300 feet. The bow of the Gascogne had drawn ahead of the bow of the Switzerland when the vessels came in collision, the Switzerland's bow striking the Gascogne on her starboard quarter at an angle of about 30 degrees. To recover the damages resulting from this collision to the respective vessels, each vessel has brought an action against the other. The collision occurred in broad daylight, on a clear day, with no other vessel to interfere with the navigation of either vessel. It is manifest, therefore, that the collision was caused by negligence, but where the negligence was is not so clear. The contention on the part of the Switzerland is that the Gascogne, instead of keeping her course, as she was bound to do, until she had passed the Switzerland, attempted to cross the Switzerland's bows, under a port helm, when the distance between the vessels was too small to permit her to accomplish such a maneuver in safety. On the part of the Gascogne the contention is that while she was passing the Switzerland, and holding her course, at a safe distance, the Switzerland, instead of keeping her course, as she was bound to do, suddenly swung over to the eastward, and struck the Gascogne upon her starboard quarter."

Further facts in the case are that the speed of the Gascogne was about 15 knots per hour; the speed of the Switzerland was 9 or 10 knots per hour; that a strong northwest wind was blowing; and that the Switzerland was carrying a port helm, to steady herself

against the wind. There was testimony that, with such wind, "momentary carelessness on the part of the men at the wheel would be likely to be followed by a swing of the steamer's head to the eastward, which would carry her some distance to the east of her course before it could be stopped by the helm." Her witnesses said that the cause of this porting was the dangerous approach of the Gascogne towards the Switzerland's course. The testimony inclined the district judge to hold that the emergency which caused the sudden porting was not a change of course on the part of the Gascogne, but was the necessity of overcoming a swing to the eastward which the Switzerland had taken in the strong northwest wind. He was manifestly helped to this conclusion by the averment—which he found to be true, and which was not strongly controverted by the Switzerland—that her bow struck the Gascogne's starboard quarter at an angle of about 30 deg. If this was the fact, it would go far to sustain the theory that the Switzerland was the aggressor.

Much new testimony was taken by the appellant for use before the circuit court, and in some respects a new case is presented. The theory of the Switzerland's libel was that the Gascogne, as she began to draw past the Switzerland, sheered over towards her under a port helm, whereupon the Switzerland put her helm hard a-port, but the Gascogne, continuing under her new course, drew across the bows of the Switzerland, striking her a little forward of her mizzen rigging, on the bluff of the bow, her port anchor penetrating the starboard quarter of the Gascogne. The theory of the Gascogne's answer appears in the testimony of her captain, who testified that when the Gascogne's bow was about the middle of the Switzerland, and the vessels were 150 to 300 feet apart, the Gascogne changed one point to starboard, in order to take exactly the direction of the channel, which there makes a small bend; that the vessels continued on parallel courses, but when the bow of the Switzerland was a little aft of the Gascogne's bridge the former briskly made a movement to the port side, and immediately collided with, and struck her bow into the starboard quarter of, the Gascogne, about 90 feet from her stern. The Gascogne's pilot testified that when the Switzerland was about one length ahead of the Gascogne the former changed her course slightly to the eastward to let a schooner pass on her starboard side; that he accordingly changed the Gascogne's course to the eastward about one point; that the Switzerland hauled up on her course again as soon as she rounded the schooner, when he hauled up on his course about one point, and that, when he straightened up on his course again, the Gascogne's bow was about abreast of the Switzerland's bridge; and that the vessels were on parallel courses. La Veuve, a quartermaster, and at the wheel of the Gascogne at the time of the collision, testified that when the bow of the Switzerland was about opposite her smoke-stack, as he supposed, the pilot changed the Gascogne's course one point of the compass to starboard, and that the collision took place about 90 seconds thereafter. He changed the time afterwards to about 30 seconds. The captain of the Gascogne has consistently given the same version of the movements of his vessel, and his ac-

count is to be taken as true,—that at the time named the course was modified in order to conform to the direction of the channel. Before this change the vessels were on parallel courses, abreast of each other, and were probably about 250 feet apart. The appellant urged before the district court that this change of course on the part of the *Gascogne* was the direct cause of the collision. The appellee insisted that it could not have produced collision at an angle of 30 deg. Lieut. Chambers, of the navy, the expert for the appellee, testified that if the *Gascogne* ported a point, and the *Switzerland* held her course, the vessels being at the time of porting between 200 and 300 feet apart, they would have collided in about a minute and a quarter, but at a very short angle. The district judge thought that the porting of the *Gascogne* would not account for the collision, and did not tend to produce it, and further thought that the angle of incidence disproved the account given by the *Switzerland's* witnesses,—that when their helm was ported their vessel came up to the wind four or five points before the blow. The new proofs on the part of the appellant were taken to show the slowness of the movement of the head of the *Switzerland* under the mere influence of the wind, the proper practice in regard to passing steamships upon parallel courses, and that the blow was along the bluff of the *Switzerland's* bow, and not against her stem. The appellee offered evidence in contradiction of these points, and especially that the wound upon the *Gascogne* showed that it was caused by the *Switzerland's* stem.

It is manifest that there was no attempt or wish on the part of the *Gascogne* to cross the bows of the *Switzerland*, and that there was no intentional attempt on the part of the *Switzerland* to swing over to the eastward. The reason for such a swing rested upon the hypothesis of momentary carelessness. The new testimony in regard to the insufficiency of brief carelessness, if it existed, to cause such a sheer as the *Gascogne's* witnesses assert was taken, causes at least a hesitation to adopt the supposition of carelessness, and leaves the important question in regard to the truth or probability of the *Gascogne's* theory to be solved by other or proved circumstances. The circumstance which gave probability to the testimony of the *Gascogne's* witnesses was that the stem of the *Switzerland* struck the quarter of the *Gascogne* at an angle of 30 deg. If, on the contrary, the starboard quarter of the *Gascogne*, as she was proceeding on her crossing course after the change of one point, struck the bluff of the *Switzerland's* bow at an angle of 15 deg., the new testimony changes the features of the case which were presented to the district judge. Especially is this true when the respective experts do not disagree that, under the conditions stated by Lieut. Chambers, a collision would take place somewhere, and at some angle.

The appellee has introduced the testimony of Mr. Dickey, who repaired the *Switzerland* and saw the *Gascogne*, and of Mr. Clark, mechanical engineer in the service of the owners of the *Switzerland*, and photographs of the injuries upon both vessels, and the official report of the survey of the *Gascogne*. While the libel of the ap-

pellant alleged that the injury was received by the Switzerland on the bluff of her bow, no substantial attempt was made to support that averment by testimony in the district court, and it was not until the importance of the angle of incidence had been dwelt upon by the district judge that proof was offered. This creates a natural distrust of the genuineness of new testimony, but the photographs of the Switzerland were taken immediately after the collision, and were not a new creation. Upon them the testimony of Mr. Dickey, the superintendent of her repairs, and the computation of Mr. Clark, are substantially based. These proofs show that the Switzerland did not strike the Gascogne with her stem, but that the first point of contact was about 18 feet abaft the stem, on the upper part of her port bow, and that the injury ended just above the fore foot on the stem, and did not extend the length. The appellee insists that a well-defined indentation on the Gascogne shows that the first point of contact was with the sharp corner of the stem of the Switzerland. It is well established that the Switzerland's anchor broke into the side of the Gascogne, and that the two vessels became fastened together. The indentation cannot be relied upon to prove much in regard to the first point of contact, and there is about as much evidence from the Gascogne's wounds, and the known incidents of the collision, that its injury was not inflicted by the stem of the Switzerland, as that it was, while the known appearance of the Switzerland's wound pretty clearly shows that the angle must have been from 15 to 20 deg.

The case, upon appeal, stands in this condition: The Switzerland and the Gascogne were, when the latter ported, upon parallel courses, about 250 feet apart, and abreast of each other. The Gascogne was an overtaking ship, and could not deviate from her course, to the injury of the overtaken vessel. It did deviate, and this deviation, contrary to the testimony in the district court, could have produced the collision at the time when, and in the place in which, it occurred. The sufficiency of the cause upon which the district judge relied, of a swing of the Switzerland to the eastward, is weakened by the new proofs; and the angle of incidence, which went to show that it must have occurred, is diminished. The probabilities that it did occur are lessened, while the probabilities that the collision was caused by the act of the Gascogne are increased; and the supposed inconsistencies between the testimony of the witnesses on board the Switzerland and the proved circumstances do not exist. The proofs, as they now stand, call for a finding that the collision was caused by the negligent act of the pilot of the Gascogne, in deviating from his proper course, and that the Switzerland ported as soon as she perceived the change in the Gascogne's course. The decree of the circuit court is reversed, with costs, and the cause is remanded, with instructions to ascertain the damages, and render a decree for the libellant for the full amount of damages, and for the costs of the district court, disbursements of the circuit court, and for the costs of this court.

DAVIS & RANKIN BLDG. & MANUF'G CO. v. BARBER et al.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1894.)

No. 62.

APPEAL—JURISDICTION.

Under Act March 3, 1891, creating the circuit courts of appeals, and declaring that appeals and writs of error may be taken from the trial courts directly to the supreme court "in any case in which the jurisdiction of the court is in issue," the circuit court of appeals has no jurisdiction to review a judgment dismissing an action on demurrer for want of jurisdiction.

In Error to the Circuit Court of the United States for the District of Indiana.

Action by the Davis & Rankin Building & Manufacturing Company against William W. Barber and 60 other defendants for breach of contract. A demurrer to the declaration was sustained, and the plaintiff brings error.

George Shirts and John B. Cochrane, for plaintiff in error.

James A. McNutt and George A. Knight, for defendants in error.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

JENKINS, Circuit Judge. This cause is brought here seeking a review of the judgment of the court below sustaining the demurrers to the plaintiff's declaration. The action was against some 61 subscribers to a contract with Davis and Rankin, the assignors of the plaintiff in error. This contract was for the construction of a creamery, and damages are sought for an alleged breach of the contract by the defendants. The demurrers go to the jurisdiction of the court below over the subject-matter of the action, and are predicated upon the theory that, by a proper construction of the contract declared upon, the liability of the defendants is several, and not joint; and, being several, and measured by the amount placed opposite the names of the several parties subscribing to the contract, the claim, as against each defendant, was less than the minimum amount necessary to give the court jurisdiction over the subject-matter of the action. The court below sustained the demurrers upon the grounds stated, and its opinion is reported in 51 Fed. 148.

We have listened to able arguments upon the subject of the proper construction of the contract in question; and, in view of the conflicting decisions of the several courts which have had similar contracts under consideration, the question of its proper construction is one by no means free from difficulty. We have, however, come to the conclusion that we have no authority here and now to determine the question. The controversy in the court below went to the jurisdiction of the court over the subject-matter. The decision below was adverse to the jurisdiction. The act of March 3, 1891, creating this court (26 Stat. 826, c. 517), provides, in section 5 of the act, that appeals or writs of error may be

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taken from the district courts, or from the existing circuit courts, direct to the supreme court, "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." By section 6 of the act, the circuit courts of appeals have appellate jurisdiction to review final decisions of the lower courts in all cases other than those provided for in section 5. The supreme court, in *McLish v. Roff*, 141 U. S. 661, 668, 12 Sup. Ct. 118, has declared the proper construction of the act to be that the party against whom judgment is rendered "must elect whether he will take a writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court." The act, thus construed, manifestly contemplates that, when the case is brought to the circuit court of appeals, there shall be something for the court to review, aside from the question of the jurisdiction of the court below. Here, the plaintiff, upon the sustaining of the demurrer, refused to plead anew, and elected to stand upon its complaint, and final judgment was rendered dismissing the action. The only question, therefore, presented by the record goes to the jurisdiction of the court below. In such case a review of the determination of that question can only be had in the supreme court. The writ will be dismissed for want of jurisdiction here to entertain it.

BARTH v. COLER et al

(Circuit Court of Appeals, Eighth Circuit. February 26, 1894.)

No. 354.

1. CIRCUIT COURTS OF APPEALS—REMOVED CASES.

Under the judiciary act of 1875, § 5, it is the duty of the circuit court of appeals, in considering a case which has been removed from a state court, to examine the record to see whether the removal was rightfully made, even if there was no motion to remand.

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

Suit was brought in a Colorado court by the owner of the equity of redemption in certain lands to set aside conveyances thereof made by the sheriff as trustee ex officio, under a deed of trust. It was charged that the sale was made by fraud and collusion between the sheriff and the purchaser, and both were made defendants. It appeared, however, that the purchaser had paid a large sum of money for the lands, which the sheriff had distributed to the persons entitled. *Held*, that the sheriff was a necessary party, and that there was no separable controversy which would enable the purchaser, who was a citizen of a different state, to remove the cause to a federal court.

Appeal from the Circuit Court of the United States for the District of Colorado.

This action was brought in a Colorado court by William Barth against W. N. Coler, Jr., and Walter O'Malley to set aside certain deeds made by O'Malley to Coler pursuant to a sale under a deed

of trust. Defendant Coler removed the case to the federal court, by which, after hearing had, it was dismissed. From the decree of dismissal, complainant appeals.

Cass E. Herrington and Charles J. Hughes, Jr. (Fred Herrington, on the brief), for appellant.

John H. Knaebel, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, delivered the opinion of the court. The appellant, who was the complainant in the circuit court, first filed his bill against the appellees, Coler and O'Malley, in the district court for the county of Huerfano, state of Colorado, the object of which suit was to set aside and annul three trustee's deeds conveying certain lands situated in said county and in the town of Walsenburg, Colo. The bill charged in substance that Thomas F. Martin, a former owner of the property, had executed a deed of trust thereon in the nature of a mortgage, in favor of one Richard H. Hutton, for the purpose of securing the repayment of a loan in the sum of \$5,000; that, under the provisions of said deed of trust, Walter O'Malley, who was one of the defendants, as acting sheriff of Huerfano county, became entitled by virtue of his office to act as trustee in said deed for the purpose of executing the power of sale therein contained; and that as such trustee he had, in the month of April, 1892, made three deeds to his codefendant, W. N. Coler, Jr., which deeds purported to convey to Coler all of the lands embraced in said deed of trust. The bill also showed that, prior to the alleged conveyances by O'Malley to Coler, the complainant Barth, at a sale made under a junior deed of trust, had become the purchaser and the owner of Martin's equity of redemption in said property. The bill further showed that the deeds by O'Malley to Coler were ostensibly executed in favor of the latter, because he was the highest bidder at a public sale which had been duly advertised and held by O'Malley as trustee, in execution of the power of sale contained in the aforesaid deed of trust. It was averred, however, that the deeds thus made by O'Malley as trustee were fraudulent as to Barth, the owner of the equity of redemption, because of a conspiracy between the trustee and Coler to so conduct the sale as to vest the title to said land in Coler, and to deprive Barth of any share of the purchase price that might be realized in excess of the mortgage debt. It was further charged that the trustee's sale was also void, because the mortgage debt had been paid prior to the sale, and because notice of that fact was communicated to the trustee before the sale was consummated. After process had been issued by the state court and had been served, the defendant O'Malley appeared by his attorney, and filed a general demurrer to the complaint. Coler appeared by his attorney, and filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Colorado, where it was eventually tried, the result being a final decree dis-

missing the complainant's bill. The material portion of the petition for removal was as follows:

"Your petitioner respectfully shows that he is one of the defendants in the above-entitled suit, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of more than five thousand dollars. Your petitioner further shows that said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that he was at the time of the bringing of this suit, and still is, a citizen of the state of New Jersey, and the said plaintiff, who, as your petitioner avers, was then, and still is, a citizen of the state of Colorado; that the said controversy is of the following nature: That said plaintiff has filed a complaint in this court to set aside a deed to your petitioner conveying the Lake Miriam ditch and reservoir, and also certain other deeds mentioned and described in said complaint, alleging that the said title to said premises was obtained by fraud on the part of your petitioner, and praying that the said conveyances to your petitioner be set aside and for naught held, and praying no other or further relief against his said codefendant, Walter O'Malley; and that the only relief demanded in said complaint is against your petitioner, and that your petitioner and said plaintiff are both actually interested in the said controversy."

No motion appears to have been made in the circuit court to remand the case to the state court, but, under the provisions of section 5 of the act of March 3, 1875 (18 Stat. 470, 1 Supp. Rev. St. 175), it is made our duty, even in the absence of such a motion, to examine the record, and to order a remand if it appears to be a suit that was not rightfully transferred to the federal court. *Railway Co. v. Swan*, 111 U. S. 379, 383, 4 Sup. Ct. 510; *Burnham v. Bank*, 10 U. S. App. 485, 3 C. C. A. 486, 53 Fed. 163. It appears to have been removed to the United States circuit court upon the assumption that it involved a separable controversy within the meaning of the third clause of section 2 of the judiciary act of March 3, 1887 (25 Stat. 434, c. 866); but it seems obvious that it does not fall within the purview of that clause of the removal act. It has been settled by a long line of decisions beginning with *Barney v. Latham*, 103 U. S. 205, that a case is not removable on the ground of a separable controversy, unless the cause of action sued upon is capable of separation into two or more independent suits, one of which is wholly between citizens of different states, in such sense, that it may be fully determined as between them without the presence of the other parties to the record. *Fraser v. Jenkinson*, 106 U. S. 191, 1 Sup. Ct. 171; *Hyde v. Ruble*, 104 U. S. 407; *Corbin v. Van Brunt*, 105 U. S. 576; *Ayres v. Wiswall*, 112 U. S. 190;¹ *Pirie v. Tvedt*, 115 U. S. 43, 5 Sup. Ct. 1034, 1161; *Railroad Co. v. Ide*, 114 U. S. 55, 5 Sup. Ct. 735; *Telegraph Co. v. Brown*, 32 Fed. 337. The sole purpose of the present suit was to obtain an adjudication that the deeds executed by O'Malley, as trustee, were voidable both on the ground that the mortgage debt had been paid before the sale was consummated and on the ground that the trustee had acted unfairly and in collusion with the purchaser at the sale. It is manifest, we think, that the cause of action

¹ 5 Sup. Ct. 90.

was not susceptible of division into two or more separable controversies, and that the suit was not removable on that ground, for the reason that the complainant only demanded one form of relief which was predicated altogether upon wrongful acts for which the trustee and the purchaser were jointly responsible. An attempt is made to sustain the jurisdiction of the circuit court on the ground that the controversy was really between Barth and Coler, who, as the petition for removal shows, were citizens of different states, and that O'Malley was an unnecessary party defendant. This position, however, cannot be maintained. The record shows that both of the defendants were concerned in the alleged fraud; it also shows that the purchaser at the trustee's sale paid to the trustee at the conclusion of the sale some \$15,000, being the amount of his bid, and that the trustee had distributed the proceeds of the sale before the present bill was filed, paying a large part thereof to Martin, the mortgagor. If the trustee's deeds are set aside, O'Malley is accountable to Coler for the purchase price so received and distributed. He cannot be regarded, therefore, as a merely nominal or disinterested party, but is entitled to be heard in a suit which is brought to impeach the validity of the sale, and to annul deeds that were executed by him in the discharge of his trust. *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287; *Rust v. Brittle Silver Co.*, 7 C. C. A. 389, 58 Fed. 611. We also note the fact that the petition for removal in the present case did not even allege that Coler was a nonresident of the state of Colorado, but simply averred that he was a citizen of New Jersey. It is not necessary to decide at this time whether this latter fact is also fatal to the jurisdiction of the circuit court of the United States for the district of Colorado, but we allude to it for the purpose of saying that, in view of the different meanings which the words citizen, resident, inhabitant, etc., have now acquired, counsel will frequently save their clients great expense and delay, which might easily be avoided, by speaking in the exact language of the removal acts when they attempt to use either of the above terms. *Freeman v. Butler*, 39 Fed. 1; *Overman Wheel Co. v. Pope Manuf'g Co.*, 46 Fed. 577. The case must be remanded to the circuit court, for the reasons above indicated, with directions to vacate its former decree dismissing the bill, and to remand the case to the district court of Huerfano county, Colo.

It is so ordered, at the cost of the appellees.

ROBINSON v. CITY OF WILMINGTON et al.

(Circuit Court of Appeals, Fourth Circuit. February 17, 1894.)

No. 60.

CIRCUIT COURTS OF APPEALS — JURISDICTION — APPEALS FROM INTERLOCUTORY ORDERS.

Section 7 of the act creating the circuit courts of appeals (26 Stat. 828) gives no jurisdiction of an appeal from an interlocutory order dismissing a restraining order and denying an injunction.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

This was a bill filed by W. S. O'B. Robinson, receiver of the First National Bank of Wilmington, N. C., against the city of Wilmington and William A. Willson, to enjoin the levy of a tax execution against the real estate of the bank. The court below, having granted a restraining order, afterwards made an order dismissing the same, and denying an injunction. From this order complainant appeals.

E. K. Bryan, for appellant.

Thomas W. Strange, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This is an appeal in equity from the circuit court of the United States for the eastern district of North Carolina. The appellant in this court, the plaintiff below, filed his bill against the city of Wilmington, N. C., and William A. Willson, alleging that the defendants were about to levy a tax execution against the real estate of the First National Bank of Wilmington, in his custody as receiver of the said bank. The bill alleged that the bank was not responsible for the taxes assessed against it, but that such taxes should properly have been assessed against the stockholders of the bank resident in the city of Wilmington, and paid by them out of their own funds; and that the levy of said tax execution created a cloud upon the title of the bank's realty. The prayer of the bill is for a perpetual injunction. Upon the filing of the bill the court granted a rule against the defendants to show cause why the injunction prayed for in the bill be not granted, and in the mean time issued the usual restraining order. The defendants answered the bill, denying and putting in issue the facts stated therein as to the ownership of the stock, and claiming that the bank was estopped from denying its liability for the tax because of the action of its cashier in returning its property for taxation. Upon the return of the rule to show cause, after hearing the bill, answer, proofs, and argument thereon, the circuit court entered an order containing these words: "That the restraining order heretofore issued be, and the same is hereby, dismissed, and the prayer in plaintiff's bill, asking for a perpetual injunction, is hereby denied."

Upon the entry of this order the plaintiff, in writing, prayed an appeal, his prayer reciting as follows: "An order refusing the restraining order moved for in this case having been refused after a hearing on the bill, answer, and proofs," the plaintiff, through his solicitor, prays an appeal to the circuit court of appeals, "and assigns as error the refusal of the court to grant the restraining order upon the bill, answer, and proofs." The court granted the appeal, the order reciting "that the plaintiff in the above-entitled suit having this day prayed an appeal from the order refusing the restraining order;" and in this way the case comes here. No final

disposition has been made of the case in the court below, and no final decree entered.

The general rule, without question, is that to authorize an appeal the decree must be final in all matters within the pleadings (*Mordecai v. Lindsay*, 19 How. 199), and that a decree cannot be said to be final until the court has completed its adjudication of the cause (*Green v. Fisk*, 103 U. S. 518). The seventh section of the act of congress creating this court (26 Stat. 828) makes one exception to this well-established rule:

"Where upon a hearing in equity in a district court or in an existing circuit court an injunction shall be granted or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals."

In the case before us the order neither granted nor continued an injunction, and the case does not come within the exception. This point was not made in the record, nor in argument. But the question involves the jurisdiction of this court, and of its own motion the court will notice the objection. *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; *King Bridge Co. v. Otoe Co.*, 120 U. S. 225, 7 Sup. Ct. 552.

The appeal was improvidently awarded, and is dismissed, each party paying his or its own costs in this court.

The case is remanded to the circuit court for such further proceedings as may be deemed necessary. This cause came on to be heard at the February term of this court, and was then and there decided. The reasons of the court for its decision having been now formulated, ordered that the clerk of this court file the opinion as of the 17th of February, 1894, and issue the mandate thereon forthwith.

DE CHAMBRUN v. COX et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 64.

1. CONTRACTS—CONSTRUCTION—PRIORITIES.

One C. undertook to promote and carry on litigation to recover real estate belonging to certain heirs, who agreed to give him a percentage of the amount recovered "for fees, and also to repay him for advances, disbursements, and whatever expenses" he might incur to effect the recovery. C. agreed with one of his counsel to pay him, in addition to professional compensation, \$25,000 out of the proceeds recovered, "after the payment of all proper disbursements." By numerous subsequent contracts he assigned specified proportions of his share of the amount to be recovered to various persons in consideration of professional services and advances of money to carry on the necessary litigation. *Held*, that the amounts so assigned are entitled to priority of payment over the \$25,000, though the contract on which that is based was prior in point of time.

2. TRUSTS—TRUSTEE DEALING WITH FUND—ACCOUNTING.

S. held two of these contracts by which the amount to be paid was made a lien on C.'s share of the recovery. She assigned these contracts to one of C.'s attorneys under an agreement that she was to be paid what was due under the subsequent contract before the attorney received

anything under the prior one, and he at once executed a declaration of trust in C.'s favor as to the claims assigned to him, subject only to his lien for fees in the main litigation. The attorney then induced S. to accept a smaller sum than was due under her subsequent contract, and to agree to his retaining the balance as compensation for his services in prosecuting the claim; and the amount he actually received from the proceeds of the assigned contracts, pursuant to this arrangement, exceeded the fees for which he had a lien. *Held* that, as to the excess, this was an unlawful dealing with the trust fund for his own benefit, and he must account to C. therefor.

2. SAME—HOSTILE CLAIMS.

Other contracts which created liens on C.'s share of the recovery were assigned to the same attorney, and were included by him in the same declaration of trust in C.'s favor. His relation as attorney was terminated, and he agreed with the holders of contracts prior to those assigned to him to prosecute their claims in consideration of a portion of the amount to be recovered thereunder. *Held*, that these claims were hostile to the trust fund, and hence he could not deal with them for his own benefit, but must account to C. for the profit thence arising.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a bill for an accounting originally filed by Charles A. De Chambrun against Douglas Campbell, impleaded with Frances A. Gesner. The deaths of De Chambrun and Campbell being suggested, Pierre De Chambrun, as administrator of the former, and Abraham Cox and William A. Campbell, as executors of the latter, were substituted. There was a decree for defendants, and complainant appeals.

Everett P. Wheeler and Wyllys Hodges, for appellant.
Louis Marshall, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Charles De Chambrun was a lawyer having an office at Washington, D. C., and in some way connected with the French legation. Having become satisfied that certain real estate in the city of New York, then in the possession of Nelson Chase and others, was in law the property of the heirs of one Stephen Jumel, he undertook to promote an action to secure its recovery. With the assistance of one Stanislaus Le Bourgeois he succeeded in discovering the Jumel heirs, resident in France, and on April 20, 1876, entered into an agreement with them, by the terms of which he undertook and agreed to commence and carry on proceedings for the recovery of the estate of the said heirs, and to bear the expenses thereof. The heirs agreed to pay him as compensation for his services and outlay a sum equal to 47½ per cent. of any money or property recovered in such proceedings, and as security for such payment gave him a lien upon such recovery. They also executed a power of attorney, giving him full authority to act for them, retain counsel, prosecute suits, negotiate, and compromise, but at his own risk and expense. In furtherance of the end proposed, De Chambrun retained various attorneys and counsel, and incurred considerable expense in and about the prosecution of the proceedings, with the result that eventually there was recovered for the

heirs property which turned out to be worth nearly \$350,000. The 47½ per cent. to which De Chambrun was entitled, less commissions of the trustee appointed by the state court to sell and distribute, amounted at the time of final distribution to \$178,784.33. The litigation was long, arduous, complicated, and expensive. De Chambrun either was not able, or, if able, did not choose, to pay all the counsel fees or other disbursements as they were incurred. He did, indeed, at various times pay out as counsel fees to lawyers engaged in the proceedings some \$7,000 to \$8,000, and his entire cash disbursements amounted to nearly \$34,000. This sum seems, however, to have been entirely inadequate to conduct the controversy, and, in order to provide means to pay counsel and meet the other disbursements, De Chambrun entered into agreements, in some instances with counsel, in others with lenders of money, stipulating for payment out of his share of the proceeds of the litigation. These agreements were executed by De Chambrun with such reckless improvidence that the aggregate thereby promised considerably exceeded the entire amount of his 47½ per cent. Some of the counsel, however, who were thus retained died before rendering the services stipulated, and in the subsequent proceedings (referred to below as the Chase suit) several of these contracts were for that or other reasons disallowed. It will be sufficient, therefore, to refer only to the following:

(1) Contract No. 1. On March 3, 1876, De Chambrun entered into an agreement with E. Delafield Smith, a lawyer, practicing in New York city, whereby, in consideration of \$16,250, advanced by the latter, for the purpose of negotiating and perfecting the purchase from the French heirs, De Chambrun assigned to him one-fourth of his interest in any contracts he should have or thereafter make with the French heirs. This agreement was superseded by subsequent agreement of the parties to it on January 5, 1877.

(2) Contract No. 2. On March 3, 1876, De Chambrun and Smith entered into another agreement. It recited the purchase by the latter of a one-fourth interest in De Chambrun's contracts with the French heirs, and that Nelson Chase, a tenant upon and claimant of part of said Jumel estate, was indebted to Smith to the amount of about \$25,000. Thereupon the parties further agreed that "the said sum of \$25,000, or thereabouts, shall also be paid to the said Smith out of the proceeds of said Jumel estate so acquired by the said heirs, or any further interest therein, after the payment of all proper disbursements, and is hereby made a charge on the same." The agreement also made special provision as to a portion of the Jumel lots owned by Smith's partners, which is immaterial to the present discussion. The superseding agreement of January 5, 1877, above referred to, expressly referred to this contract No. 2, and continued it in force.

(3) Contract No. 3. On July 10, 1876, De Chambrun executed an instrument in writing, by which he transferred to Stanislaus Le Bourgeois 7½ per cent. out of his 47½ per cent., "in consideration of the services you [Le B.] have rendered in discovering heirs of Stephen Jumel, who were unknown to me [De C.], and in settling

with them, in advance, and in my absence, and in my name, the basis of the contract of April 20th, 1876."

(4) Contract No. 4. On August 8, 1876, De Chambrun agreed with John A. Stoutenburgh, a lawyer in New York city, to pay or cause to be paid to him the sum of 4 per cent. on the entire proceeds of the property recovered, covenanting that "under and by virtue of the power invested in De Chambrun by the heirs" it be created and made a specific lien on the property, and every part thereof, to be paid as fast as proceeds be recovered. The consideration is stated as consultations had and services already rendered by Stoutenburgh, and professional services further to be rendered.

(5) Contract No. 5. On October 4, 1876, De Chambrun made a further agreement with Levi S. Chatfield, also a lawyer in New York, agreeing to pay him \$1,000 within a few days, and further to pay him, his heirs or assigns, \$45,000, when the title to the property should be established; and, if less than the whole should be recovered, or the right of the heirs compromised for less than the whole amount, then to pay a pro rata share of the amount recovered; no part of the \$45,000 to be paid in the event of an entire failure to recover. To these payments De Chambrun pledged his share and interest under the French contract. The consideration expressed is "for services performed and to be performed, and information communicated in relation to the interests of the legal heirs," etc. In the subsequent proceedings (referred to below as the Chester suit) it was held that Chatfield did perform such services, and did communicate such information, and no one upon this appeal questions that finding.

(6) Contract No. 6. On October 25, 1876, De Chambrun agreed in writing with George J. Schermerhorn, also a lawyer, who had been employed by De Chambrun a few months before, to pay him \$500 within 90 days, and \$10,000 when the title of the heirs shall be established either by suit or compromise, to the property, or any part thereof. To secure this payment De Chambrun mortgaged his interest under the French contract. The consideration is "for services performed and to be performed during the next ninety days." The agreement is headed with the title of the first suit brought by the heirs against Nelson Chase, which had been begun in September, 1876, with E. Delafield Smith as solicitor and Stoutenburgh as counsel.

(7) Contract No. 7. On October 29, 1876, De Chambrun entered into an agreement with W. N. Griswold and Henry Chamberlain. After reciting the contract with the French heirs, it sets out the fact that it has become necessary to raise more money for the prosecution of the claim, and to defray the expenses thereof. By its terms, Griswold, who was a real-estate expert, and Chamberlain, undertook to advance \$6,600 for that purpose, and De Chambrun assigned to them 5 per cent. out of his $47\frac{1}{2}$ per cent.

(8) Contract No. 8. On November 9, 1876, De Chambrun, by an instrument in writing, assigned to Jesse C. Connor $3\frac{1}{2}$ per cent. of 40 per cent. of the entire recovery, and made such assignment a lien on whatever might be recovered by him (De Chambrun) under his con-

tract with the Jumel heirs. The consideration was "services to be rendered by Connor in relation to the prosecution and preparation of the case of the said heirs against Nelson Chase and others."

(9) Contract No. 9. On January 5, 1877, De Chambrun and Smith entered into an agreement by which Contract No. 1, *supra*, was abrogated. The parties then agreed that Smith should receive out of the proceeds of the adventure his advance of \$16,250, and one-tenth in value of the recovery in the Jumel proceedings. This was in consideration of the services of Smith, who was to continue to be, as he had been in the past, the "attorney and counsel of the heirs in all present and future actions, suits and proceedings." Smith died in April, 1878. In May, 1878, the suit in which he had appeared was discontinued, and in the same month a second equity suit was brought, in which Stoutenburgh appeared as solicitor.

(10) Contract No. 10. On August 28, 1880, De Chambrun and Schermerhorn entered into a further agreement, whereby, "in consideration of services rendered by Schermerhorn, at the request of De Chambrun and in behalf of the heirs * * * in the litigation," De Chambrun agreed to pay him \$30,000, making the same a lien upon any money said De Chambrun might receive for said heirs.

(11) Contract No. 11. On August 31, 1881, to secure the payment of \$10,000, which De Chambrun borrowed from Frances A. Gesner, he assigned to her all his right, title, and interest under the contract with the French heirs. He confirmed this with another agreement to the same effect on March 18, 1882.

(12) Contract No. 12. In 1880 defendant's testator, Douglas Campbell, also a lawyer, was employed by De Chambrun to render services in that capacity. He continued in such employment, acting as counsel in the various suits, actions, and proceedings, until June 16, 1884, when, the litigation for which he was retained being closed by a final settlement in a partition suit,—brought after compromise of the second equity suit had left the Jumels tenants in common with other claimants,—he terminated his employment by written notification to De Chambrun. On May 6, 1882, De Chambrun, by an instrument in writing, transferred out of his 47½ per cent. to Douglas Campbell the sum of \$25,000, with interest from May 6, 1882, giving him a lien therefor. The consideration expressed was "professional services rendered."

The Jumel litigation being terminated, and its gross proceeds in the hands of a trustee for distribution, and there being delay in the final settlement of the claims, one Stephen M. Chester, to whom Stoutenburgh had assigned his contract (No. 4, *supra*), brought a suit (about January 1, 1886) against the heirs, De Chambrun, and the various claimants under the latter's assignments, to determine the validity and priorities of all such claims. De Chambrun appeared by counsel, and denied that any of the claimants had any right, share, or interest in or upon the lands or moneys in the hands of the trustee; alleged that he had expended \$30,000 for expenses, and that his services were reasonably worth \$30,000. By his procurement the French heirs contended that their agreement with him was void for champerty. These defenses were not sustained, and

the referee in *Chester v. Jumel* found in favor of most of the claims litigated. The judgment upon his findings was adopted as the rule of distribution in still another action,—*Tauziade v. Jumel*,—wherein final distribution was made of the fund of \$178,784.33 as follows:

No. 3. Le Bourgeois.....	\$ 28,302 76
No. 4. Stoutenburgh (Chester).....	15,045 96
No. 5. Chatfield	16,776 46
No. 6. Schermerhorn	17,026 55
No. 7. Griswold	9,306 66
No. 8. Connor	2,321 36
No. 9. Smith (Margaret J., Executrix).....	37,746 96
No. 10. Schermerhorn	51,656 26
No. 11. Gesner (the balance of the fund).....	601 36
	<hr/>
	\$178,784 33

Other contracts sustained by the referee are not referred to in this opinion, since those above recited exhausted the fund.

Before stating the nature of the claim made by the complainant and appellant in the case at bar, it will be necessary to set forth yet another series of assignments. On February 25, 1882, Chatfield assigned his contract (No. 5) to William H. Adams, and on March 17, 1882, Adams assigned it to Campbell, the latter paying to Chatfield and his assignee, on account of the purchase price of said contract, \$3,888; and to Adams, for services rendered to De Chambrun, \$150. On May 6, 1882, Campbell assigned his contract (No. 12, *supra*) to Margaret Smith (E. Delafield Smith's executrix). On May 17, 1882, Margaret Smith assigned to Campbell, *inter alia*, contracts Nos. 1, 2, and 9, *supra*, the claim against De Chambrun for \$16,250, with interest from March 11, 1876, and the claim against Nelson Chase on his promissory notes for about \$25,000, upon the express condition that \$25,000, with interest from May 6, 1882 (the amount of Campbell contract, No. 12, *supra*), should be paid in full to Mrs. Smith before payment of any sum whatever should be made to Campbell under Margaret Smith's assignment to him. These Chatfield and Smith assignments to Campbell appear to have been made with De Chambrun's assent, presumably to secure some control of the Chatfield and Smith claims, and to arrange more securely for Campbell's contingent fee, his own contract being so late in order of time that the fund would probably be exhausted before his lien thereon could be satisfied. Accordingly, on July 21, 1882, Campbell executed a declaration of trust, in which, after reciting the assignments from Smith and Chatfield (through Adams) to himself, he declared that he held "all of said contracts, agreements, and claims for the benefit of Charles A. De Chambrun, subject only to his (Campbell's) interest therein and lien thereon for legal services." Immediately thereafter De Chambrun assigned his rights under this declaration of trust to Mrs. Gesner, to further secure her claim against him. On July 1, 1884, immediately after Campbell had ceased to be counsel for De Chambrun, he entered into an agreement with Schermerhorn whereby they agreed to make common issue in the prosecution of their claims to recover compensation for their professional services

in the Jumel litigations, and to divide, share and share alike, the net sum each should obtain, whether under their own contracts or under those which either of them then held or might thereafter acquire. Some time subsequent to the declaration of trust, Campbell acquired interests in the claims of Stoutenburgh-Chester, Griswold, and Margaret Smith, by agreements with them, respectively, whereby he agreed to act as counsel for each of them in the Chester suit and subsequent litigations. With Margaret Smith he agreed, June 19, 1884, to prosecute her claim to the \$25,000 and interest, under her assignment to him of May 17, 1882, holding her harmless against all costs and expenses of litigation. In the event of success he was to keep for himself all of the recovery in excess of the sum of \$18,000, plus interest from December 19, 1884. Under a similar arrangement he agreed to prosecute the Stoutenburgh-Chester claim, retaining for himself all recovered in excess of \$5,000. And of the Griswold claim he was to receive, under like arrangement, all in excess of \$4,000. Of the Le Bourgeois claim he acquired in April, 1888, an option to purchase the same for the sum of \$15,000, with interest from that date. In the answer it is averred that "he never actually became the owner thereof, the same having been purchased by Ashbel Green." He did, however, prosecute the claim. Whether anything was received by him on final recovery, and, if so, how much, does not appear. In the Chester and Tauziade suits Campbell appeared, originally or ultimately, for himself, Smith, Chatfield, Chester, Griswold, and Ashbel Green (assignee of Le Bourgeois). Other counsel appeared for De Chambrun and for the French heirs. Frances Gesner was represented by her own counsel, as was also Schermerhorn; and Connor was represented by Schermerhorn. The various contracts; numbered supra, were proved, as were also the Chase notes. In his findings of fact the referee found substantially as stated in this narration as to the making of the several above-numbered contracts, and the course of litigation to recover the property. He also found that the Chase notes amounted to \$23,740, and that De Chambrun had proved disbursements made by him to the amount of \$33,445.27. He further found that Campbell's professional services in the matters in which he had been retained by De Chambrun for the heirs were in the aggregate of the value of \$30,000, on account of which he had received \$950 only; and that he had advanced for the benefit of De Chambrun to Chatfield and Adams \$4,038. Inasmuch as part of these services were rendered subsequent to recovery,—that is to say, in the partition suit and proceedings to distribute,—52½ per cent. of those services was charged against the Jumel heirs, and \$7,875 paid by them to Campbell. The remaining 47½ per cent. of those charges (\$7,125), and all charges for services prior to recovery from the Chases (\$15,000), besides the moneys advanced for De Chambrun (\$4,028), reduced by the credit of \$950, was charged against the latter, the amount being \$25,213. The referee found as a conclusion of law as to the declaration of trust and subsequent assignment thereof that Campbell held the Chatfield contract, and any interest in the Smith contract which might remain after payment to Margaret Smith of the \$25,000 and interest from May 6, 1882, in

trust for De Chambrun and his assignee, Gesner, but subject first to Campbell's lien thereon for the said sum of \$25,213, due to him for services and disbursements out of De Chambrun's 47½ per cent. The claims found by the referee, and the order of priority to which he held them entitled, are enumerated *supra*. The amounts are a little in excess of those given by him, the property having appreciated between the filing of his report and final distribution. Neither the referee's report nor any subsequent judgment in either the Chester or the Tauziade suit contained any express statement of a conclusion of law as to the status of the Smith-Chase contract, No. 2, *supra*.

The contention of the complainant and appellant in the suit at bar is twofold: First. That Campbell, either through gross neglect of his duty as trustee under the declaration of trust, or fraudulently and by collusion with Schermerhorn, procured the omission of the Smith-Chase claim from the referee's report, and the judgments in the actions for distribution, to the damage of the complainant's intestate. Second. That Campbell, being trustee and former counsel of De Chambrun, purchased interests in several of the claims of others against the fund,—claims which conflicted as to priority with those which he held as trustee,—and by such purchase realized large profits, for which he held, it is contended, he should account to his *cestui que trust*.

1. The first of these only is considered in the opinion of the circuit court. In the view we take of this part of the case, it will not be necessary to discuss the facts in proof on which the complainant relies to establish the fraud he alleges. Long before the Chester case was submitted to the referee, there existed bitter hostility between De Chambrun and Campbell. Who was in fault for this falling out it is not necessary to inquire; nor need we review the voluminous correspondence which has been put in evidence, nor follow step by step the various proceedings in court and before the referee, which it is claimed indicate an intent collusively to postpone the Smith-Chase claim, or to subordinate it to others; nor need we review the calculations, which complainant insists show that there was a motive for securing its rejection, because, had it been allowed with priority according to its date, it would have so depleted the fund that there would have been practically nothing left to pay the \$51,656.26, under contract No. 10 (Schermerhorn, *supra*), in which Campbell had acquired a half interest. The fundamental difficulty with complainant's contention is that, although (except for the superseded contract No. 1) the Smith-Chase contract was the first in order of time, it was not entitled to priority according to its date. All the other contracts provided for compensation to be made for professional or other services rendered or disbursements made or information given. This one was evidently intended to secure a claim of Smith, not against De Chambrun, but against Nelson Chase, in the event of the latter being deprived of the means to pay his debts by reason of the success of the very litigation Smith was about to conduct, and for his services in which Smith had already secured, by contract No. 1 (not then superseded), one-fourth

part of De Chambrun's share. If it were necessary, in order to secure success, to disburse still more, there was reason why the parties should agree that the costs of victory should first be paid, and the loss that victory might entail on Smith be compensated for, only out of the residue. The phraseology of the various contracts indicates just such an intent. All of the others assign some percentage of the proceeds, or make some specified sum a lien or mortgage upon the proceeds of recovery, without any suggestion as to priority other than such as their respective dates imply. In the Smith-Chase contract, however, it is expressly provided that the amount of the notes shall be paid to Smith, out of the proceeds of the Jumel estate "so acquired by the said heirs," *"after the payment of all proper disbursements."* When it is borne in mind that at the time this contract was entered into the disbursements already made were comparatively small; that suit had not yet been begun; that the litigation about to be undertaken would necessarily be long, difficult, and arduous, requiring not only the professional services of able counsel, but also careful and intricate examinations of real estate records and of pedigree, would necessitate much documentary proof, the taking of testimony in a foreign country, one, or perhaps more, trials in court, and possibly appeals, involving great expense,—we cannot assent to the proposition that the quotation above italicized was intended only to provide for disbursements already incurred. All proper disbursements from the beginning of the campaign till its close were undoubtedly included in the phrase. Nor, in our opinion, is the word "disbursements" used therein with the narrow and technical meaning it has acquired in the offices of court clerks, as something distinct from "costs," "counsel fees," and "allowances." The contract of De Chambrun with the French heirs sets forth that his share of $47\frac{1}{2}$ per cent. is "attributed to him * * * as much for his having made known to them the existence of that estate as for fees, and also to repay him for advances, disbursements, and whatever expenses he may have made and shall make to bring about the recovery." It was the payment of moneys properly disbursed by De Chambrun to bring about the recovery to which the payment of the Chase notes was postponed. First of such disbursements are the fees of attorneys and counsel. It surely could not be reasonably contended that, had De Chambrun paid in cash all retainers and charges of counsel as they accrued, he would not be entitled to reimbursement therefor out of the proceeds, before being called on to respond for Chase's default on his notes. The situation is not changed, because, not having the means to pay, he postponed their settlement until the end of the litigation; nor because most of the attorneys and counsel bargained for fees contingent on success, and no doubt largely increased in amount because of such contingency. The law of this state allows attorneys and counsel thus to buy interests in the claims they professionally represent, and Smith and De Chambrun, both lawyers, had that very day made just such a contract. The bulk of the claims allowed by the referee were of this character. That of Griswold and Chamberlain (No. 7) was for moneys which it had become necessary to raise for the prosecu-

tion of the Jumel claim, and to defray the expenses thereof. That of Le Bourgeois was for services rendered in discovering the French heirs and negotiating the contract with them. To trace out the pedigree and establish the identity of the persons in whose name the suit was to be brought was necessarily the first thing to be done, and the expense of so doing was a disbursement which De Chambrun would have to make before he could even begin to bring about the recovery. Moreover, the referee found that De Chambrun had disbursed in cash \$33,445.27. He disallowed, indeed, De Chambrun's request that the same should be paid before any of the claims of the defendants, as he found them. But, as between De Chambrun's claim for cash disbursements and the Smith-Chase claim (which was not included at all among the conclusions of law), the terms of the latter so plainly postpone it to the former that we must assume that, had any such question of priority been considered by the referee, he would have so held. Whatever, then, Campbell may have done or omitted to do touching the Smith-Chase claim, can in no way have injured complainant's testator, who was not entitled to have it paid in advance of the claims which were allowed, whose allowance is not disputed here, and which wholly exhausted the fund.

2. The other branch of the complainant's claim remains to be considered. The finding of the referee in the Chester suit as to the declaration of trust has already been stated, and is undoubtedly correct. By its terms Campbell was constituted trustee to hold the Smith and Chatfield contracts for the benefit of De Chambrun, subject only to his own interest therein and lien thereon for legal services. That lien also covered the moneys he advanced for the benefit of De Chambrun to pay Chatfield and Adams for their assignments. The terms of the Smith assignment, moreover, required him to pay Margaret Smith \$25,000 and interest from May 6, 1882. Out of the residue and the proceeds of the Chatfield contract he was entitled to retain the amount of his own lien, and the balance he was bound to hold for De Chambrun, or his proper assignee. At the time Campbell accepted this trusteeship and undertook its obligations, he was, and had for a long time been, De Chambrun's counsel. It is urged by defendant that the relation of attorney and client never existed between them, inasmuch as Campbell was retained for the Jumel heirs, as the associate of De Chambrun. In one sense this is true, but De Chambrun was the attorney in fact for the heirs. He selected and retained counsel; he alone directed the conduct of the proceedings; he alone, out of his percentage, was to pay such counsel as he did retain. The relation between the two men was that one of trust and confidence which the law assumes to exist between client and counsel. By reason of his professional connection with the litigations as to the Jumel estate, and his relations with De Chambrun himself, Campbell undoubtedly acquired a fund of information touching not only the suits to recover possession of the estate, but also the complicated, conflicting, and improvident contracts which De Chambrun's recklessness had attached to the fund out of which alone compensation could ultimately

come. When, with De Chambrun's consent, he accepted the trust, he accepted it charged with all the knowledge he had thus acquired. When, two years subsequently, he terminated professional relations with De Chambrun, he did not thereby relieve himself from the obligations of his trusteeship under the written declaration of trust, nor did he become free to use, for his own benefit, and against the interests of his cestui que trust, the information he had obtained while the confidential professional relations existed between them. It is not only as a trustee, but as a trustee who is a lawyer, and has been himself practically counsel for his cestui que trust in the very matters out of which the trust springs, that Campbell's conduct is to be judged. But it needs even no such addition to the wholesome rule of equity, too elementary to require citations, that a trustee may not so manage the trust estate that thereby he shall benefit at the expense of his cestui que trust. Had he been some chance comer, appointed trustee without any knowledge whatever of the subject-matter, his conduct touching the Margaret Smith claim (to \$25,000 and interest under the assignment of May 17, 1882) would have been equally indefensible. It will be remembered that, under cover of the agreement to prosecute her claim before the referee,—the very claim which he held in trust,—he induced her to agree to accept, instead of \$25,000 and interest from May 2, 1882, \$18,000 and interest from December 16, 1884. In urging her to make such reduction he referred to the fact that the fund to be ultimately realized would be inadequate, and that De Chambrun, to whose "indomitable energy and pluck" it was due that the work of recovery was carried on, was likely to be left, not only without repayment of his expenses, but heavily in debt,—a result which, he expressed the hope, "none of the interested parties would be willing to see," and added that he himself would willingly make a liberal reduction from his own fee, rather than that De Chambrun should thus lose all for which "he had worked well and long." So far as he was a trustee for her under her assignment to him, this arrangement with Mrs. Smith to reduce her claim was right enough. She could remit as much of it as she chose. Such remission only left a larger balance for the other persons interested in the trust. Had he arranged for such a reduction of her claim, that the balance of it, together with the Chatfield claim, amounted to just the amount of his own fees, De Chambrun could not complain. He was entitled only to the residue after Margaret Smith and Campbell had both been paid. And Campbell could not be expected to obtain from Mrs. Smith any greater reduction than she was willing to give. But Campbell did secure such a reduction that the balance of the Smith claim under contract No. 9 (after paying Mrs. Smith), plus Chatfield's, amounted to considerably more than his fees. Had this been done as part of the administration of his trust, De Chambrun would have benefited thereby to the extent of the difference; but Campbell so arranged the transaction as to put the difference into his own pocket. That he covered up the transaction by an agreement to take the amount of the reduction as his fee for collecting the Smith claim will not avail. The court will look through the

form to the substance. The amount of the reduction was \$13,815.06 out of a claim of \$37,746.96, a sum grossly disproportioned to any possible quantum meruit for prosecuting the Smith claim in the Chester and Tauziade suits. It is true, as stated before, that the law of this state allows members of the bar to make such agreements for contingent compensation,—in our opinion, most unfortunately for the profession, as the record of the case at bar abundantly shows,—but, so far as we know, it has not changed the rule as to a trustee's duty so as to allow him, by such an arrangement, practically to buy at a discount claims which conflict with his trust estate and himself reap the fruits of his speculation.

The following statements show the result of Campbell's agreement with Margaret Smith:

Chatfield claim.....	\$16,776 46
Smith claim.....	37,746 96
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	54,523 42

Under original arrangement Margaret Smith was entitled to \$25,000 and interest from May 6, 1882, say, in round numbers, altogether	32,500 00
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Balance to be distributed under declaration of trust.....	\$22,023 42
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—And which is insufficient to satisfy Campbell's lien for fees.

Smith and Chatfield, as before.....	\$54,523 42
Mrs. Smith received in full satisfaction.....	23,931 90
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Balance to be distributed.....	30,591 52
Campbell's lien for fees, etc.....	25,213 00
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Balance which, under trust, would have come to De Chambrun..	\$ 5,378 52
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—But which, under Campbell's arrangement with Margaret Smith, he retained for himself.

The other claims in which Campbell acquired interests under cover of an arrangement for counsel fees, viz. Chester-Stoutenburgh and Griswold, were undoubtedly claims hostile to those which he held under the declaration of trust, since the fund was inadequate to pay all. His plain duty as a trustee forbade him from speculating in hostile claims to his own profit. If he wished to be free from the obligation of his trusteeship, he should have notified his cestui que trust, and secured the appointment of another trustee. Equity will not tolerate his continued holding of the one set of claims as a trustee and dealing with hostile claims as an individual. Whatever profit a trustee makes by such operations, he must account for to his cestui que trust. The cases cited by counsel for the appellee do not apply. They hold that under some circumstances an attorney whose relation with his client has been severed, not on the ground of his own misconduct, may act for an opposite party when it clearly and distinctly appears that he does not avail of information obtained in his former character to the prejudice of his former client. Were the question here one solely of professional relation, we might analyze these authorities and compare them with others,—profitably, no doubt; for any relaxation of the wholesome

rule as to disqualification by reason of professional relations should be most scrupulously and carefully limited and defined before it is announced by a court of equity. But in this case we are spared all such discussion. It is not a question of professional relations, but of the obligations of a trustee of an express trust. Under the declaration, Campbell held, *inter alia*, the Smith-Chase contract for others as well as himself. In point of time it was prior to all the others, but by its terms was to be postponed to such subsequent ones as represented proper disbursements of De Chambrun, and were so phrased as to be valid obligations against the fund. At least one claim, apparently for counsel fees, was rejected by the referee because the phraseology of the contract on which it was based permitted recovery only when the title of the heirs was established to the property,—an event which he held never happened, since the original controversy was compromised. Whether or not the terms of all the other contracts permitted recovery, and whether they covered proper disbursements, were issues upon which the legal owners of those other contracts and the legal owner of the Smith-Chase were irreconcilably hostile. To sanction the contention that the holder of the Smith-Chase contract, when that holder is a trustee, active or passive, could acquire or hold any part or lot in hostile claims, or even prosecute them to his own personal profit, would be subversive of the fundamental principles of equity. The same remarks apply to the claims represented by Schermerhorn, in which concededly Campbell acquired a half interest, and would apply to the Le Bourgeois claim, if in fact he realized anything out of it, which the record before us leaves in some doubt.

The judgments in the Chester and Tanziade suits are no bar to the second claim in this suit, which was not, and could not be, litigated therein; nor was De Chambrun under any obligation to object in those suits to Campbell's prosecution of the hostile claims on the ground that he was the trustee of other claims. Whatever pecuniary benefit the trustee thereby obtained would be for the benefit of his trust, and the *cestui que* trust might fairly lie by, allow the trustee to secure all he could, and rely upon the subsequent accounting for the protection of his own interest. The decree of the circuit court is reversed, with costs, and the cause remitted to that court, with instructions to decree in favor of the complainant for an accounting as to any profits made by defendant's testator in excess of his fees and disbursements (\$25,213) out of the claims of Stoutenburgh-Chester, Griswold, Chatfield, Smith, and Schermerhorn.

On motion to amend the mandate the claim of Stanislaus Le Bourgeois was included among those for whom the accounting for profits was ordered.

WATTS et al. v. BRITISH & AM. MORTG. CO. OF LONDON, Limited.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 158.

1. MORTGAGE—RESCISSION—AFFIRMANCE BY CONDUCT.

A mortgage company filed a bill to rescind a mortgage, and secure a return of the money loaned, on the ground of fraud. Afterwards, it advertised the premises for sale under the deed of trust. It did not, how-

ever, attempt to make the sale, but pressed its suit for rescission with due speed. *Held*, that the act of advertising should not be considered an affirmance of the mortgage.

2. SAME—CONSPIRACY TO DEFRAUD—LIABILITY OF CONFEDERATES.

A number of persons, each doing his part, acted together in procuring a loan from a mortgage company upon the security of land which was greatly overvalued. *Held*, that the mortgagor was entitled to a rescission of the mortgage, and a decree against all the parties for return of the money loaned, regardless of what disposition had been made of it, or which of the defendants had executed the papers.

Appeal from the Circuit Court of the United States for the North-east District of Mississippi.

This was a bill in equity filed by the British & American Mortgage Company of London, Limited, against Ben M. Pettis, W. C. Pettis, Charles L. Watts, and A. C. Johnson, to rescind a mortgage and procure a decree for the return of the money loaned. There was a decree for complainant in the court below, and the defendants appeal.

H. A. Barr, J. W. T. Falkner, and Chas. B. Howry, for appellants.
W. V. Sullivan, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. On 27th December, 1889, C. L. Watts, one of the appellants, applied to an agent of the appellee for a farm loan on 820 acres of land in La Fayette county, Miss. This application was made on one of the regular forms used by appellee. The answers to the numerous questions in this form were all written in by W. C. Pettis, one of the appellants. On the 16th January, 1890, the land was conveyed to C. L. Watts by Ben M. Pettis, described as containing 826 acres, more or less. This deed recited, "In consideration of eighteen thousand two hundred and sixty dollars, I here convey and warrant C. L. Watts the following described lands," etc., "to wit." A. C. Johnson, one of the appellants, inspected the land, and reported it to be of the value of \$13,740, without the improvements, and to have on it a residence house, six tenant houses, and a gin house, with machinery, all of the aggregate value of \$2,250. Shattuck & Hoffman were the agents, at New Orleans, of the appellee. They seem to have corresponded with W. A. Roane, Esq., of Oxford, Miss., and to have received from him abstracts of title to land in La Fayette county on which they made loans. Mr. Shattuck testifies that A. C. Johnson never was in the company's (appellee's) employ, and W. A. Roane never was the company's attorney; that the company have no employees or attorneys or brokers in the country. Unless the inspection and report of A. C. Johnson was made for the company, it had none made by any one before it made the loan of \$4,500 on this land. On January 25, 1890, C. L. Watts drew on Shattuck & Hoffman in favor of Benjamin M. Pettis, for the full amount of the loan. This draft was accepted 30th January, 1890, payable at the Louisiana National Bank. It is indorsed: "Benj. M. Pettis. W. C. Pettis. For collection, for acct. of Bank of Oxford, Oxford, Miss. Ben Price, Cashier."

Benj. M. Pettis and W. C. Pettis are brothers. At the time of ob-

taining this loan they lived in the same house on a plantation a few miles from a farm on which C. L. Watts resided. The loan was completed January 30, 1890. In March, 1890, one H. C. Williamson examined the land and improvements, and reported to appellee's agents at New Orleans that the land and improvements had been grossly overvalued in Watts' application and in Johnson's report, and that the real consideration for B. M. Pettis' conveyance to Watts was \$3,500 of the money loaned by the appellee to Watts on the land. After efforts to obtain a rescission of the contract and the return of the money had failed, the appellee exhibited its bill, setting up the facts, and praying for relief on the ground of the fraud charged to have been perpetrated on it by the appellants. The utter want of care indulged by appellee in accepting the security mentioned should not escape notice, and, if it should result in a partial loss of the money loaned, retributive justice would hardly be more than satisfied.

After filing its bill the appellee advertised the mortgaged premises for sale under the deed of trust. The appellants insist that this was an affirmance after full knowledge of the facts. They support this contention by a reference to *Grymes v. Sanders*, 93 U. S. 55; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29. It is sound doctrine that a party who desires to rescind a contract on the ground of subsequently discovered fraud must announce his purpose as soon as such discovery is fully made, and must adhere to it. He will not be permitted to vacillate, and play fast and loose. In this case the appellee did announce its purpose, endeavored to obtain a rescission and the return of the money without resort to a court of equity, and, failing in that, duly exhibited its bill, and has sped the cause. The sale was not attempted to be made. No other indication of a vacillating purpose is shown. Grant that this act is not adequately explained. Is it, under the circumstances, to be taken as a conclusive abandonment of appellee's bill, and an affirmance of the contract which by the bill the appellee seeks to have canceled? In our view the adjudged cases and sound reason do not go to that extent.

Appellants contend that no injury is shown to have resulted to the appellee by the alleged fraud; that the security was and is adequate and ample. To our view the proof does not sustain this contention. The most that can be claimed for the evidence on the subject of value is that the land is worth from eight to ten dollars an acre. No market value is shown. It appears that few sales of land in that neighborhood have been made since the loan was effected. The appellee, in making loans on farms, was not willing to take such security at more than one-third of its estimated value. It is matter of such common knowledge as not to require evidence that there is generally a great difference between landowners' estimates of the value of farm lands in their neighborhood, and the price the lands would bring at public sale. The preponderance of the evidence indicates that had the land been put up at public sale at the time Watts' application for the loan was made, or at any time since then, it would not have brought in cash as much money as

Watts borrowed on it. It is not extravagant to doubt if the appellee could, at any time since it made the loan, have realized one-third of the principal and interest, and the reasonable cost of a foreclosure, by a public sale, without reserve, of the mortgaged premises.

It is insisted that the conspiracy charged is not proved; that it is abundantly disproved. The complainant, in its bill, did not waive an answer under oath. The respondents, answering separately, each denies that he was a party to a conspiracy, as charged, and denies that any such conspiracy existed. It is, perhaps, a matter of definition. These are said to be good people. We do not deem it necessary to review the evidence. Our point of view may be so different from that of the appellants that any summary of the proof we could make would appear to them to be harsh. We therefore only say the evidence satisfies us that the appellee should have the relief it seeks. It appears to us that all of the appellants, each doing his own part, acted together in procuring this loan; that the part each acted contributed materially to effect the common purpose. It is immaterial what disposition was made of the money, or who of them executed the writings sought to be canceled. Equity is not so restrained that it cannot do full justice in such a case as this.

The decree appealed from is affirmed.

FRINK et al. v. McCOMB.

(Circuit Court, D. Delaware. March 5, 1894.)

1. ATTORNEY AND CLIENT—COMPENSATION—AMOUNT.

Counsel were retained to bring suit upon an important and doubtful claim, which had already been asserted in another jurisdiction without success. It was agreed that the client should furnish \$2,000 for necessary costs and disbursements, and that counsel should look only to the amount recovered for compensation for their services, of which recovery they were to be permitted to retain "a liberal amount." The litigation, which was long and arduous, was in the end successful. All the counsel retained testified that one-third of the amount recovered was no more than a moderate compensation, and their testimony was not contradicted. *Held*, that they were entitled to a lien on the amount recovered to the extent of one-third thereof.

2. SAME—AGREEMENT—ABROGATION.

Pending the litigation, counsel wrote to their client that, inasmuch as a final settlement was likely to be long deferred, they thought it "no more than reasonable to ask for a payment on account of services;" but no payment was made, and the request was not insisted upon. *Held*, that no inference could arise from this that the agreement asserted by counsel had not been made.

3. SAME—LIEN—EFFECT OF ASSIGNMENT.

An assignment made by a client, pending litigation, of the amount to be recovered, cannot prejudice the lien of his attorney thereon for services; nor is it essential to the preservation of his rights that he should notify the assignee of his claim, especially when such assignee assents to the services rendered, and knows that the client is financially unable to pay the fees.

WILSON & Wallis, George Gray, and William C. Spruance, for complainants.

Henry Schmitt, for assignees.

DALLAS, Circuit Judge. This is a suit in equity in which an amended final decree was entered on the 7th of August, 1889, for the plaintiffs and against the defendant, for \$91,420. During the same month both parties appealed, but neither appeal was sustained. On June 2, 1893, the mandate of the supreme court affirming the decree, and directing further proceedings in this court, was filed, and on the 6th of the same month, in pursuance of the praecipe of plaintiffs' counsel, a writ of fieri facias was issued. Thereupon the defendant, by her counsel, tendering herself ready and willing to pay whomsoever might be entitled, but informing the court that she had been notified by Walkinshaw & Voigt (claiming to be assignees of the decree) to pay only to them, applied to be relieved from the hazard, by which she supposed herself to be confronted, of being required to make double satisfaction. This application was heard on July 15, 1893, the counsel of Walkinshaw & Voigt and the solicitors of the plaintiffs being then present in court. We then thought, as we still do, that the defendant might with entire safety have paid under the execution, and left the respective claimants to litigate their several claims to the fund after it had reached the marshal's hands; but, to release so much of the amount as was not in controversy, to expedite the determination of the only matter involved in dispute, and to relieve the defendant from any possible embarrassment, it was, with the acquiescence of all the counsel, ordered:

"(1) That \$40,000 of the fund above referred to be forthwith paid into the registry of this court by the petitioner (the defendant), and that, after payment therefrom of the costs to this time, the balance of said \$40,000 shall await distribution or payment over until the further order of the court; (2) that S. Rodmond Smith, Esquire, be, and is hereby, appointed examiner to take such evidence as may be adduced before him upon behalf of the parties claiming to be entitled to receive or to participate in the distribution of the money in the registry of the court, and to report said evidence, and the facts in his opinion shown thereby, to the court; (3) that the defendant pay the balance of debt, interest, and costs, over and above said sum of \$40,000, upon receiving a satisfactory release therefor from the complainants, and also from those claiming to be entitled as assignees,—with leave to all parties to apply for further orders in the premises."

In accordance with this order, \$40,000 was placed in the registry of the court, of which there still remains on deposit a balance of \$39,373.25. The examiner, rightly conceiving the scope of his duties, has taken and filed all the evidence, and has confined his report thereon to a simple statement of the facts which, in his opinion, are shown thereby. Upon his findings, however, though evidently made with much care, we have not, in view of the exceptions filed, deemed it proper to rely, but have ourselves examined the evidence, and upon that examination, independently made, have reached the conclusions of fact embraced in this opinion. The present situation is substantially the same as if the money in question had been actually paid to the marshal, and had then, on motion of Walkinshaw & Voigt, been ordered to be paid into court, instead of to the solicitors

at whose instance the execution had been issued, in order that the disposition to be made of the fund might be considered and adjudged while it still remained under the control of the court. In other words, the case presented, and which has now been fully argued and considered, is simply this: Walkinshaw & Voigt, basing their assertion of right upon certain instruments of writing, ask that the entire sum made by the writ of fieri facias shall be awarded to them, notwithstanding the demand of the plaintiffs' solicitors that there shall be first deducted, and allowed to the latter, the amount which they allege to be due to them as compensation for their professional services, and for disbursements made by them in and about the prosecution of this cause, and in the production of the fund in controversy. This is the whole matter, and every point which is material to its decision may be conveniently treated with reference to two questions, viz.: (1) Would the plaintiffs' solicitors, if the money had come to their hands, have had the right to deduct and retain the amount claimed by them, as against the plaintiffs themselves? (2) If they would, then have Walkinshaw & Voigt established a title which operates to defeat that right of the solicitors?

1. The broad proposition primarily suggested by the first of these questions does not admit of contention. That counsel may rightfully withhold, in satisfaction of their proper charges, money of the client collected in the proceeding to which those charges pertain, is indubitable. In *Read v. Dupper*, 6 Term R. 361, this right was held to extend to a judgment recovered, though not collected, and was enforced against a defendant's attorney who, after notice from the plaintiff's attorney not to do so until the bill of the latter had been first satisfied, paid the debt and costs to the plaintiff himself. Lord Kenyon there said:

"The principle by which this application is to be decided was settled long ago, viz. that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained."

The principle thus enunciated has now been established for about a century longer than when Lord Kenyon referred to it as having been settled long ago, and is at this day so fully recognized as not to be open to question. The only difficulty upon this branch of the subject is as to the amount of the charge which counsel have made for their fees in this case. They demand one-third of the sum recovered, and in an ordinary case this would, beyond doubt, be excessive. But this is not an ordinary case. The plaintiffs have, from the commencement, been represented by three counsel (Wilson & Wallis being treated as one), and there is no ground to support the contention that so many counsel were not needed. The firm mentioned (as then constituted) was first employed. Its members advised that the others (Mr. Gray and Mr. Bayard, and subsequently Mr. Spruance, in substitution for Mr. Bayard) should be retained, and there is not the slightest reason to doubt the wisdom of this advice, or to suspect that it was not given in absolute good faith. At all events it was accepted, and the additional counsel gave their services to the plaintiffs with their full knowledge and approval.

There is no standard by which the compensation of counsel can be properly and definitely determined as to amount. The question, when presented at this time, must be decided upon considerations as vague and indefinite as when it was said in the *Mirror* (chapter 2, § 5) that "four things are to be regarded: (1) The greatness of the cause; (2) the pains of the serjeant; (3) his worth, as his learning, eloquence, and gift; (4) the usage of the court." With respect to the first three of these, several pertinent things may safely be affirmed with regard to this cause. It was an important and a doubtful one. The claim which it was instituted to recover had already been asserted in another jurisdiction without success. The plaintiffs were discouraged, and had but little hope of a favorable result. The suit was brought upon the advice of counsel, based upon their better apprehension that it might be maintained. They conducted it with care and skill, and secured a decree. In the brief submitted on behalf of Walkinshaw & Voigt, they are referred to, and we think with justice, as "eminent counsel," and two of them are well known to the court as lawyers of the highest standing,—one of them having been engaged in practice at this bar for nearly 40 years, and the other for at least 30 years. As to the importance of the cause, the worth of the counsel, and the ability and usefulness with which they have served their clients in this suit, nothing more need be said. We come now to the "usage of the court," and with reference to this we have already said that the amount charged is greater than, under ordinary circumstances, could be sanctioned. The justification of this charge, if it can be justified, must be found in the peculiar circumstances of this case. It is not practicable to discuss all the evidence submitted, and arguments advanced, in relation to the understanding between counsel and clients as to the compensation of the former. It must suffice to say that we have reached the conclusion that it was agreed that, beyond the sum of \$2,000, which the clients undertook to provide, in any event, for payment of charges and expenses, including retaining fees amounting to \$870, the plaintiffs were to pay nothing for services or for disbursements, except from and out of the sum (if any) realized from the litigation; and that, in consideration of counsel undertaking and prosecuting the case upon these terms, they would, if successful, be permitted to retain for their fees a liberal proportion of the sum recovered. It is insisted that a letter which was written by Messrs. Wilson & Wallis to Mr. Frink is inconsistent with this view of the understanding between them. That letter was written after decree in this court, and pending the appeal to the supreme court. It contains this statement: "We also think it not unreasonable, under the circumstances, to ask you for a payment, say \$2,000, on account of our services in the litigation." This was not a demand made as of right, but a request submitted as "reasonable under the circumstances;" and the circumstances mentioned at the beginning of the same letter are that some years would probably elapse "before any of the fruits of that litigation can be gathered." A decree had been obtained, but the fund from which counsel were to be paid was not likely to be realized for some time, and so they said that they thought it

not unreasonable to ask for a payment "on account" at that stage. They had no right to insist upon this request, and they do not appear to have urged it any further. It was certainly not complied with. Nothing was paid in response to it, and the services of counsel were continued. We are satisfied that from beginning to end the case was conducted in reliance upon the arrangement we have stated, and which was originally made by Mr. Frink and Mr. Wilson, and was, through the latter, in pursuance of his authority to employ additional counsel, extended to Mr. Gray and to Mr. Spruance, who accepted their respective retainers subject thereto. The precise sum to be applied to the payment of counsel in case of success was not agreed upon, and if the court were called upon to fix what would be a proper amount, without the aid of more direct evidence, it would be compelled to do so with reference merely to this understanding of the parties and the other pertinent circumstances; but, fortunately, we are not required to determine the question upon so unsatisfactory a presentation of it. Four witnesses have been examined as experts on behalf of the solicitors, and they agree in their testimony. They are William G. Wilson, Hamilton Wallis, George Gray, and William C. Spruance. The testimony of the latter was, in part, as follows:

"In view of all the circumstances connected with this case, as testified to by me, and as disclosed by the printed records and briefs in this cause, the length of time engaged, the number and difficulty of the questions presented, the difficulty of obtaining the full facts of the case, and the fact that the compensation of counsel was agreed at the start that it should depend upon the result, I consider that a third would be a very moderate and reasonable compensation for their services, * * * one-third of the recovery and interest."

It appears from the examiner's notes that, after the proceedings before him had been closed for general purposes, an adjournment for several days was had, to afford opportunity for adducing evidence "as to the value of the services of counsel and solicitors for the complainants;" but, though this was followed by several meetings, not a witness was called on behalf of Walkinshaw & Voigt to testify as to the value of the services in question. In brief, the expert testimony is all in favor of the solicitors, and we see no reason for disregarding it. It does not appear to be unreasonable in itself. It is wholly uncontradicted, and the character of the witnesses is unimpeached. It is true that they are interested in the result, but this alone would not justify us in refusing them credit. They were peculiarly well informed with respect to the particular subject, and they are officers of this court, sworn, not only to testify truly, but also to the observance of all due fidelity, as well to the court as to the client, and nothing has been shown which would warrant the imputation that they have been unfaithful to these sacred obligations. We are of opinion that, upon the facts appearing in this case, the solicitors of the plaintiffs would, as against the latter, be entitled to retain one-third of the amount of the decree and interest, in payment for their services, and, in addition thereto, the amount of the disbursements properly made by them in the prosecution of this suit.

2. Assuming, then, that the charge made by these solicitors is a

reasonable and proper one, and that, as against the plaintiffs, they would have a right to insist upon its payment, as well as their disbursements, out of the fund in court, we pass now to the consideration of the claim of Walkinshaw & Voigt to the whole amount collected under the decree, without satisfying the legal demands of those by whose industry, and to a considerable extent at whose expense, that decree was obtained. This claim is founded upon three instruments of writing, all of which purport to have been made after the suit had been commenced, and which bear date, respectively, as of April 16, 1888, July 3, 1890, and November 8, 1890. It is not necessary to add to the length of this opinion by referring to these several writings in detail. It is sufficient to state that Walkinshaw & Voigt insist that they constitute a valid assignment of the decree in this case; and, though this is strenuously denied by the solicitors of the plaintiffs, we do not deem it requisite to pass upon the subject. The plaintiffs themselves seem to admit that a valid assignment was made, and, in view of the fact that our conclusion upon the only matter with which we are now concerned is not at all dependent upon the correctness of this admission, it is not desirable that we should question it at the instance of the solicitors. For the present purpose, therefore, let it be conceded that Walkinshaw & Voigt are the owners of the decree, but subject to the question as to whether their title is paramount to the right of the plaintiffs' solicitors to be paid, from its proceeds, their fees earned, and expenses incurred, in obtaining, maintaining, and collecting it. The many cases cited upon this point have been examined with attention and interest, but any extended review of them would be tedious and redundant. Taken together, they clearly establish that the right of counsel to which we have referred cannot be extinguished by assignment of the judgment or decree, made without their acquiescence. This rule is, in most of the cases, based upon the ground that an attorney has a lien upon a judgment recovered by him for his proper charges with respect to it, and in others an equitable assignment in his favor is asserted, while in some it is said that, in addition to, or independently of, either of these aspects of the subject, the court owes to its officers the duty of protecting them against deprivation of their just reward and needful outlays, by whomsoever attempted. But, upon whatever theory it should be rested, there is no doubt whatever that the rule exists, and that, as was said by Mr. Justice Bradley in *Re Paschal*, 10 Wall. 483, it prevails, generally, in this country. *Railroad Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387; *Claffin v. Bennett*, 51 Fed. 694; affirmed in circuit court of appeals, sub nom. *Blair v. Harrison*, 6 C. C. A. 326, 57 Fed. 257. It is enforced in the state of New York, where the solicitors in this case were, in the first instance, employed. *Rooney v. Railroad Co.*, 18 N. Y. 368; *In re Knapp*, 85 N. Y. 284; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649. The industry of counsel has failed to bring to light any judicial decision of the point in the state of Delaware; but we have convincing and uncontradicted testimony that the rule in question is recognized as existing by the bar of that state, and we are quite disposed to believe that, if asserted before its courts, it would be

maintained by them. It is, however, at least very doubtful whether the law of that state, even if certainly known, should be accepted as determinate of this matter, and certainly, in the absence of such knowledge, we must, so far as its law is concerned, be content to assume that it does not differ from that which generally prevails; and, according to this general rule, we are of opinion that the solicitors of the plaintiffs in this case have a lien on the fund recovered therein, and now in court, which lien has not been, and could not be, divested by the alleged assignments to Walkinshaw & Voigt, or by any of them. The instrument dated July 3, 1890, was filed in the office of the clerk of this court on September 3, 1890, after the final decree had been obtained and the appeal taken, and the one dated November 8, 1890, was, in like manner, filed on February 7, 1891; but we attach no importance to these acts. The solicitors of the plaintiffs were not informed and knew nothing of them at the time, nor until they were subsequently brought to their attention incidentally, and not by either the plaintiffs or their assignees. The only material fact in connection with the filing of these papers is that the solicitors did not, after they became aware of their existence, in any manner agree or admit that their lien was, or could be, affected by them. It is true that, while the appeal was pending, they acquired knowledge of one of these papers and its contents, but this cast no duty upon them. It was not incumbent upon them to notify their rights to Walkinshaw & Voigt, who already knew, of course, that counsel were giving, and had given, their services to the cause. Nor, if this had been otherwise, would such notice have advantaged the assignees, inasmuch as such title as they now have they had already accepted, and with or without special notice, subject to the vested rights of the solicitors? On the other hand, Walkinshaw & Voigt never at any time communicated with the counsel who had professional charge of the case in which they had, as they claim, become solely interested. The earliest document which they set up, though dated April 16, 1888, was never disclosed until it was produced before the examiner in this proceeding, on October 23, 1893; and counsel were allowed to labor in the cause from that time until the fruits of the litigation were attained, without any intimation of the present claimants' interest therein, other than such as might, perchance, be derived from an examination of the records of the court, after the decree had been obtained. Nothing has been done or omitted by these solicitors to forfeit or waive their right of priority, and nothing which the plaintiffs or their assignees have done can avail to defeat or evade it. Plaintiffs' solicitors may prepare, and, after five days' notice thereof to counsel for Walkinshaw & Voigt, shall submit to a judge of the court for settlement, a decree awarding and distributing the fund in court as follows: (1) To the payment of the costs of this proceeding; (2) to the counsel of the plaintiffs a sum equal to one-third of the amount of the decree and interest, as compensation for their services in this suit, and also such further sum as, after allowance of proper credits, will reimburse the expenses incurred and paid by them therein, exclusive, however, of any payments, other than for taxable costs, made in the present pro-

ceeding; (3) the balance to Walkinshaw & Voigt, as assignees of the decree.

(March 6, 1894.)

WALES, District Judge. I fully concur in the opinion of Judge DALLAS, and I will add only a word or two in relation to some of the evidence in the case.

1. As to the agreement for the compensation of the plaintiffs' solicitors. Mr. Frink denied the existence of any agreement on the subject, but his denial is overborne by the testimony of Mr. Wilson, and is inconsistent with his own subsequent admission that he had, at the outset, proposed to Wilson & Wallis that they should begin and carry on the suit at their own cost, and receive for their compensation 50 per cent. of whatever amount might be recovered. This proposition having been declined, the agreement, testified to by Mr. Wilson, that the estate of C. B. Snyder should advance \$2,000 for costs and disbursements, and that the compensation of the solicitors should depend wholly on the successful result of the suit, naturally and reasonably followed. If the decree should be favorable, they were to have a liberal share of the proceeds; if unfavorable, they would receive nothing. In compliance with this arrangement, Mr. Frink did furnish a few hundred dollars, which were expended in retaining local counsel in Delaware, taking testimony, etc.; but he has not, up to this day, advanced more than \$950, leaving his solicitors out of pocket for a considerable sum expended by them in and about the suit.

2. Mr. Frink's recollection is also at fault as to what occurred in the interview between him and Mr. Wilson after the discovery by the solicitors of the first assignment, of July 3, 1890. Mr. Wilson testified that Mr. Frink gave him the assurance that "we need not feel any concern about the assignment, because the persons who had it were fully aware of our connection with the litigation, and expected us to go on and carry through the case, and that the assignees' interest was entirely subordinate to our claim; that the debt of Walkinshaw & Voigt was only \$50,000, and would not interfere with our claim." Mr. Frink denied that he had made this statement; but he must have made representations which were sufficient to allay the apprehensions of the solicitors, and inspire them with the belief that no attempt would be made to deprive them of a fair share of the amount of the decree, for they continued to render their professional services in the cause down to the final argument in the supreme court. Their confidence in Mr. Frink's assurance remained unbroken until after the mandate of the supreme court had been filed, when for the first time they heard of the second assignment, dated November 8, 1890, which practically absorbed almost the whole decree.

3. Again, there was the secret agreement between the plaintiffs and Walkinshaw & Voigt, dated April 16, 1888, by which the former agreed to assign the decree, if obtained, to the latter, to cover past and future advances to the firm of C. B. Snyder & Co., this last-named firm being composed of Mr. Frink and the widow and

daughters of C. B. Snyder, deceased. The concealment by Mr. Frink of this agreement, and of the assignments, from the solicitors, and his defective memory in reference to other transactions, prevent me from placing much, if any, reliance on his testimony. His intention appears to have been to play into the hands of Walkinshaw & Voigt, and to help them to pay off their advances to C. B. Snyder & Co. out of the decree, leaving the remainder, if any there should be, to the solicitors. His conduct throughout indicated bad faith towards the latter.

4. The counsel for the assignees contended that they were in the position of purchasers for a valuable consideration, without notice of the attorney's lien. But this does not satisfactorily appear. When they took the assignments they knew that the estate of C. B. Snyder was insolvent, and that Mr. Frink, individually, was unable to pay counsel fees, and they were thus put on inquiry as to the claims of the solicitors, of whose connection with the cause they had been informed by Mr. Frink, and at least had reason to suspect that there was no other source for the payment of those fees than a portion of the proceeds of the decree. But the want of actual notice to the assignees, as is conclusively demonstrated in the opinion of Judge DALLAS, would not enable them to take precedence of the attorney's lien. The proportion of the fund awarded to the solicitors is not excessive, when all the circumstances of the case are considered. They had declined to accept the offer of one-half of the recovery, less actual costs and expenses, and now ask for only one-third, for which they have labored and waited for over 10 years, and to which they are fairly entitled.

DILLINGHAM v. HAWK.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 149.

JUDGMENT AGAINST RECEIVER—OPERATION AND EFFECT.

Under Act Cong. March 3, 1887, which declares that every receiver appointed by a federal court may be sued without previous leave of that court, but that "such suits shall be subject to the general equity jurisdiction of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice," a judgment rendered against such a receiver by a state court in an action at law is conclusive as to the existence and amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court appointing the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Petition by Leona P. Hawk against Charles Dillingham, receiver of the Houston & Texas Central Railway Company, to have a judgment recovered by her against such receiver paid out of the estate in his hands. There was a decree granting the prayer of the petition. The receiver appeals.

F. M. Etheridge, for appellant.
R. S. Neblett, for appellee.

Before PARDEE, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. On October 20, 1890, appellee recovered in the district court of Navarro county, Tex., against appellant, as receiver of the Houston & Texas Central Railway Company, judgment for \$2,500, with interest and costs. On February 3, 1891, appellee filed, in consolidated cause No. 198, entitled "Nelson S. Easton and James Rintoul, Trustees, et al., vs. The Houston & Texas Central Railway Company et al.," then pending in the circuit court of the United States for the eastern district of Texas, wherein appellant had been appointed as such receiver, her petition of intervention, based upon the aforesaid judgment rendered in her favor by the said district court of Navarro county, Tex., praying that said receiver be ordered to pay the same. Said petition was on February 12, 1891, referred to the special master for examination and report. On January 14, 1892, the special master reported that the said district court of Navarro county was without jurisdiction to render the aforesaid judgment, and that same was void. To such report appellee excepted—

"Because it appears from the records of this cause, and from the report of the master, that intervenor's cause of action accrued against defendant after the passage of the act of congress of March 3, 1887, and that she instituted her suit in the district court of Navarro county, Tex., and recovered the judgment she now seeks to enforce October 20, 1890, which judgment has never been reversed nor appealed from, and is in full force and effect, and neither the master nor this court can now inquire into the facts on which such judgment was rendered."

The said circuit court sustained appellee's said exception, holding that the aforesaid judgment declared upon by her was final and conclusive, and decreed accordingly. Appellant's assignments of error are as follows:

"(1) The trial court erred in holding that the judgment obtained by intervenor in the district court of Navarro county, Tex., and made the basis of her intervention herein, was conclusive, and in sustaining the exceptions of intervenor to the report of the master, which set forth all the testimony adduced upon the hearing before the master. (2) The trial court erred in rendering judgment for intervenor, and not rendering judgment in favor of defendant, in that intervenor's judgment, which formed the basis of her intervention, was not conclusive, but only *prima facie*, and the facts adduced before, and reported by, the master, showed that such judgment was inequitable, unconscionable, against and without evidence to support it, and the facts so reported by the master imperatively demanded judgment for the defendant."

The sole question presented for our decision is raised by appellant's first assignment of error. That question is whether the judgment obtained by the appellee in the state court was conclusive upon the federal court, or only advisory to it. The contention of appellant is that all judgments obtained against a receiver in suits at law are but the trial of issues out of chancery, and are not conclusive on the court appointing the receiver. We cannot agree

with this contention. The trial of an issue out of chancery is where the chancery court directs an issue to be tried by a jury. "It is intended to inform the conscience of the chancellor," or to aid him where there is great difficulty in deciding upon the facts of a case. The order of a chancellor directing the issue at law is discretionary. In such case the verdict of the jury is only advisory, and never conclusive upon the court. The court renders the decree, but in doing so may disregard the finding of the jury, and render a decree contrary to it. 2 Daniell, Ch. Pr. p. 1071; 1 Fost. Fed. Pr. § 305; Watt v. Starke, 101 U. S. 247; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298. As said by Mr. Greenleaf in his work on Evidence, in section 262, vol. 3:

"It is only where no right of the party is recognized by law, and where the resort to a jury is left to the discretion of the judge, in aid of his own judgment, that he is at liberty to disregard the finding of the jury, or to determine the facts for himself."

Such is not this case. The court whose receiver appellant was did not direct the issue on which appellee's judgment was obtained to be tried by a jury, and did not render the judgment thereon. The suit in which the judgment was obtained was not instituted by leave of the court, but was brought as a matter of right,—a right conferred by the act of congress of March 3, 1887, which provides that every receiver appointed by any court of the United States may be sued without the previous leave of the court. Prior to that act of congress the rule was that a receiver could not be sued without leave of the court of equity which appointed him. That act abrogates the old rule. The court now has no discretion to say when its receiver may be sued. The act of congress gives the right without condition or qualification. It gives the right to sue the receiver in any court having jurisdiction of the subject-matter and of the parties. The counsel for appellant concedes that the act referred to gave appellee "an absolute, unqualified, and indisputable right of trial by jury, and in the forum of her own selection." She selected the state court, and the proceeding therein was on a legal claim, and was purely a common-law proceeding. It had no element of equitable jurisdiction in it. The suit was to recover damages for a personal injury caused by the negligence of the receiver, or his agents, in operating a railroad as a common carrier. On such a cause of action a receiver can be sued in any court of competent jurisdiction. Central Trust Co. v. St. Louis, A. & T. Ry. Co., 40 Fed. 426, 41 Fed. 551; Dillingham v. Russell, 73 Tex. 50, 11 S. W. 139. If, then, the right of trial by jury was given by the act of congress, it was given subject to the constitutional provision that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Const. U. S. Amend. 7. In Parsons v. Bedford, 3 Pet. 446, the court says, in speaking of this provision of the constitution:

"This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. * * * The only modes known to the common law, to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly

returnable, or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings."

In the case of *Justices v. Murray*, 9 Wall. 274, the supreme court says that the provision in the seventh amendment of the constitution of the United States which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law" applies to the facts tried by a jury in a cause in a state court. The claim on which appellee's judgment was obtained was a legal, not an equitable, demand. It was adjudicated in the state court of Texas, wherein appellant, being duly served with process, appeared as defendant, and contested the same. The federal court having no appellate or supervisory jurisdiction over such proceedings, it cannot re-examine the facts constituting the cause of action on which the judgment was rendered, or annul, vacate, or in any manner modify, the judgment. *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, supra.

But, it is said that, while the act of congress grants leave to sue, it expressly provides that "such suits shall be subject to the general equity jurisdiction of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice;" and it is contended that this provision of the act precludes any departure from the established chancery practice. It is true that the act does contain such provision. But considering it in the light of, and as in harmony with, the seventh amendment of the constitution of the United States, we must construe it as applying only to suits which seek to interfere with the receiver's possession of property, and to process the execution of which would have that effect; any process, whether for the recovery of such property, or for the enforcement and collection of a judgment out of it. These shall be subject to the control of the court appointing the receiver, so far as the ends of justice may require. The time when, and the manner in which, a judgment against the receiver shall be paid; the adjustment of equities between all persons having claims against the property in his hands; the just distribution of the funds according to the rights of the several parties interested in it,—all must necessarily be under the control of the court having custody of the property by its receiver, and shall be subject to its general equity jurisdiction. *Dillingham v. Russell*, supra. This, we think, is the true meaning of the statute referred to. We can perceive no other reasonable interpretation of it. Any other interpretation would impute to congress a very useless act. We agree with the learned judge who pronounced the opinion in the case of *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, supra, when he says that "the right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this [federal] court," to which it is presented as a claim against the fund or property in the hands of the receiver. The judgment of the state court is conclusive as to the existence and amount of the appellee's claim, but the time and manner of its payment must be controlled by the court appointing the receiver. A judgment may be complete and perfect, and have full effect, independent of the right to issue

execution. *Mills v. Duryee*, 7 Cranch, 481. The decree of the circuit court is in accordance with the views expressed in this opinion, and it is affirmed.

PARDEE, Circuit Judge. I concur with the conclusion reached, but not with all the reasoning of the majority.

MASONIC BEN. ASS'N OF CENTRAL ILLINOIS v. LYMAN.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

No. 79.

1. TRIAL—EXCEPTIONS—REVIEW ON APPEAL.

A ruling that a certain document is admissible in evidence is not assignable as error where the record does not show that the document was actually read to the jury.

2. SAME—BILL OF EXCEPTIONS.

The exclusion of documentary evidence is not assignable as error where the excluded documents are not set forth in the bill of exceptions.

3. SAME—INSTRUCTIONS.

An exception "to the giving of each and all" of the instructions is unavailing where any part of the charge states a correct proposition of law, under a rule of court that "the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts."

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Assumpsit by Rachael S. Lyman against the Masonic Benevolent Association of Central Illinois. Plaintiff obtained judgment. Defendant brings error.

This was an action by the defendant in error against the plaintiff in error upon a certificate of membership issued by the latter to Joseph Lyman for the benefit of his wife, who is the defendant in error. Omitting the formal parts, the certificate is as follows: "This certificate of membership witnesseth, that the Masonic Benevolent Association of Central Illinois, in consideration of the representations and warranties made to it in the application for this membership, which is hereby made a part of this, and the sum of six dollars paid by Joseph Lyman, of Council Bluffs, Iowa, and the sum of one and 25-100 dollars to be paid within fifteen days after due notice has been given of the death of a member of this association, according to the by-laws, does promise and agree to and with Joseph Lyman to pay, or cause to be paid, to Rachael S. Lyman, his wife, if living; if not, to Aaron J. Lyman, his son, if alive; if not, then to the legal heirs of the survivor of said beneficiaries,—within ninety days after satisfactory proof of the death of the said Joseph Lyman, and proof of interest, shall be received at the office of this association, and shall have been approved by the directors, the amount of ninety cents for each whole member, forty-five cents for each half member, and twenty-five cents for each quarter member, of the association at the time of death: provided, however, and it is expressly understood and agreed, that the benefit herein provided for shall never exceed the sum of four thousand dollars." "It is also agreed that if the said Joseph Lyman shall not pay the assessment hereinbefore named on or before the time mentioned for the payment thereof, or in case he shall, without the consent of this association previously obtained in writing, engage in any military or naval service whatsoever in time of war, rebellion, aerial voyages, the manufacture of highly explosive or inflammable substances, or as a freight brakeman on a railroad, or if any of the representations made in the application

for this membership is untrue, then this certificate shall be null, void, and of no effect. It is expressly understood and agreed that no suit at law or in equity can be maintained upon this certificate for the recovery of any claim by virtue thereof unless the same shall have been actually begun within twelve months from the date of the death of the member to whom it was issued, any statute of limitations to the contrary notwithstanding." Section 1 of article 3 of the by-laws is the only one material to any question sought to be raised by the assignment of errors. It is as follows: "Section 1. Upon the death of a member of the association, the secretary shall send by mail to the postoffice address of each member of the association a notice giving the name of the deceased member, and the postoffice address at the time of death, and the assessment due from each member to whom such notice is sent, or the secretary may employ a suitable person, in each town or city where the members reside, who shall act for the secretary in serving such notices either personally or by mail, which notice so sent or served shall be deemed and taken to be lawful and sufficient notice for the payment of the assessment so called for and required; and any member failing to pay such assessment within fifteen days after such notice has been served upon him shall forfeit his membership in the association, and all benefit therefrom."

The plaintiff in error pleaded the general issue, and it was stipulated that all defenses might be proved thereunder which would have been provable under any plea which might have been pleaded. The only defense sought to be made on the trial was that the certificate of membership had become forfeited by the failure of Joseph Lyman to pay an assessment of \$6.25 claimed to have been made December 1, 1889, of which he had reasonable notice in writing. Two questions of fact were sharply contested: (1) Whether Joseph Lyman had received notice of the assessment; (2) whether the board of directors of the plaintiff in error had made an assessment before the notice was sent. John F. Scott, the secretary of the plaintiff in error, was called and examined as a witness in its behalf, and gave evidence tending to support its defense. On his cross-examination he testified that he knew that a notice had been served on the association or its counsel to produce on the trial certain record books and papers in his custody and control as such secretary; and he admitted that, on the suggestion of counsel, he had failed to produce them. The defendant in error offered in evidence the notice so served, to which counsel for the plaintiff in error objected. The objection was overruled, and an exception reserved. The bill of exceptions does not show that the notice was read in evidence to the jury. The plaintiff in error, to maintain its defense, offered in evidence a number of letters written by Joseph Lyman, which it was asserted contained admissions that he had notice of the assessment, and had failed to pay it. Upon objection the court excluded the letters, and an exception was duly reserved. The bill of exceptions does not set forth any of the letters so offered or excluded. The plaintiff in error also offered in evidence another letter written by Joseph Lyman, said to inclose an application by him for reinstatement, which was excluded, and an exception reserved. Neither this letter nor the inclosed application is set forth in the bill of exceptions. The court, at the conclusion of the argument, gave an oral charge to the jury upon all the legal questions involved in the case. The charge covers about two pages of the printed record. At the conclusion of the charge the plaintiff in error reserved its exception thereto, as follows: "To the giving of each and all of which instructions the defendant, by its counsel, excepted." The plaintiff in error has copied the entire charge in its assignment of errors, and at its conclusion is the following: "We assign error as to that part of the instructions holding that each member shall be assessed, and that such assessment should be by the board of directors, and that the board of directors should ascertain and determine that certain members of the association had died, thereupon assessing a certain amount to be due on said death losses. And as to that part of the instructions holding that if they (the jury) believe, from the evidence, that a record was kept, they should not consider oral evidence, and, as to the rule of damages, we insist that the word 'assessment' is synonymous with the word 'installment,' and that it was a sum certain, due upon the death of a member, and that there was no evidence whatever

of any record upon which to base that part of the instruction. As to the rule of damages, we insist that the amount to be paid, in all cases, depends upon the amount actually paid in, and not upon the membership."

Horace S. Clark and James A. Connelly, for plaintiff in error.
Samuel P. Wheeler and Clark Varnum, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge, after having made the foregoing statement, delivered the opinion of the court.

The first assignment of error is that the court erred in ruling that the notice to produce record books and papers was admissible in evidence. This assignment presents no available error, because the bill of exceptions fails to show that the ruling was followed up by the introduction of the notice in evidence. This court will not indulge the presumption, because the court held the notice admissible, that the defendant in error read it in evidence to the jury, since the record fails to show that such was the fact. Error, to be available, must be affirmatively shown by the record; and, in the absence of such showing, every intendment will be indulged in support of the judgment. Nor does the ruling of the court in excluding the several letters offered in evidence present any available error. None of these letters is set forth in the bill of exceptions. To enable this court to review the action of the court below, it is necessary that the excluded evidence should be incorporated in the bill of exceptions; otherwise, the court has no means of forming a judgment in regard to the propriety of the alleged erroneous ruling.

The remaining assignments are predicated upon alleged errors in the instructions of the court to the jury. These instructions fill nearly two pages of the printed record. The exception of the plaintiff in error is as follows: "To the giving of each and all of which instructions the defendant, by its counsel, excepted." An exception to "each and all" of the instructions gave no information to the court in regard to what was in the mind of the excepting party, and therefore afforded no opportunity to correct any error committed by it. Every allegation of the declaration was traversed by a plea of the general issue, and the instructions by the court contained a number of distinct propositions of law in addition to those pointed out as erroneous. It is firmly settled that a general exception to an entire charge, which embraces several propositions of law, is unavailing, if any part of the charge states the law correctly. Several propositions of law relevant to the facts in issue are correctly stated by the court in its charge. The whole charge is not substantially wrong, and therefore a general exception is unavailing for any purpose. *Holder v. U. S.*, 14 Sup. Ct. 10; *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 136; *Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731; *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. 53; *Burton v. Ferry Co.*, 114 U. S. 474, 476, 5 Sup. Ct. 960; *Railway Co. v. Jurey*, 111 U. S. 584, 596, 4 Sup. Ct. 566; *Cooper v. Schlesinger*, 111 U. S. 148, 151, 4 Sup. Ct. 360; *Lincoln v. Claffin*, 7 Wall. 132, 139; *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A.

551, 53 Fed. 312. The law on this subject, as settled by the uniform decisions of the supreme court, was embodied in a rule, and adopted for the government of the practice of this court, as follows:

"Rule 10. The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law and those only, shall be inserted in the bill of exceptions and allowed by the court." 12 Sup. Ct. vii.

It has been well said that:

"This rule was designed to put an end to the practice of allowing bills of exception like the one in this case. It matters not that the judge may be willing to consent to such a bill. He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the judge's personal protection or benefit, but for the protection of suitors, and the advancement of justice. It is the duty of the party excepting to call the attention of the court distinctly to the portions of the charge he excepts to, and this must be done before the case is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so." Price v. Pankhurst, supra.

The assignment of errors improperly sets out the entire charge. The eleventh rule of this court (12 Sup. Ct. vii.) provides, when "the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis;" and "when this is not done counsel will not be heard except at the request of the court, and error not assigned according to this rule will be disregarded, but this court, at its option, may notice a plain error not assigned."

This case is not one in which the court ought, upon its own motion, to notice the alleged error in the charge, even if it was thought to be a plain one. A manifest error, saved by a proper exception, might perhaps be noticed when not properly assigned; but to notice errors which have neither been saved by a proper exception, nor properly assigned, would be a departure from sound principle, and an open disregard of the foregoing rules. It would leave the rights of suitors to be determined by the mere discretion of the court, unrestrained by any fixed principles for its control or guidance. Hardship may result in individual cases from the enforcement of these rules, but they manifestly tend to the orderly administration of justice, and a disregard of them would be productive of more injustice than is likely to result from their enforcement. For these reasons we must decline to examine the alleged errors in the charge. There is no available error presented in the record, and the judgment must be affirmed, at the cost of the plaintiff in error, and it is so ordered.

MISSOURI, K. & T. RY. CO. v. RUSSELL.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1894.)

No. 360.

BILL OF EXCEPTIONS—TIME OF SETTLING—VACATION.

Inasmuch as a bill of exceptions cannot be allowed after the term at which the judgment was entered, except by virtue of an order entered at

that term, or by standing rule of court, in the absence of such a rule the court has no power in vacation to enlarge the time fixed for filing the bill of exceptions by an order entered during the term; and where no consent to such enlargement was given by defendant in error, a bill of exceptions so allowed is no part of the record, and cannot be considered on writ of error.

In Error to the United States Court in the Indian Territory.

This was an action brought by William R. Russell against the Missouri, Kansas & Texas Railway Company for killing stock belonging to the plaintiff. There was judgment for plaintiff in the court below, and defendant brings error.

Clifford L. Jackson, for plaintiff in error.

Henry L. Haynes, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. In this case the first question called to our attention by the arguments of counsel is whether the bill of exceptions was filed in time to become a part of the record. If this question is answered in the negative, in accordance with the contention of the defendant in error, then we cannot notice any of the rulings of the trial court which have been assigned for error. The record shows that a judgment was rendered against the plaintiff in error on the 21st day of April, 1893, at a regular term of the United States court in the Indian Territory held at South McAlester, in the second judicial division of said territory. Thereafter, on April 26, 1893, before the expiration of the term, an order was duly made and entered of record extending the time for filing a bill of exceptions for 30 days from that date. Before the expiration of the last-mentioned period, the term of court lapsed. Afterwards, on May 24, 1893, and again on June 22, 1893, orders were made under the hand and seal of the trial judge, extending the time for filing a bill of exceptions for a period of 30 days on each occasion. Also, on July 8, 1893, a further extension of time was granted until September 1, 1893. The three orders last mentioned appear to have been ex parte orders, which were obtained from the judge in vacation, without notice to the defendant in error, and without his consent. The bill of exceptions was finally allowed, signed, and filed on the 10th of August, 1893. The question whether a bill of exceptions can be allowed after the lapse of the term at which the judgment is rendered has been frequently considered by the federal courts, and the rule of practice in that regard is now well defined. In *Muller v. Ehlers*, 91 U. S. 249, it was decided that, save under very extraordinary circumstances, a bill of exceptions signed after the term at which the judgment is rendered, without the consent of parties, or an express order of the court to that effect, made during the term, cannot be considered as a part of the record in the case. The general rule, as last stated, was reaffirmed in *Jones v. Sewing Mach. Co.*, 131 U. S. Append. 150. It has since been held, in substance, in *Chateaugay, etc., Iron Co.*, Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, that a bill of

exceptions may be allowed and signed after the lapse of the term, if it is settled, signed, and filed in substantial conformity with a standing rule of the particular court regulating the time and manner in which bills of exceptions shall be presented and filed. It was further decided in *Davis v. Patrick*, 122 U. S. 133, 7 Sup. Ct. 1102, that if a bill of exceptions is seasonably submitted to the trial judge, and through his neglect or oversight the bill is not signed and filed until after the expiration of the term, it will not be stricken out. This court has also held that a bill of exceptions may be allowed at the term when a motion for a new trial is finally acted on, though it be a term subsequent to the one at which the judgment was entered, provided the motion for a new trial was duly filed by leave at the trial term, and the hearing thereof was continued or postponed to the succeeding term. *Woods v. Lindvall*, 4 U. S. App. 45, 1 C. C. A. 34, 48 Fed. 73. The latest declaration on the subject in hand is to be found in *Bank v. Eldred*, 143 U. S. 293, 298, 12 Sup. Ct. 450, where Mr. Justice Gray summarizes the law in the following language:

"By the uniform course of decision no exceptions to rulings at a trial can be considered * * * unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of the parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, * * * all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

See, also, *U. S. v. Jones*, 149 U. S. 262, 13 Sup. Ct. 840; *Hume v. Bowie*, 148 U. S. 245, 253, 13 Sup. Ct. 582; *Railway Co. v. Hyde*, 5 C. C. A. 461, 56 Fed. 188.

In view of the foregoing decisions, we think it manifest that the bill of exceptions in the present case did not become a part of the record, and that it must be ignored. We are of the opinion that the trial judge, in the absence of any standing rule of court on the subject, had no power in vacation to enlarge the time for filing a bill of exceptions which had been fixed by an order of court made and entered of record in term time; and, as no consent was given by the defendant in error that the time might be thus enlarged, the orders made in vacation cannot operate against him as an estoppel. The result is that, for want of any bill of exceptions covering the rulings complained of in the assignment of errors, the judgment of the court below must be, and the same is hereby, affirmed.

AMERICAN SUGAR-REFINING CO. v. JOHNSON.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1893.)

No. 153.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION—JURISDICTIONAL QUESTIONS.

When the whole case is taken to the circuit court of appeals, that court has jurisdiction to pass upon the question of jurisdiction in the

court below (Judiciary Act March 3, 1891, §§ 5, 6). *McLish v. Roff*, 12 Sup. Ct. 118, 141 U. S. 661, followed.

2. **FEDERAL JURISDICTION—CITIZENSHIP OF CORPORATIONS.**

An averment, in a suit brought by a citizen of Louisiana, that defendant is "a corporation domiciled and doing business in this city [New Orleans], and a citizen of New Jersey," is not equivalent to an averment that it is a corporation organized under the laws of New Jersey, and hence is insufficient to support federal jurisdiction.

3. **DEATH BY WRONGFUL ACT—SURVIVORSHIP—NEGLIGENCE OF SERVANTS.**

The Louisiana statute—Civ. Code, art. 2315 (2294)—declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," and also provides that the action shall survive, and that damages may be recovered when death results. *Held*, that the statute includes acts of omission as well as commission, and applies in a case in which death results from the negligence of servants for which the master is responsible.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action brought by Mrs. Otto Johnson, individually and as tutrix of her minor children, Anthony, Celia, and Anna Johnson, against the American Sugar-Refining Company, to recover damage for injuries to her husband, Otto Johnson, from which he died. There was a verdict for plaintiff in the sum of \$10,000, from which she remitted \$2,500. Judgment was entered for the remainder, and defendant sued out this writ of error.

The petition of the plaintiff in the lower court, defendant in error here, suing individually and as tutrix of her minor children and as a citizen of Louisiana, averred that the "American Sugar-Refining Company, a corporation domiciled and doing business in this city [meaning the city of New Orleans, La.], and a citizen of New Jersey, and found within the eastern district of Louisiana, of which George S. Eastwick is general manager," is indebted to petitioner in the sum of \$10,000 upon the following grounds: "That on and prior to the 20th day of June, 1892, your petitioner's husband, Otto Johnson, was employed by the said American Sugar-Refining Company as a laborer to work at their refinery situated in this city. That under said employment petitioner was employed to work in the fifth story of said refinery, and under said employment was required to watch and care for large tanks used for the purpose of receiving sugar that is pumped up through a large 18-inch pipe running from said fifth story to the first floor of the said refinery. That, after said pumping of sugar ceases and the tanks having sufficient, the said 18-inch pipe is cleaned by the engineer on the first floor by turning on a strong force of steam through said pipe, which forces the sugar out, and thoroughly cleans said pipe; and, should any one be in close proximity to said pipe, he is liable to be scalded and killed. That said steam is always turned on immediately after the sugar pumping ceases. That on said date and at said place, without any warning or notice by the said defendant company or its agents or engineer in charge of the engine on the first floor to petitioner's husband and to the workmen on the top floor, where petitioner's husband was working, and in close proximity to the said pipe, his employment requiring him to be there, the steam was turned on with great force, although the pumping of sugar had long since ceased, and your petitioner's husband was badly scalded and burned, which caused him great bodily injury and pain, from the effects of which he died after great suffering; thus depriving your petitioner from his support and companionship and from earning a living for herself and four small children. That petitioner's husband was using due diligence and care on his part, and that the defendant company could have prevented the said disaster by the employment of a competent and trustworthy engineer, and by the use of proper appliances for the giving notice by the engineer to the occupants of the upper story, where your petitioner's husband was engaged, either by

messenger, bell, or speaking tube, which they neglected and failed to do. That it is the legal duty of the defendant company to maintain and employ competent foremen, workmen, and engineers to superintend, manage, and care for and direct their work, and thus prevent the disaster which occurred to your petitioner's husband, and which they failed to do. That petitioner's husband was lawfully compelled and directed to be in the place where he was injured, and had no notice or warning of the danger, and same was caused by gross neglect of duty on their part by not having the proper appliances, and competent, faithful, and trustworthy workmen and employees."

The defendant below excepted to this petition on the grounds that the alleged cause of action did not survive, and that the injury complained of was the result of the negligence of a fellow servant. The plaintiff below, under leave of the court, then undertook to amend by filing the following: "The supplemental and amended petition of Mrs. Otto Johnson, widow of Otto Johnson, individually and asatrix of her minor children, Anthony, Ce'a, and Anna Johnson, with respect shows: That in conformity with the order of the honorable judge presiding in the above-mentioned court, petitioners reiterate all the allegations of their original petition filed herein, except in so far as the same is altered by this amended petition, and allege further that the said Otto Johnson, husband and father of plaintiffs, was employed as a laborer by the said American Sugar-Refining Company to work at their refinery, situated in this city, and that under said employment he was caused to work in the fifth story of said refinery, and was required to watch and care for large tanks, used for the purpose of receiving sugar which was to be pumped up from the first floor into said tanks, which pumping was to be done by means of machinery operated by steam power, and which machinery was run by an engineer stationed on the ground floor of said refinery. That it is the custom and usage of said refinery that, immediately after the said tanks are sufficiently filled with sugar, warning is given to the occupants and workmen on the said fifth floor, where said tanks were situated, that the pipe which conveys the sugar to said tanks is blown out by injecting a strong force of steam, which warning prevents the occupants of said floor from being within close proximity of said pipe, their business requiring them otherwise to be engaged within close proximity to the said pipe. That it is necessary said pipe be cleaned by injecting a force of steam immediately after said pumping ceases, otherwise same would corrode and become clogged. That on the date mentioned, long after said pumping had ceased, and contrary to the custom and usage of said refinery, the said refinery, through the incompetent, irresponsible, and untrustworthy person employed by them as an engineer in charge of said machinery, and without any warning or notice whatsoever to your petitioner's said husband, Otto Johnson, who was engaged in his usual employment of storing the contents of said tanks, a strong force of steam was suddenly sent through said pipe, terribly burning and scalding petitioner's husband, said Otto Johnson; and from said burning and scalding the said Johnson, after great pain and suffering for some days, died. That your petitioner's said husband, at the time that he received the injuries as aforesaid, was engaged in his usual employment in said refinery, using due diligence and care on his part; and that by his death your petitioner and her said children were deprived of his support and companionship, and from earning a living for herself and her small children. Petitioner further avers that the said killing of her said husband was caused solely by the neglect and gross carelessness of the said American Sugar-Refining Company, and that they could have prevented the said disaster if they had used due diligence and care in the employment of a competent and trustworthy engineer, and by the use of proper appliances for the giving notice to the occupants of the upper story, where your petitioner's husband was engaged, either by messenger or bell or speaking tube, all of which they neglected and failed to do. Your petitioner alleges that by reason of the said carelessness and neglectful acts of the said American Sugar-Refining Company aforesaid, that she and her said children have been damaged, by reason of the pain and suffering her said husband endured, and by reason of the loss and deprivation to them of his care and support, in the full sum of ten thousand dollars (\$10,000.00)."

The defendant below again excepted as follows: "First. That said so-

called amended and supplemental petition does not conform to, but disregards, the order of the court directing an amendment. Second. Said so-called supplemental and amended petition is so vague, inconsistent, incoherent, and contradictory in its allegations that defendant cannot justly be called on to join issue thereon, nor can any issue be intelligently framed thereon for submission to a jury. And, if the foregoing exception be overruled, defendant further says: Third. That, as appears on the face of the so-called amended and supplemental petition, the said Otto Johnson died from the effects of the alleged accident; and under the law of Louisiana no right of action in the premises set forth in said petitions survived to plaintiff, individually or as tutrix of her minor children, nor to said children, nor by said law is there in the same premises any right of action by plaintiff, individually or as tutrix of her minor children, or by said children, for damages alleged to have been sustained by her or by them by the death of said Otto Johnson. Fourth. And, if this exception be overruled, defendant further says that, as appears on the face of said so-called amended and supplemental petition, plaintiff alleges that said Otto Johnson was injured and killed in the course of an employment the risk of which he assumed, and by his own carelessness, or by the act of a fellow servant, the risks of whose carelessness he, said Johnson, also assumed, or both, and that said petition states no cause of action against this defendant."

These exceptions were overruled, and the defendant below, reserving the benefit of the exceptions, answered in substance as follows: "Respondent admits that the deceased, Otto Johnson, was employed in the refinery of defendant in this city; but specially denies that said deceased was ever injured through any fault, carelessness, negligence, or want of care of respondent, its officers, agents, and employees, or any party or parties for whom it was or is in any manner responsible, as set forth in said petitions or otherwise. Respondent specially denies that the injuries complained of in said petitions were in any manner caused by, or the result of, the want of proper machinery and appliances in said refinery, or the employment of incompetent or untrustworthy engineers, foremen, or workmen, but avers, on the contrary, that the machinery and appliances in said refinery were proper and in good order, and the engineers and other parties were competent and trustworthy. Respondent further avers that, even if said deceased, Otto Johnson, was injured through any fault or negligence of respondent, its agents, or employees in the premises, or as stated in said petitions (which is specially denied), yet even in such case plaintiff cannot recover, because said deceased, Otto Johnson, was himself careless and neglectful in said premises, and by his negligence and fault contributed to the accident complained of, and its results. And respondent specially denies that said deceased, Otto Johnson, was, at the time of said accident, using due diligence and care on his part. Or [respondent avers] the said accident and results were caused by the negligence and fault of fellow servants of said deceased, engaged in a common employment. Respondent further avers that said deceased, Otto Johnson, was familiar with the appliances used in said refinery, and the manner in which the work was carried on, and he assumed all the risks of his employment. Respondent avers that it is in no manner indebted to or liable to plaintiff."

The cause was tried before a jury, and a verdict rendered for \$10,000. On a motion for a new trial, the plaintiff remitting \$2,500, judgment was rendered for \$7,500. The defendant below took its writ of error, and with it filed the following assignment of errors: "And now comes the defendant, the American Sugar-Refining Company, and assigns the following errors in the final judgment of this honorable court, rendered April 21, 1893, and signed April 22, 1893: (1) The court erred in entertaining jurisdiction of the said cause, and rendering said judgment; said court, on the face of the record, having no jurisdiction in the cause, and the averments of citizenship, whether of Otto Johnson, deceased, or of his children, or of this defendant, as stated in the petition, not being sufficient to give jurisdiction to the court, and there being no federal question in the cause. (2) Said court erred in overruling the first exception to the supplemental and amended petition, as well as to the original petition, filed herein on the 30th day of November, 1892, and in requiring the defendant to answer thereto; the so-

called amended and supplemental petition not conforming to, but disregarding, the order directing an amendment. (3) The said court erred in overruling the second exception filed herein on the 30th day of November, 1892, to the amended and supplemental petition, as well as to the original petition, and in requiring the defendant to answer thereto; the said supplemental and amended petition of the plaintiff, and the original petition as well, and the same, when taken together, being too vague, inconsistent, and contradictory in their allegations to demand an answer, or enable defendant to safely answer the same, and to go to trial thereon. (4) The said court erred in overruling the third exception filed in this cause on the 30th day of November, 1892, and requiring defendant to answer, it appearing on the face of said amended and supplemental petition, as well as the original petition, that said Otto Johnson died prior to the institution of this suit from the effects of the alleged accident; and under the law of Louisiana no right of action in the premises set forth in said petitions could survive to plaintiff individually or as tutrix of her minor children, nor to said children; nor by law is there in the said premises any right of action by plaintiff individually or as tutrix of her minor children, or by said children, for damages alleged to have been sustained by her or by them by the death of said Otto Johnson. (5) The said court erred in overruling the fourth exception filed herein November 30, 1892, it appearing on the face of the plaintiff's petitions that said Otto Johnson was injured and killed in the course of an employment the risk of which he assumed, by his own carelessness or the act of his fellow servant, the risk of whose carelessness he, the said Johnson, also assumed, or both; and the said petitions showed no cause of action against the defendant. And for these and other errors apparent on the face of the record the said defendant, applying for a writ of error, prays that the said final judgment may be reversed, and plaintiff's suit dismissed, and for costs and general relief."

W. W. Howe and S. S. Prentiss, for plaintiff in error.

B. R. Forman, Wynne Rogers, and J. H. Woolfson, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The record shows that the question of jurisdiction of the circuit court was not raised in the court below, and of course the jurisdiction is not certified as involved in the case. The first assignment of error raises the question in this court that the jurisdiction of the circuit court does not appear from the face of the record. The appellee, relying upon the textual provisions of section 5 of the judiciary act of 1891, which is to the effect that appeals or writs of error may be taken from the district courts or existing circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, and upon the terms of the sixth section, which restrict the jurisdiction of the circuit courts of appeal to cases other than those provided for in the fifth section, contends that this assignment of error cannot be considered in this court.

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This

question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Railway Co. v. Swan*, 111 U. S. 379-389, 4 Sup. Ct. 510.

In the case of *McLish v. Roff* the supreme court of the United States, in construing the fifth and sixth sections of the judiciary act of 1891, among other things, said:

"The true purpose of the act, as gathered from its context, is that the writ of error or the appeal may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court." 141 U. S. 661-668, 12 Sup. Ct. 118.

Relying upon the construction given in *McLish v. Roff*, the practice of this court has been, where an appeal or writ of error has been taken in the whole case, and the question of jurisdiction in the court below has been raised, to pass upon the question of jurisdiction as upon any other issue raised in the case. And accordingly, in *Telephone Co. v. Robinson*, 2 U. S. App. 148, 1 C. C. A. 91, 48 Fed. 769, which was a case in which the jurisdiction of the circuit court was not apparent of record, this court held that the jurisdiction of the circuit court must appear affirmatively in the record, citing *Insurance Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193; *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. 585; and also held that, "where the jurisdiction of the circuit court does not appear in the record, the appellate court will, on its own motion, notice the defect, and make disposition of the case accordingly;" and we then reversed the decree of the circuit court remanding the cause to the court below with instructions to remand to the state court from which it was removed. And in *Railway Co. v. Rogers*, 6 C. C. A. 403, 57 Fed. 378, and in *Tinsley v. Hoot*, 2 U. S. App. 548, 3 C. C. A. 612, 53 Fed. 682, this court followed the same practice. In the case of *Carey v. Railway Co.* (recently decided, but not yet officially reported) 14 Sup. Ct. 63, the supreme court say:

"The judiciary act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the supreme court and the circuit courts of appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided), and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court. The fifth section of the act specifies six classes of cases in which appeals or writs of error may be taken directly to this court, of which we are only concerned with the first and fourth, which include those cases 'in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision,' and 'any case that involves the construction or application of the constitution of the United States.' In order to bring this appeal within the first of these classes, the jurisdiction of the circuit court must have been in issue in this case, and, as appeals or writs of error lie here only from final judgments or decrees, must have been decided against appellants; and the question of jurisdiction must have been certified. We do not now say that the absence of a formal

certificate would be fatal, but it is required by the statute, and its absence might have controlling weight where the alleged issue is not distinctly defined."

Reading the fifth and sixth sections of the act of 1891 in the light of *McLish v. Roff* and *Carey v. Railway Co.*, and the former practice of this court, we consider that the exclusive jurisdiction of the supreme court, in any case where the jurisdiction of the court is in issue, only attaches when the appeal or writ of error is taken direct to that court, and that, when not so taken, but the appeal or writ of error is taken on the whole case to the circuit court of appeals, that court is vested with jurisdiction to pass on all the issues involved. As to certifying a jurisdictional question to the supreme court in such cases, that is only to be done when the instruction of that court is desired for the proper decision of the case. *Watch Co. v. Robbins*, 148 U. S. 266, 13 Sup. Ct. 594.

We consider, therefore, that we have full jurisdiction to pass upon the first assignment of error in this case.

The right of a corporation to sue and be sued in the circuit courts of the United States, irrespective of the citizenship of the individual stockholders, was at one time much questioned, but was finally settled by the supreme court in favor of the right. *Railway Co. v. Letson*, 2 How. 497; *Marshall v. Railway Co.*, 16 How. 314; *Railroad Co. v. Wheeler*, 1 Black, 286. See, also, *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935. In *Railroad Co. v. Wheeler*, *supra*, the following propositions are declared:

"(1) A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created. It must dwell in the place of its creation. (2) A corporation is not a citizen within the meaning of the constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. (3) In such case they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in the corporate body and acting under the name conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state. (4) Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence. (5) A suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."

To apply these propositions in a suit brought in a circuit court of the United States for or against a corporation, it is all important to know under the laws of what state the corporate body was created. In *Insurance Co. v. French*, 18 How. 405, the supreme court said:

"In the declaration the plaintiffs are averred to be citizens of Ohio, and they 'complain of the Lafayette Insurance Company, a citizen of the state of Indiana.' This averment is not sufficient to show jurisdiction. It does not appear that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning

attached to it. This court does not hold that either a voluntary association of persons or an association into a body politic created by law is a citizen of a state, within the meaning of the constitution; and therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed."

A similar question was again before the supreme court in *Muller v. Dows*, 94 U. S. 444, 445, and the court said:

"The decree made below is assailed here for several reasons. The first is that the court had no jurisdiction of the suit, in consequence of the want of proper and necessary citizenship of the parties. This objection was not taken in the circuit court, but it is of such a nature that, if well founded, it must be regarded as fatal to the decree. The bill avers that Dows and Winston, two of the complainants, are citizens and residents of the state of New York, and that Burnes, the other complainant, is a citizen and resident of the state of Missouri. The two original defendants, the Chicago and Southwestern Railway Company and the Chicago, Rock Island and Pacific Railroad Company, are averred to be citizens of the state of Iowa. Were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the circuit court jurisdiction of the case. In *Insurance Co. v. French*, 18 How. 404, a similar averment was held to be insufficient, because it did not appear from it that the Lafayette Insurance Company was a corporation, or, if it was, that it did not appear by the law of what state it was made a corporation. It was therefore ruled that, if the defective averment had not been otherwise supplied, the suit must have been dismissed. A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen. Such an averment is usually made in the introduction or in the stating part of the bill. It is always there made if the bill is formally drafted. But if made anywhere in the pleadings it is sufficient. In *Insurance Co. v. French*, supra, the defective averment of citizenship was held to have been supplied by the plaintiff's replication to the plea, which alleged that the defendants were a corporation created under the laws of Indiana, having its principal place of business in that state. And in the present case we think the averment in the introduction of the bill that the two defendant corporations were citizens of Iowa, which, if standing alone, would be insufficient to show jurisdiction in the federal court, has been supplemented by other averments which satisfactorily show that the court had jurisdiction of the case."

In *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. 553, the jurisdictional averment was: "The commonwealth of Pennsylvania, by her attorney general, complains of the Quicksilver Mining Company, a body politic in the law of, and doing business in, the state of California." In disposing of the matter on a motion to dismiss, Mr. Justice Nelson, for the supreme court, said:

"And the question in this case is whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California; and this turns upon another question, and that is whether the averment there imports that the defendant is a corporation created by the laws of that state; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject. The court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that state by its agent, but not that it had been incorporated by the laws of the state. It would have been very easy to have made the fact clear by

avermment, and, being a jurisdictional fact, it should not have been left in doubt."

From these considerations and authorities we conclude that in a suit for or against a corporation in the courts of the United States the matter of jurisdiction may be shortly stated as follows: That, in order to hold that a private corporation is a citizen of a particular state, within the meaning of the word "citizen" as used in the judicial acts of the United States, and thereby conclusively presume that all of the shareholders of such corporation are citizens of the particular state, it must affirmatively appear that the corporation was created under the laws of such state; and it would seem that an averment that the body suing or sued is a corporation or a citizen or both of a particular state is insufficient.

In the case under consideration the jurisdictional averment is that "the American Sugar-Refining Company, a corporation domiciled and doing business in this city [New Orleans], and a citizen of New Jersey, and found within the eastern district of Louisiana, of which George S. Eastwick is manager, and authorized to accept service of legal process, is indebted," etc. This averment is doubtful and contradictory. A corporation cannot have two domiciles. *Bridge Co. v. Woolley*, 78 Ky. 523; *Bank v. Earle*, 13 Pet. 519, 520. The domicile, the residence, and the citizenship of a corporate body are all necessarily within the state which created and organized it. It must dwell in the place of its creation, and cannot migrate to another sovereignty. *Bank v. Earle*, 13 Pet. 519, 520; *Railroad Co. v. Koontz*, 104 U. S. 5-12; *Ex parte Schollenberger*, 96 U. S. 369-377. We have already shown that it can only be a citizen of the state which creates it. If force and effect is given to the jurisdictional averment in this case, we are bound to conclude that the American Sugar-Refining Company, being domiciled in Louisiana, is a Louisiana corporation, and that the same company, being a citizen of New Jersey, is a New Jersey corporation. In this state of the record, it cannot be said that the assertion that "the American Sugar-Refining Company is a citizen of New Jersey" is the controlling averment, and that we can therefrom conclusively presume that all the shareholders of said company are citizens of the state of New Jersey, however much we may be inclined to consider the case of *Insurance Co. v. French*, *supra*, and *Muller v. Dows*, *supra*, as inapplicable; and agree with the argument of learned counsel for appellee that, "if it is a conclusive presumption of law that a corporation is a citizen of a state by whose laws it is created, is it not equally a conclusive presumption of law that a corporation which is a citizen of a state named was created such by the laws of the state?"

Our conclusion is that the first assignment of error is well taken. This conclusion is sufficient to reverse the case, but, as the error in question may be cured by amendment in the court below, and the case retried, we proceed to consider the other assignments of error.

The second and third can be considered together. They are, in substance, that the original petition and the supplemental and

amended petition, taken together, as they must be, because the amended petition reiterates all the allegations of the original petition except as the same are altered by the amended petition, are too vague, inconsistent, and contradictory in their allegations to demand an answer, or enable the defendant to safely answer the same, and go to trial thereunder. It cannot be denied that the allegations of the original and amended petitions, taken together, are vague, inconsistent, and conflicting, and that this criticism will apply to the amended petition considered by itself. It is easy to gather from the petitions that, in the causes which resulted in and produced the death complained of, the negligence of a fellow servant intervened. That being the case, the responsibility of the company for the acts complained of, under the matter as generally stated in the petitions, could only result from the failure on the part of the company either to furnish suitable appliances and machinery, or to neglect and fail to use due diligence and care in the employment of the servants through whose negligence the death resulted. A critical examination of the original and amended petitions shows that neither one of these acts on the part of the company is sufficiently charged to put the defendant company on its defense. Under the practice in Louisiana the defendant is entitled to a clear and concise statement of the causes of action. Code Pr. art. 172.

The fourth assignment of error presents the question whether the right of action for damages sustained by the death of Otto Johnson survives in favor of the plaintiff, widow of said Otto Johnson, and tutrix of the minor children of the said Otto Johnson. The articles of the Civil Code necessary to consider are the following:

"Art. 2315 (2294). Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive, in case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the father or mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be. Art. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill. Art. 2317. We are responsible not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable. * * * Art. 2320. Masters and employers are responsible for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

The contention of the plaintiff in error is that article 2315, as amended, refers only to acts of commission, and that, under the proper construction of that article and the succeeding articles, provision is made for no survivor of action in case of death, except where death resulted from acts of commission; and the learned counsel cites the well-known state of both the common and civil law with regard to the survival of actions, and the cases of *Asher v. Cabell*, 50 Fed. 818,¹ and *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749, as showing that the right of action for death is not to be ex-

¹1 C. C. A. 693.

tended beyond the line drawn by the lawgiver; and he further cites *Wood v. Stokes*, 13 La. Ann. 143, to show that an amendment of one article of the Civil Code of Louisiana, when it contains no repealing clause, does not affect any other article not irreconcilable with such amendment; and thereupon contends that, as there is no repealing clause in the several acts amending article 2315 of the Code, said amendments introduce a limited survivorship as to the one article of the Code only.

Conceding the correctness of the authorities cited, still we do not concur in the conclusion reached by the learned counsel. Article 2315 and the other articles quoted from the Code of Louisiana are found in a chapter of the Code entitled "Of Offences and Quasi Offences." The first article (2315) lays down broadly the general proposition with regard to liabilities in cases of offenses and quasi offenses. The remaining articles are evidently explanatory and restrictive of the first. To give to the first article the narrow construction that it applies only to positive acts of commission is unwarranted by the terms of the article: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." To warrant the construction claimed, it should read in phraseology similar to the next article: "Every person is responsible for the damage he occasions by his wrongful acts." The application of article 2315 to acts of omission as well as to acts of commission has been frequent in the courts of Louisiana, and it has never been disputed that when death resulted from such acts of omission, or through the negligence of servants and employes for which the master was responsible, that the cause of action survived as permitted in said article. See *Earhart v. Railroad Co.*, 17 La. Ann. 243; *Frank v. Railroad Co.*, 20 La. Ann. 26; *McCubbin v. Hastings*, 27 La. Ann. 713; *Vredenburg v. Behan*, 33 La. Ann. 643; *Walton v. Booth*, 34 La. Ann. 913; *Curley v. Railroad Co.*, 40 La. Ann. 811, 6 South. 103; *Cline v. Railroad Co.*, 41 La. Ann. 1031, 6 South. 851; *Id.*, 43 La. Ann. 327, 9 South. 122; *Clements v. Electric Light Co.*, 44 La. Ann. 692, 11 South. 51; *Myhan v. Electric Light Co.*, 41 La. Ann. 964, 6 South. 799; *Clairain v. Telegraph Co.*, 40 La. Ann. 178, 3 South. 625. We are not disposed to indorse an innovation on the narrow grounds suggested.

The fifth assignment of error is that the lower court erred in overruling the fourth exception to the plaintiff's petition, to the effect that the said amended and supplemental petition alleges that the said Otto Johnson was injured and killed in the course of an employment, the risk of which he assumed, and by his own carelessness, or by the act of a fellow servant, the risks of whose carelessness he, the said Johnson, also assumed, or both, and that the said petition states no cause of action against this defendant. This assignment of error is not well taken, because the said amended and supplemental petition does not allege directly or by permissible construction that the said Otto Johnson was injured and killed in the course of an employment, the risk of which he assumed, and by his own carelessness or by the act of a fellow

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servant, the risks of whose carelessness he, the said Johnson, also assumed. As we have said before, the petition is vague, uncertain, and inconsistent, and no such clear-cut allegations as claimed by plaintiff can be found therein.

The judgment of the lower court is reversed, and the cause is remanded to said court to be therein further proceeded with, allowing amendments and awarding a new trial, as law and justice may require; appellee to pay the costs of appeal.

AMERICAN SUGAR-REFINING CO. v. TATUM.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1893.)

No. 154.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by Arthur Robinson Tatum to recover damages against the American Sugar-Refining Company for personal injuries sustained while in its employment. There was a verdict for plaintiff in the sum of \$4,000, and, a new trial being refused, defendant brought the case upon writ of error.

W. W. Howe and S. S. Prentiss, for plaintiff in error.

B. R. Forman, Wynne Rogers, and Joseph N. Wolfson, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The plaintiff below, who is defendant in error, made the following allegations as to citizenship and as to jurisdiction of the lower court, and there is nothing in the record to supplement them:

"The petition of Arthur Robinson Tatum, a citizen of Louisiana, and residing in New Orleans, with respect shows that the American Sugar-Refining Company, a corporation domiciled and doing business in this city, and a citizen of New Jersey, and found within the eastern district of Louisiana, of which George S. Eastwicke is general manager, and authorized to accept service of legal process, is indebted to your petitioner in the sum of five thousand dollars (\$5,000.00), for this, to wit."

The plaintiff below further stated his case as follows:

"That on and prior to the 20th day of June, 1892, your petitioner was employed by the said American Sugar-Refining Company as a laborer to work at their refinery situated in this city. That under said employment petitioner was employed to work in the fifth story of said refinery, and under said employment was required to watch and care for large tanks used for the purpose of receiving sugar that is pumped up through a large 18-inch pipe, running from said fifth story to the first floor of the said refinery. That, after said pumping of sugar ceases, and the tanks having sufficient, the said 18-inch pipe is cleaned by the engineer on the first floor by his turning on a strong force of steam through said pipe, which forces the sugar out, and thoroughly cleans said pipe; and, should any one be in close proximity to said pipe, he is liable to be scalded and killed. That said steam is always turned on immediately after the sugar-pumping ceases. That on said date, and at said place, without any warning, or notice by the said defendant

company or its agents or engineer in charge of the engine on the first floor to petitioner or to the workmen on the fifth floor, where your petitioner was working, and in close proximity to the said pipe, his employment requiring him to be there, the steam was turned on with a great force, although the pumping of sugar had long since ceased, and your petitioner was badly scalded and burned, which caused him great bodily injury and pain, maiming and disfiguring him for life, and rendering him less able to earn a living for himself and family, and causing him great mental and physical pain, whereby he has been disabled from that day to the present, and will continue to be so for the balance of his life, or for a long time to come. That your petitioner was using due diligence and care on his part, and that the defendant company could have prevented the said disaster by the employment of a competent and trustworthy engineer, and by the use of proper appliances for the giving notice by the engineer to the occupants of the upper story, where your petitioner was engaged, either by messenger, bell, or speaking tube, which they neglected and failed to do. That it is the legal duty of the defendant company to maintain and employ competent foremen, workmen, and engineers to superintend, manage, and care for and direct their work, and thus prevent the disaster which occurred to your petitioner, and which they failed to do. That your petitioner was lawfully compelled and directed to be in the place where he was injured, and had no notice or warning of the danger, and same was caused by the gross neglect of duty on their part by not having the proper appliances and competent, faithful, and trustworthy workmen and employes."

Defendant excepted to said petition, and the plaintiff amended as follows:

"The supplemental and amended petition of Arthur Robinson Tatum with respect shows: That in conformity with the order of the honorable judge presiding in the above-mentioned court, petitioner reiterates all the allegations of his said original petition filed herein, except in so far as the same is altered by this amended petition; and alleges further that the said Arthur R. Tatum was employed as a laborer by the said American Sugar-Refining Company, to work at their refinery, situated in this city; and that under said employment he was caused to work in the fifth story of said refinery, and was required to watch and care for large tanks used for the purpose of receiving sugar, which was to be pumped up from the first floor into said tanks, which pumping was to be done by means of machinery operated by steam power, and which machinery was run by an engineer stationed on the ground floor of said refinery. That it is the custom and usage of said refinery that, immediately after the said tanks are sufficiently filled with sugar, warning is given to the occupants and workmen on the said fifth floor, where said tanks were situated. That the pipe which conveys the sugar to said tanks is blown out by injecting a strong force of steam, which warning prevents the occupants of said floor from being within close proximity to said pipe, their business requiring them otherwise to be engaged within close proximity to said pipe. That it is necessary that said pipe be cleaned by injecting a force of steam immediately after said pumping ceases, otherwise same would corrode, and would become clogged. That on the date mentioned, long after said pumping had ceased, and contrary to the custom and usage of said refinery, the said refinery, through an incompetent, irresponsible, and untrustworthy person employed by them as an engineer in charge of said machinery, and without any warning or notice whatsoever to your petitioner, who was engaged in his usual employment of stirring the contents of said tanks, a strong force of steam was suddenly sent through said pipe, terribly scalding and burning your petitioner, which caused him great bodily injury and pain, and maiming and disfiguring him for life, and rendering him less able to earn a living for himself and family, and causing him great mental and physical pain, whereby he has been disabled from that day to the present, and will continue to be so for the balance of his life, or for a long time to come. That your petitioner, at the time he received the injury aforesaid, was engaged in his usual employment in said refinery, using due diligence and care on his part. Petitioner further avers that the said dis-

aster was caused solely by the neglect and gross carelessness of the said American Sugar-Refining Company, and that they could have prevented the said disaster if they had used due diligence and care in the employment of a competent and trustworthy engineer, and by the use of proper appliances for the giving notice to the occupants of the upper story, where your petitioner was engaged, either by messenger or bell or speaking tube, all of which they neglected and failed to do. Your petitioner alleges that by reason of the said carelessness and neglectful acts of the said American Sugar-Refining Company aforesaid he has been damaged in the full sum of five thousand dollars (\$5,000.00)."

The defendant below excepted further, as follows:

"And now comes defendant, and also excepts to the 'supplemental and amended petition' of plaintiff, as well as to the original petition, and says: (1) That said petition, in its allegations, as well as in connection with said original, is too vague and contradictory in its allegations to demand an answer, or enable defendant to safely answer the same. And, if this exception be overruled (2) that, as appears on the face of the said petition, the plaintiff avers that he was injured in the course of an employment, the risks of which he assumed, and by the act of a fellow servant or servants in the same employment, the risks of whose carelessness he also assumed; and the said petitions show no cause of action in the premises. And defendant prays that these exceptions be maintained, and the suit dismissed with costs."

These exceptions were overruled, and, reserving the points made by them, the defendant below answered, with general and special denials as to any neglect on its part, in any respect, as charged, and further stated as follows:

"Respondent further avers that, even if plaintiff was injured through any fault or negligence of respondent, its agents, representatives, or employees, as stated in the petitions (which is not admitted but specially denied), yet, even in such case, plaintiff cannot recover, because the said plaintiff was careless and neglectful in the premises, and by his own fault and negligence contributed to the accident alleged and complained of in the petitions, and to its results. Respondent specially denies the allegation in said petitions that plaintiff was using due care and diligence in the premises. Respondent further avers that if plaintiff was injured by the negligence of any employee of respondent, such employee was a fellow servant of plaintiff, the risk of whose negligence plaintiff assumed. Respondent further avers, that plaintiff was familiar with the appliances used in said refinery, and the manner in which his work should be done, and in which the work was carried on; and that he assumed all the risks of his employment arising from either the nature of the work, the machinery and appliances, or the negligence of his fellow servants."

The cause was tried before a jury, who rendered a verdict for \$4,000, and, a new trial being refused, the case is brought to this court by writ of error, and the following assignment of errors was made:

"(1) The court erred in entertaining jurisdiction of the said cause, and rendering said judgment, said court, on the face of the record, having no jurisdiction of the cause, and the averments of citizenship of this defendant, as stated in the petitions, not being sufficient to give jurisdiction to the court, and there being no federal question in the cause. (2) Said court erred in overruling the first exception to the supplemental and amended petition, as well as to the original petition, filed in this cause on the 15th day of February, 1893, and in requiring defendant to answer in the cause; the said supplemental and amended petition of the plaintiff, and the original petition as well, and the same when taken together, being too vague and contradictory in their allegations to demand an answer, or enable defendant to safely answer the same. (3) Said court erred in overruling the second ex-

ception filed in this cause on the 15th day of February, 1893, to the supplemental and amended petition, as well as to the original petition, it appearing on the face of said petitions that the plaintiff was injured in the course of an employment, the risk of which he assumed, and by the act of a fellow servant or servants in the same employment, the risks of whose carelessness he also assumed, and the petition showing no cause of action in the premises. (4) The said court erred in giving the charge to the jury at the request of plaintiff, and against the objection of defendant, in the following words: "That, where it is the custom or uniform practice of a company to give certain signals to warn workmen of approaching danger, or that anything will be done requiring them to repair to a place of safety, and by the failure to give such signal a workman or employe is injured, the company is liable. It is, in such case, not negligence on the part of the workman to rely upon such signal being given; but it is negligence of the company to omit to give such customary signal,"—as more fully appears from the bill of exceptions allowed, signed, and filed herein on the 10th day of April, 1893."

The questions presented as to the jurisdiction of the circuit court, and of the sufficiency of the original and amended petitions, are the same as in the case of *Refining Co. v. Johnson* (just decided) 60 Fed. 503, and they must be ruled in the same way.

The questions presented by the other assignments of error need not be considered, as they may not arise on another trial of the case. For the reasons assigned in *Refining Co. v. Johnson*, the judgment of the circuit court is reversed, and the cause is remanded, with instructions to permit amendments and award a new trial as law and justice may require, the appellee to pay the costs of this court.

RED RIVER LINE v. CHEATHAM.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1894.)

No. 162.

1. ADMIRALTY APPEALS—NEW EVIDENCE—WHEN ALLOWED.

New testimony will be admitted on appeal when the court is of opinion that, under all the circumstances, substantial justice requires it, although a perfectly satisfactory excuse is not given for failing to produce the testimony below.

2. SHIPPING—NEGLIGENCE—LANDING OF RIVER STEAMERS—CUSTOM.

It is the general usage on the Mississippi and its branches to land steamboats having stages operated by steam, for the delivery of small quantities of freight, by running the bow into the shore, and holding the vessel in position by revolutions of the wheel, without putting out lines; and therefore any risk attendant upon this method is assumed by the employes whose business it is to pass over the stage in delivering or receiving freight. 56 Fed. 248, reversed.

3. SAME—FELLOW SERVANTS.

Negligence of a steamboat fall tender selected from the crew, in slackening the fall controlling a stage operated by steam so as to cause the drowning of a member of the crew, is negligence of a fellow servant, for which the owner is not liable.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel in personam filed by Thomas Cheatham, as tutor of Bernice, Ruby, and Maggie Brooks, against the Red River Line, to recover damages for the drowning of James Brooks through

the alleged negligence of the defendant. There was a decree below for \$2,500 (56 Fed. 248), and defendant appeals.

Suit was brought in the court below by libel in personam against the Red River Line, a corporation created under the laws of Louisiana, owner of the steamboat Valley Queen, in the Mississippi and Red river trade, and against George W. Rea, master of the Valley Queen, for damages accruing to the minor children of James Brooks through the drowning of the said Brooks at a landing on Red river on the up trip of the Valley Queen, May 16, 1892. The gist of the libel in relation to the death of Brooks is found in the third and fourth articles thereof, as follows: "Third. That, said steamboat having some freight on board to deliver at said East Point, said Rea, master, directed a landing to be made there, but failed and neglected to have said steamboat moored or fastened to the wharf or bank by lines, chains, or other fastenings, and attempted to hold said vessel to the bank by her wheel,—the engine being kept going,—which libelant alleges to have been gross carelessness and negligence on the part of said master, particularly in view of the fact that Red river was at that point swollen with floods, and that the current of the river was then and there unusually rapid. Nevertheless, by directions of said master, the stage plank was lowered to the bank, and the deck hands, including James Brooks, were ordered to take the freight for East Point off said steamer, to a warehouse at said East Point on or near the bank of said river, which the deck hands, including said James Brooks, did. That as the last deck hand left the stage plank, to carry to shore some of the said goods, the said master, not giving sufficient time for the deck hands to put the freight on shore, and return to the boat, tapped the bell, and ordered the boat backed out, and cried out, 'Come aboard,' 'Come aboard.' That thereupon the dock hands, including said Brooks, ran to the stage plank, which had then, in consequence of the motion of said steamboat, fallen into the river at the shore end. That some of the hands managed to scramble on board. While they were going on board, said master ordered the men on deck to throw the fall off the capstan, to lower the stage. That one deck hand caught at the stage, but missed his hold, and was swept away and drowned. That the said James Brooks climbed up on the stage, the boat meanwhile still backing out. That in consequence of the grossly careless action and orders of said master, while said Brooks was climbing to the stage, it turned up on edge, and fell into the water, clear of said boat, falling on said Brooks. That the said Brooks swam down, and caught the wheel of the boat. That thereupon men on shore and men on the boat, who were witnesses, immediately cried out to stop the wheel; that the man had caught it. That these cries were in the hearing of, and were heard by, said master, Rea, who nevertheless willfully and cruelly refused to have said wheel stopped, or to take any action to rescue said Brooks, who was then and there thrown by the revolution of said wheel violently into the rapidly flowing and swollen river, and then and there drowned. Fourth. That the said James Brooks came to his death because of the gross negligence and willful carelessness of the said master, in not fastening said steamer to the wharf or bank in making said landing; in not giving the deck hands sufficient time to take off the freight, and get back on board; in attempting to hold said steamer to the bank by the revolution of her wheel; in the orders which he gave to the men on deck with regard to the stage plank, in consequence of which said stage plank turned on edge, and fell into the river; and in not stopping the wheel when he was informed that said Brooks was clinging to it, and not making any effort to rescue said Brooks from the imminent peril in which he was placed by the gross and willful negligence and carelessness of said Rea as aforesaid." To these articles of the libel the respondents answered as follows: "That the third article of said libel is true in part, and in part untrue, and its allegations are denied, except as herein admitted. The truth is that the said steamboat, as is usual and customary, did make a landing at East Point, on Red river, on its up trip, and did not fasten the boat to the bank; its stem being pointed up the river, and it being held in position with its nose to the bank, and as has been done from time immemorial, and well known to all seafaring and river men, as well as laborers. That it is true a few barrels of freight were ordered taken off

said steamboat to land at said point, and said work was duly and properly performed by a number of said laborers on board, including the said James Brooks, and that ample and sufficient time was given and granted for the purpose of returning on board the boat, but that the libellant neglected and refused to return to said boat in due time. That the various orders given to him in the premises to return to said boat were disobeyed by him, and that everything requisite and proper was done to have said Brooks return to said boat, without avail; he persisting in having his way in regard to what he should do, regardless of the orders given him. Fourth. To the fourth article of said libel, respondents answer and say that the same is untrue, and the allegations are specially denied, and the truth is that the respondents and the master and officers of said steamboat did everything in their power to have said James Brooks return to said steamboat, and that there was no fault and no negligence on their part, in any manner, in any of the premises. That no damage whatsoever was sustained by said James Brooks, nor by any one dependent upon him, for which respondents are liable; and respondents specially deny any liability to any one claiming to represent them, as being responsible in the premises. And respondents aver that if said Brooks was injured in the premises by any cause, save his own recklessness and neglect, it was by the neglect of a fellow servant or fellow servants, the risk of which he assumed."

On the hearing the court below dismissed the libel as to George W. Rea, master, but found the boat in fault, and condemned her owner, the Red River Line, to pay to the libellant the sum of \$2,500, with legal interest from the 17th day of May, 1892; basing its opinion as to the liability of the defendant corporation upon the fact that the boat made the landing, and required James Brooks, employé, to cross and recross the stage plank without the boat being moored, and that this was the substantial cause of the death of Brooks. An application for rehearing was made, based on the ground, among others, that the court erred in holding that there was anything improper or unusual in the method of landing and holding the boat at East Point, under the circumstances set forth in the testimony; it appearing that said landing was usual and proper and necessary, and that, without such landing, navigation upon said river would be at an end. The rehearing was refused on the ground that there was no testimony in the record as to the general usage of vessels upon the river; that the only custom or usage proven in the case was the custom of the particular boat, the Valley Queen, and the only reason given why the precaution should not be taken of tying the boat was that it would take too much time. Since the appeal to this court, and upon a petition showing "that ample testimony, in the view of counsel for respondents in the district court, was taken before the trial of said cause, and filed in evidence therein on the trial of said cause; that no point was raised as to its sufficiency, nor as to the point involved, of a steamboat tying or not tying to the bank of a river whilst ascending a stream, but that respondents were taken by surprise in the ruling of his honor, the district judge, in first maintaining that the want of such tying caused the injury complained of, from the judgment on which this appeal comes before this honorable court, and in his afterwards maintaining said opinion on application for rehearing, against what appellant was advised to be a great array of evidence; and it is material and necessary, in order to prevent a failure of justice, that further and additional testimony be had herein, under the rules of court,"—and upon leave obtained from one of the judges, the appellant has taken the testimony of a number of steamboatmen, masters and others (12 in all), to show that it is the general custom and practice of steamboats having stages operated by steam power to make landings in all stages of water, and deliver and receive freight, without mooring the boat to the shore by lines, but using the wheel to keep the boat in position, if necessary, and that this custom is reasonable, proper, and necessary to the saving of time and the dispatch of business, and is generally known among all steamboat officers and crews.

W. W. Howe, S. S. Prentiss, and W. S. Benedict, for appellant.
M. Marks, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The first matter to be considered is the motion of the appellee to exclude the evidence as to the custom of landing steamboats on the Mississippi river and its branches, taken, since the appeal, in this court, on the ground that the same should have been taken in the court below, if taken at all, and no sufficient reason or excuse is given for taking it in this court. In *The Beeche Dene*, 5 C. C. A. 208, 55 Fed. 526, this court recognized as the proper rule on the subject of taking testimony in this court the rule declared in *The Mabey*, 10 Wall. 420, which is that testimony can only be taken in cases in admiralty, on appeal, when it appears that the testimony is material, and a good excuse for not offering it in the trial court is given. We are not satisfied that a perfectly satisfactory excuse is given by the appellant for not taking the testimony in question in the lower court, where the issue as to the custom in the premises was plainly made by the defendant's answer; but we are of the opinion that substantial justice requires the admission of the testimony in this court, under all the circumstances of the case, and that all prejudice resulting to the appellee because it was not taken in the court below can be corrected in disposing of the costs of the case.

The appellant makes two points in this court, each tending to deny all right of action to the appellee:

(1) It is submitted that there is no right of action, under the law of Louisiana, against the Red River Line, under the circumstances set forth in the libel; that article 2294 of the Civil Code of Louisiana does not apply, and the articles 2295 and 2299 have never been amended so as to give any survivorship of action, or right to damages to survivors. This objection was considered in the case of *Sugar-Refining Co. v. Johnson* (recently decided), 60 Fed. 503, and need not be further considered here.

(2) That it has never been held by the supreme court of the United States that a claim for damages resulting from the wrongful death of a person on the high seas, or on the waters within the admiralty jurisdiction, survives in admiralty, even when the death occurred within the territory of a state where the law provides for recovery in like cases.

In view of the conclusion reached on the merits of the case, we do not find it necessary to pass upon this question, nor upon the further objection suggested by brief, but not presented in the court below, that this present action cannot be maintained because of the act of congress entitled "An act relative to the navigation of vessels, bills of lading and certain obligations, duties and rights in connection with the carriage of property," approved February 13, 1893 (27 Stat. 445).

On the merits the case shows that at about 7 o'clock p. m., May 17, 1892, the steamboat *Valley Queen* (George W. Rea, master), on a trip from New Orleans to Shreveport, made a landing at

East Point, on Red river, to deliver some 8 or 10 boxes and barrels of freight. The landing was made without putting out any lines, or in any manner mooring the boat to the shore, but by lowering the stage to the bank, it being intended by the master in immediate command that the boat would be held to the bank by slow revolutions of the wheel. A portion of the freight to be delivered was carried ashore, over the stage, by some 10 or 12 of the crew (James Brooks, deceased, among the number), to a warehouse some short distance from the bank, the boat being actually kept in position by working her engines slowly. Meanwhile, the bank was caving, and did cave to such an extent that the stage was left suspended by the fall. Three of the crew got on the stage to return to the boat, and while thereon the fall tender let go the fall, lowering the stage, by which the outer end struck the current, and the same tilted; throwing James Brooks, one of the men on it, into the water. Brooks was swept down past the boat to the wheel, which he caught, but, not being able to maintain his hold, dropped off into the river, and was drowned. The river was high, and rising, at the point where the landing was made. The current was unusually swift and strong. There were many whirlpools, and the banks were caving rapidly.

As we view the evidence, but two points are necessary to consider:

(1) Was it negligence on the part of the master, for which the owner is liable, to have landed the Valley Queen at the place in question, when the river was high, the current strong, and the bank caving, without mooring the said boat to the bank by lines before attempting to deliver freight across the stage to the warehouse on the bank?

(2) Was the owner liable for the negligence which resulted in the death of James Brooks, because sufficient care and diligence were not used by the master in selecting a competent fall tender?

The learned judge of the court below found that it was negligence on the part of the master to have landed the boat under the circumstances mentioned, and that there was no such proof of general usage of vessels upon the river in making such landings as would justify the master therein, or excuse the owner. We find in the case that, as a matter of fact, there were at the landing in question no trees, or other natural objects, to which the boat could have been tied, in order to make the landing, and that the check posts which had been placed in the bank for such use if necessary had either caved into the river, or were submerged by water. And we find by the evidence taken in this court that the general usage of vessels navigating the Mississippi river and branches is to land steamboats, having stages operated by steam, for the delivery of small quantities of freight, by running the bow into the shore, and holding the vessel in position by the revolutions of the wheel, and without putting out lines, and this, at all stages of the river; and we further find that this general usage facilitates the rapid delivery of freight and passengers, and is not attended with unusual risk. The general usage in the busi-

ness being proved, and being known to all steamboat hands and employe's, it follows that the risk attendant upon such method of landing steamboats is incidental to the employment, and assumed by the employe'. Therefore, if the proximate cause of James Brooks' death was the landing of the steamboat Valley Queen, under the circumstances detailed in the libel, the owner cannot be chargeable therewith, nor liable therefor.

The evidence shows that the negligence of the fall tender was very likely the proximate cause of Brooks' death. The preponderance of evidence is that the master of the vessel ordered the fall tender, when the bank caved, and at the time that Brooks was on the stage returning to the steamboat, to hold onto the fall, but that instead of holding onto the fall, which sustained the stage, and kept it from tilting, he let go the fall; thereby letting the stage tilt and fall into the river, throwing James Brooks off into the river. The fall tender was selected by the master from among the crew, and, so far as the record shows, was of the average intelligence and capability. His own evidence with regard to the matter in hand is that he slacked up the fall because the captain ordered him to slack it up, and it is likely that he so understood the order; but he further testifies (evidently in answer to a question as to whether he heard anybody call out from the shore) that:

"Everybody was hollering. It looked like everybody was a-hollering. Everybody around the stage was a-hollering. I can't tell you who it was, but there was commotion and excitement just like when there is an alarm,—when there is a man drowned."

Our conclusion on the whole case is that, so far as James Brooks came to his death through the landing of the steamboat at the time and under the circumstances referred to, it was through one of the risks incident to his employment, and that, so far as the act of the fall tender was a proximate cause of, or contributed to, his death, the act was attributable to the negligence of a fellow servant, and that for neither is the owner liable.

The decree of the district court should be reversed, and the cause remanded, with instructions to dismiss the libel, with costs in the district court; but the costs of appeal, and of this court, should be adjudged against the appellant. And it is so ordered.

KANSAS CITY, FT. S. & M. R. CO. v. McDONALD.

SAME v. STONER.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1894.)

Nos. 85 and 86.

COSTS ON APPEAL—ATTORNEY'S FEE.

Upon the affirmance of a judgment, with costs, by the circuit court of appeals, an attorney's fee of \$20 is taxable against plaintiff in error, as this is the uniform practice of the supreme court under a rule identical with that of the circuit court of appeals (Sup. Ct. Rule 24, subd. 2, 3 Sup. Ct. xiii.; Cir. Ct. App. Rule 31, subd. 2, 47 Fed. xiii.), and as the

act creating the latter court declares that "the costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals" (26 Stat. 826, § 2).

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

These were actions to recover damages for personal injuries. The opinions of this court affirming the judgments on the merits are reported in 2 C. C. A. 153, 51 Fed. 178, and 2 C. C. A. 437, 51 Fed. 649, respectively. A motion is now made by defendants in error to retax the costs.

I. P. Dana, for plaintiff in error.

George H. Sanders and Joseph W. W. Martin, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

PER CURIAM. A motion is made in each of these cases to retax the costs in this court, and to strike from the costs taxed by the clerk against the plaintiff in error the \$20 attorney's fee he allowed. The order of this court was that the judgment of the court below be affirmed, with costs. It has been the uniform practice of the supreme court, in cases where a judgment is affirmed, to tax an attorney's fee of \$20 against the plaintiff in error. The rule of this court upon this subject is a literal copy of that of the supreme court. It is: "In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court." Rule 24, subd. 2, of supreme court rules; rule 31, subd. 2, rules of this court. The act of congress by which this court was established provides that "the costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals." 26 Stat. 826, § 2.

We are of the opinion that the fact that the highest judicial tribunal in the land has uniformly allowed this attorney's fee under a rule identical, as far as it relates to this subject, with that in this court, was sufficient evidence that this item was a part of "the costs and fees in the supreme court provided for by law" to warrant our clerk in allowing it, and the motions are accordingly denied.

INTERNATIONAL BOW & STERN DOCK CO. v. UNITED STATES.

(Circuit Court, D. New Jersey. March 16, 1894.)

1. CONTRACTS—INTERPRETATION—TECHNICAL TERMS—ADJUSTABLE.

A contract to construct an "adjustable stern dock" does not require a dock which is automatically adjustable, but one which is adjustable by cutting away and filling in its gates so that they will conform to the contour of the hull of the vessel; especially where the term is treated as a technical one, and the experts agree upon that definition of it.

2. SAME—PERFORMANCE—TEST—DEFAULT.

The last installment under the contract for the construction of such dock was to be paid after a satisfactory test with a vessel to be furnished by the government and approved by the contractors, within a specified time. The offer of one vessel approved by the contractors was withdrawn, and others were offered, and were not approved, because they were not of the class contemplated by the parties when the contract was made, and hence no test was made. *Held*, that the contractors, on making formal tender of the dock after the time for a test had expired, were entitled to such last installment.

At Law. Action by the International Bow & Stern Dock Company against the United States.

Davison & Chapman and Julian B. Shope, for plaintiff.
Henry S. White, for the United States.

DALLAS, Circuit Judge. This suit was brought by petition of the International Bow & Stern Dock Company, filed under and in pursuance of the act of congress approved March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States." To this petition the United States, by Henry S. White, Esq., the United States attorney for the district of New Jersey, duly made answer in writing, and thereupon, on February 20, 1894, the cause was, in accordance with said act, tried by the court without a jury. The evidence adduced, and the arguments of counsel, have since been fully considered, and this opinion is now filed under the terms of the seventh section of the same statute.

First. Specific Findings of the Facts.

(1) The petitioner and the United States entered into a written contract, dated February 25, 1889, by which the former agreed to deliver at the naval station, Key West, Fla., within six months from the date of the contract (excluding the months of July, August, and September), in accordance with the plans and specifications thereto appended and made part of the contract, "one adjustable floating stern dock," for the sum of \$30,000, to be paid in certain specified installments as the work progressed, and by a final payment of \$3,000, to be made "upon the delivery of the dock, ready in all respects for use, after a satisfactory test, to the commanding officer of the naval station at Key West, Fla." The only portion of the "specifications" to which it is necessary to refer is in these words:

"Dock to be tested where built, or at Key West, at the option of the government. A suitable vessel, approved by the contractors, to be furnished by the government at the port where dock is to be tested, within two months after being notified that dock is completed, and ready to be tested. Dock to be delivered at Key West, and to be at contractor's risk while in transit. Satisfactory test to mean placing the dock under stern of the ship furnished, and removing the water down to the keel. Officers and crew of the vessel to render proper assistance. Contractors to be allowed to build on government land, and to have the use of tools and machinery belonging to the government at the naval station where built, free of cost to them. Coal and water for testing purposes to be supplied by the government."

(2) Apart from the matters of fact reserved for separate statement in the following paragraphs of these findings, the petitioner complied with the said contract, and did and performed all things on its part to be done and performed according to the provisions thereof; and it was paid by the government the sum of \$30,000, which was the total amount agreed to be paid to it, with the exception of the final balance of \$3,000, which, under the terms of the contract, was to be paid upon delivery and satisfactory test of the dock. The government has the actual possession of the dock, but has always refused, and still does refuse, to "accept" it. This unpaid balance of \$3,000 constitutes the petitioner's claim in this suit.

(3) The structure erected by the petitioner under the contract is, in fact, an "adjustable floating stern dock." It is a dock which is "adjustable" according to the meaning of that word as used in the contract.

(4) On May 3, 1890, the petitioner notified the United States, in writing, that the dock was at Key West, "completed and ready to be tested," but it has been admitted that the time for testing was extended, and that at the expiration of the last period of extension, to wit, in January, 1891 (no testing having been made), the dock was formally tendered, and demand made for payment of the balance of \$3,000, which was refused.

(5) Within the period allowed for testing as aforesaid, the government offered to furnish any one of four specified vessels, either of which, as it claimed, and still claims, was a "suitable vessel" to be used for testing. One of these vessels, but not any of the others, was "approved by the contractors." The vessel approved was the Baltimore. It was offered by Rear Admiral Gherardi, whose orders were that he was to supply a ship of his squadron, to be docked for the final testing of the dock. This offer was, however, not acted upon, because it was withdrawn in pursuance of an order of the secretary of the navy, who deemed it inexpedient to employ the Baltimore in the manner proposed. No more particular reason was assigned, or has been shown, for this withdrawal. The declination of the plaintiff to approve any other of the vessels which were offered by the government was not capricious, groundless, or unreasonable. In addition to the Baltimore, the Philadelphia and the Chicago were designated by the plaintiff as vessels which it was willing to approve. The dock (as had been contemplated by both parties) was constructed with especial and immediate reference to a certain class of vessels. Those which were offered and refused were not of that class, and to have prepared the dock for testing under any one of them would have involved the plaintiff in very considerable expense for necessary adjustment and ballast.

Second. Conclusions of Law.

1. That the correct construction of the contract in suit, with regard to the only question which has been raised on that subject, is that the dock was to be "adjustable," not automatically, but by cutting away and filling in the gates so as to conform their

outline, to the contour of the hull of any vessel proposed to be docked.

2. That the plaintiff having duly offered the dock for testing, and the government having failed, during the time limited by the contract as extended, to furnish for that purpose any vessel which the plaintiff approved, or was bound to approve, and the plaintiff having, at the expiration of that time, formally tendered the dock, the latter did all that, under the circumstances, it was necessary for it to do to entitle it to the final payment of \$3,000, and to the judgment in its favor to be rendered at the conclusion of this opinion.

Third. General Observations.

The material portions of the contract in suit are, I think, sufficiently set out in the first finding, but the contract itself is in evidence, and may be treated as embodied in that finding, should it be deemed requisite to examine it at length in any proceedings to ensue upon the entry of the present judgment. The facts stated in the second finding have not been set forth with greater particularity, because no question has been made with respect to them, except that on the trial the point was made on behalf of the government that the dock lacked about two inches of the height requisite for docking two or three of the largest vessels of the navy. This allegation, however, if sustained by clear and positive evidence (which it is not), would not, under the circumstances, justify me in reversing or modifying the finding that "the petitioner complied with the said contract," etc. The contract contains no stipulation that the dock should be of sufficient height to accommodate the particular vessels referred to. The height of the dock as built is precisely "in accordance with the plans and specifications." The latter expressly specified, "Depth inside, over keel blocks, 22 feet 6 inches," and it is not asserted that the dock in question does not meet this requirement. Having complied with the terms of its contract, nothing more can now be demanded of the plaintiff as a condition precedent to the right of recovery. The fact is that this point was made for the first time upon the trial. It was not suggested when the several payments on account were made, and it is plain that, as testified by Commodore Farquhar, chief of the bureau of docks and yards, the only reason for refusing payment of the balance now sued for was that there had been no test of the dock. The real and only substantial question in the case, as I have already indicated, is as to whether the plaintiff was justified in refusing to approve the only vessels which the government offered for testing the dock, and upon this question I have no doubt whatever. The dock was constructed, as I have said, with a view to being tested by a particular class of vessels, and in view of this fact those which were offered were not "suitable," and were rightfully and in good faith rejected by the plaintiff. There were others which he was willing to accept, but no one of these was tendered, although the time fixed by the contract within which the test was to be made was greatly extended, and there is no evidence which would warrant the imputation that

the dock, if tested, would be found faulty or defective. The learned United States attorney also took the position, on the trial, that the dock tendered is not an "adjustable" one, and the question thus raised is really as to the correct construction of the contract in this regard, for as to the actual construction of the dock there is no dispute. The interpretation of writings is, even in cases tried with a jury, ordinarily for decision by the judge, and, hence, is commonly said to be matter of law; but this deduction is not accurate. The true subject of inquiry when a document is to be construed is the meaning of the parties as ascertainable from the language which they have used in the instrument, and this is plainly not a question of law, but of fact, though one of those incidental questions of fact, the solution of which is confided to the court, and not to the jury. This is said in explanation of the fact that this matter is covered by both the third finding of fact and the first conclusion of law. I deem it proper to add to those brief statements a very few words by way of elaboration. The dock as built is certainly not automatically adjustable, but by simple, though costly, changes in its gates, which are so made as to provide facilities to that end, it may be in such manner altered, without affecting its other and principal parts, as to fit (adjust) it to receive vessels of different sizes and varying forms. If I were to confine myself to a consideration of the contract alone, I would be of opinion that such a structure meets the description of an "adjustable" dock; but the case was tried, in this respect, on the theory that the word "adjustable," as here used, is a technical term, and therefore for definition by witnesses familiar with the art to which the contract relates. Accordingly, expert testimony was, without objection, received to interpret it, and the accomplished officers of the navy who were examined on behalf of the government, quite agreed with the expert witnesses called by the plaintiff, that the dock in question is such a one as, by persons versed in the art, is understood to be adjustable.

During the trial some objections were interposed upon either side to the admission of evidence. The evidence was received without passing upon the objections, and the question presented in each instance was reserved for consideration at this time; but, as the facts found do not to any extent depend upon evidence to the reception of which any objection was made, it is not necessary to extend this opinion by embodying in it any formal rulings upon such objections.

Fourth. Judgment of the Court.

And now, March 16, 1894, it is ordered and adjudged that judgment be entered for the petitioner, the International Bow & Stern Dock Company, and against the United States, for the sum of \$3,000.

NOTE. The matter was not presented by counsel, but I understand section 1091, Rev. St., to apply to this case, and therefore have not allowed interest on the claim "up to the time of the rendition of judgment."

EARNSHAW v. BOYER.

(Circuit Court, E. D. Pennsylvania. January 22, 1894.)

No. 11.

1. PRINCIPAL AND SURETY—DISCHARGE—ALTERATION OF CONTRACT.

Plaintiff purchased all the ore to be produced by a certain company within the ensuing year, and sold one-third of the amount under a contract which required that "shipments shall be made in as nearly equal monthly proportions as possible." Defendant became surety for the buyers. The parties to the contract construed it as requiring delivery of the whole amount of ore within the year, and they afterwards agreed that plaintiff should have one month longer in which to make delivery. *Held*, that this was such a change in the principal contract as to discharge the surety, who did not consent to it.

2. SAME.

Even if plaintiff, under the original contract, was bound only to deliver the ore within a reasonable time, the subsequent agreement substituted for this a definite time, and is, on that theory, such a change in the principal contract as will discharge the surety.

At Law. Action by Alfred Earnshaw against Jerome L. Boyer. On motion to strike off nonsuit.

R. C. McMurtrie, for plaintiff.

John G. Johnson and T. P. Prichard, for defendant.

DALLAS, Circuit Judge. This action is against Jerome L. Boyer as surety. The principal contract, and that of the defendant, are as follows:

Philadelphia, January 29th, 1890.

Having purchased from the Marbella Iron Ore Company, under contract dated January 24th, 1890, the total output of their mines for the twelve months commencing March 1st, 1890, and ending March 1st, 1891 (expected to be from sixty to eighty thousand tons), together with an amount of washed Marbella sand, not to exceed one-third of the said mined ore actually shipped, I have sold to Messrs. Isaac McHose & Sons, Norristown, Pa., one-third of the ore shipped under said contract, on the following terms and conditions:

(1) Price to be at the rate of seven dollars and eighty cents per ton of twenty-two hundred and forty pounds for the mined ore, commonly known as "Marbella Lump," and seven dollars and forty cents for the sand ore, commonly known as "Marbella Sand."

(2) Freight Rate: The above prices are based on an ocean freight rate of twelve shillings per ton. All freight over twelve shillings to be added to the invoice as part of the price of the ore, and all freight under twelve shillings to be deducted from the invoice.

(3) Weight to be according to the United States customhouse certificate of weight.

(4) Payment to be made one-half in prompt cash on arrival of vessel, and the balance on presentation of invoice and customhouse certificate of weight.

(5) Shipment to be made in as nearly equal monthly proportions as possible.

(6) Delivery to be made f. o. b. cars of the Philadelphia and Reading Railroad Company at Philadelphia.

(7) Sellers not to be responsible for loss at sea nor on failure of the Marbella Iron Ore Company to deliver under their contract.

(8) Change of Duty: Should the government of the United States reduce or remove the existing duty of seventy-five cents per ton on iron ore, the

buyers to have the full benefit thereof, and any increase of the duty shall be paid by them.

Witness: Ambrose B. Umstead.

[Signed] Alfred Earnshaw.

The above contract is accepted with all the terms and conditions.

[Signed] Isaac McHose & Sons.

Witness: Wm. C. Stokes, Norristown.

Guarantee.

The undersigned, in consideration of Alfred Earnshaw agreeing to this contract, jointly and severally agree to accept and pay for the ores as the purchaser if Messrs. Isaac McHose & Sons refuse or neglect to do either.

[Signed]

Jerome L. Boyer.

Wm. M. Kaufman.

January 29th, 1890.

A default in payment for the ore, as delivered under the contract between Isaac McHose & Sons and A. Earnshaw of this date, will discharge A. Earnshaw from the duty to make further delivery at his option.

[Signed]

Isaac McHose & Sons.

Jerome L. Boyer.

Wm. M. Kaufman.

The plaintiff's claim is for the amount, with interest, of his loss on contract price, arising upon resale of ore which he had tendered to Isaac McHose & Sons, and which they refused to receive, viz.:

Per steamer Hessle.....	\$1,514 60
Per steamer Nethergate.....	3,040 60
	<hr/>
	\$4,555 20

This cause having come on for trial at this term, a compulsory nonsuit was entered; and, upon the hearing of the plaintiff's motion to strike it off, the counsel for the defendant urged several grounds in support of the judgment of the court and against the motion; but I do not deem it necessary to discuss more than one of them. Upon reflection, and after examination of the authorities, I am satisfied that the ground upon which the nonsuit was ordered is, alone, sufficient to require that it should not be disturbed. I am still of opinion, as I was on the trial, that the evidence which had been adduced conclusively established that, at least in one respect, the principal contract had been changed after that of the surety had been made, and without his consent.

The plaintiff, having purchased the total output of the Marbella Iron Ore Company for the 12 months commencing March 1, 1890, and ending March 1, 1891, sold to Isaac McHose & Sons one-third of the ore shipped under said contract of purchase, and the only distinct provision contained in the plaintiff's contract of sale to McHose & Sons, with respect to shipments, is that they should be made in as nearly equal monthly proportions as possible. For the plaintiff it was contended that, in consequence of this omission, no particular time whatever was stipulated for shipment of all the ore, and that, therefore, under the law, the contract must be held to be for shipments to be completed in a reasonable time. Counsel for the defendant, on the other hand, contended that the contract, being correctly construed, required that the "as nearly equal monthly proportions as possible" should be all shipped in a definite, not an indefinite, number of months; and that, especially in

view of certain circumstances of the case which it is not necessary for me to specify, it is evident that such was the contemplation of the parties, and the meaning of the agreement, and that the period allowed for shipments was intended to be the same period of 12 months as was covered by the plaintiff's purchase from the Marbella Company. But this question is not an essential one; for, in my opinion, a change in the contract, upon either construction of it, was effected by the correspondence now to be referred to. Among the letters in evidence is one of December 15, 1890, from McHose & Sons to the plaintiff, in which the contract is spoken of as "expiring February 28th, 1891." On December 17, 1890, the plaintiff wrote to McHose & Sons: "I have notified the Marbella Co. that, as they delayed shipments, at the beginning of the contract, a month, they will have to give us a month more to move the ore in, or else we shall be simply swamped with the quantity arriving so closely together. *I have taken it for granted that this will please you, but if you would prefer to have your one-third of the contract shipped by 1st March, please let me know.*" To this, under date of December 18, 1890, McHose & Sons replied: "The arrangement which you propose regarding the extension of time for the delivery of Marbella ore is satisfactory;" and this reply was taken as an acceptance of the proposal, and the arrangement referred to was, accordingly, pursued. It is quite manifest that the parties understood this to be a new agreement, by which the definite time which they both supposed had been originally agreed upon for the completion of shipments was extended for one month. But if this was a mistake; if the effect of the contract was to require that the shipments should all be made in a reasonable time, yet the substitution of a fixed and definite time would materially change it. The correspondence required and permitted the completion of shipments by a day certain, viz. the 1st of April, 1891; and the assertion that *this* was a reasonable time, and, therefore, might be written into the contract without varying it, does not meet the objection. The principals were dealing with a matter which concerned the surety as much as it did themselves, and yet (not considering this matter of reasonableness at all) they agreed upon an arbitrary time, without consulting him, and in utter disregard of his right either to be made a party to any such agreement, or to have the question of reasonable time determined by judicial investigation. The case presented is not of acceptance by the vendees of shipments under the original contract, but of partial substitution for that contract of a binding agreement, which varied the rights of the parties. McHose & Sons, without the consent of the defendant, and in modification of the contract to which his undertaking related, assented to a definite time for completion of shipments; and this they did by positive contract with the plaintiff,—not by merely remaining inactive (*Samuell v. Howarth*, 3 Mer. 272-278). The principles of law applicable to this case were considered by the supreme court in *Reese v. U. S.*, 9 Wall. 14. Reese was surety in a recognizance conditioned that one Limantour "should personally appear at the next regular term of the circuit court to be held in the city of San Francisco, and at any subsequent term to

be thereafter held in that city." At the next subsequent term of that court the district attorney moved for, and obtained, a postponement of Limantour's trial, to which postponement he assented. The court below held that in this there was no ground for exemption of the bail from liability on the recognizance; but the supreme court, in an opinion delivered by Mr. Justice Field, reversing the judgment, said:

"The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. * * * The stipulation to postpone * * * was inconsistent with the condition of the recognizance. * * * The stipulation, in other words, superseded the condition of the recognizance. * * * The stipulation made without their consent or knowledge, between the principal and the government, has changed the character of the obligation. It has released him from the obligation with which they covenanted he should comply, and substituted another in its place. * * * And the law upon those matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. *They have a right to stand upon the very terms of their undertaking.*

In *Bonar v. MacDonald* (3 H. L. Cas. 226-238), the English rule is stated in harmony with that laid down in *Reese v. U. S.*, to be:

"That any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, *even though the original agreement may, notwithstanding such variance, be substantially performed,* will discharge the surety."

The motion to strike off nonsuit is denied.

GIRD et al. v. CALIFORNIA OIL CO.

(Circuit Court, S. D. California. February 26, 1894.)

No. 302.

1. MINING—LOCATION OF CLAIM—NOTICE—RECORDING.

Under Rev. St. § 2324, and the rules of a certain mining district passed pursuant thereto, one desiring to locate a mining claim was required to post thereon a notice of his location, attested by a claim owner within the district, and to have such notice recorded so as to show the name of the locator, date of location, and a description of the claim by reference to some natural object or permanent monument, sufficient to identify it. *Held*, that it was not necessary that the record of the claim should be an exact and literal copy of the notice posted on it.

2. SAME—NOTICE—POSTING.

A notice of location of a mining claim, required by rules of the mining district to be posted on the claim, was put in a tin can, which was placed on a shelf in a rock mound on the claim more than two feet high, the corners of the claim being marked by similar mounds. *Held*, that this was a sufficient posting.

3. SAME—DESCRIPTION—UNITED STATES SURVEYS.

A notice of location of a mining claim, required by rules of the mining district, referred to subdivisions of a United States survey for the boundaries of the claim. It was shown that a surveyor had been deputized to make this survey, and that he returned field notes and a map to

the land office, which map was approved by the land department; but that the commissioner, upon information tending to show that the survey was not made in the field, suspended this approval, and ordered an investigation. *Held*, that the notice was sufficient, for the map may be referred to for a description of the claim, whatever may be the ultimate fate of the survey.

4. SAME—PLACER LOCATION—AREA.

Under Rev. St. § 2331, which provides that no placer location "shall include more than twenty acres for each individual claimant," a claim located by three persons must be limited to said 20 acres when it appears that they are all in the employ, and acting in the interest, of a single company.

5. SAME—WORK DONE—CLAIMS HELD IN COMMON.

Rev. St. § 2324, provides that on all placer mining claims located after a given date, and until a patent has been issued, "not less than \$100 worth of labor shall be performed or improvements made during each year; but where such claims are held in common, such expenditure may be made upon any one claim." *Held*, that the work required must have been done with a view to prospect or develop the claim; and, in order that work done on one may inure to the benefit of another, held in common with it, the claims must be contiguous.

6. SAME—WORKING OIL.

For the purposes of this section, work done and expense incurred in the general development of an oil-bearing district, embracing many distinct claims held by the same owners, whatever its amount, can only inure to the benefit of claims contiguous to these operations, notwithstanding that it constitutes the most economical and practical mode of working the oil, and may ultimately result in extracting the oil from all of the several claims.

Action by Richard Gird and J. C. Udall against the California Oil Company to determine conflicting claims to certain mining locations.

Minor & Woodward and Edward Lynch, for plaintiffs.
John D. Pope, for defendant.

ROSS, District Judge. The record in this case is a very voluminous one, and has been carefully examined and considered. The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims. The defendant, California Oil Company, claiming to be the owner of a placer mining location called the "Razzle Dazzle," made application to the register and receiver of the United States land office at Los Angeles, in which district the land is situated, for a patent, against the issuance of which the plaintiffs, Richard Gird and J. C. Udall, filed a protest in writing, claiming that 17 5-10 acres of the Razzle Dazzle location are embraced by two previous mining locations, called, respectively, the "Whale Oil" and "Intervenor No. 3," of which they are the owners; and thereupon, within the time prescribed by section 2326 of the Revised Statutes, and pursuant to its provisions, the contestants commenced the present action in the superior court of Ventura county, of this state, to determine the conflicting claims of the respective parties to the disputed premises, from which court the action was, on motion of the defendants, transferred to this court. The proceedings here are purely statutory, and but a continuation of the contest that arose in the land

office (*Wolverton v. Nichols*, 119 U. S. 488, 7 Sup. Ct. 289; *Doe v. Mining Co.*, 43 Fed. 219); and the object of the action being the determination of the question which, if either, of the applicants is entitled to receive the government title to the disputed premises, each of the parties is necessarily an actor, and must establish his claim by proof.

The ground in controversy is situate in the county of Ventura, and within the Little Sespe petroleum mining district. That district was not organized until after the passage of the act of congress of May 10, 1872, which provides, among other things, as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location * * * ." Rev. St. § 2324.

Upon the organization of the Little Sespe petroleum mining district, which occurred April 27, 1878, J. C. Udall was elected recorder, and W. Roberts, J. F. Dye, and E. G. Sobey a road committee for the district. On May 4th following, by-laws were adopted, including, among others, the following:

"Section 1. Any one locating a claim or association of claims must show the notice duly posted on the claim, also the corners of the claim, to a witness, who must be a claim owner in the district, who will sign said notice, also a copy of the same to be given the recorder for recording. Sec. 2. No claim shall be recorded until at least three corners are set. When a corner of a claim is designated by a stake, it must be at least three feet high. Mounds of rock for the same purpose shall be two feet high. When a corner cannot be set, a witness post or mound must be set as near to it as possible on the line of the claim, and marked in same fashion as referred to in the location notice. Sec. 3. All claims must be recorded in the district within thirty days from the date of location. * * * Sec. 8. The necessary annual work to be done or expenses made on any claim in this district may, at the option of the claim owner or owners, be done on any road in the district designated by the road committee, the course of which shall be laid out by said committee. Sec. 9. A claim owner shall be entitled to work on any part of such road nearest to his own claim for which he is doing work. Sec. 10. Two members of the road committee at least must locate the course of roads. Their decision shall be final. Sec. 11. The time employed by the road committee laying out course of roads, or in showing claim owners where to work on the road, shall account for work done on any claim or claims of theirs they may designate to the recorder. * * * Sec. 13. The recorder shall file for record all claims duly certified to, and shall keep the same on file for the period of nineteen days, which shall be considered duly

recorded unless set aside by satisfactory proof being shown of a prior location in accordance with these laws. At the expiration of nineteen days, he shall proceed to record the same on the presentation of the proper fee. Sec. 14. The recorder shall issue a certificate for the assessment or necessary annual work done on any claim or association of claims, on being presented, before the end of the year, with a certificate, signed by the president or two members of the road committee, that such work has been done by or for any claim owner on his or their claims, provided said claim is entered on the books of the district; otherwise, the claim shall be open to location. Sec. 15. The road on which the annual work for claims is to be done in the district commences at the mouth of the Little Sespe creek; thence by way of the Los Angeles claim, taking the most practical route to Tar creek. * * * Sec. 20. The recorder shall keep a book of record of claims, also a book of record of assessment work, which shall be open at all reasonable times for inspection, and at no time to be taken out of the district."

At the fourth annual meeting of the claim owners of the district, held April 27, 1882, the following resolution was unanimously adopted:

"That all claims situated in this district that have been, or at any time hereafter shall have been, duly represented in accordance with the by-laws of this district for the period of four years from the date of their location, shall not be liable to relocation, or required to pay any further assessment under the laws of the district, subject only to the mineral law of the United States, passed May 10, 1872, and its amendments; this amendment to the laws of the district to take effect thirty days after its publication or posting in the local land office in which this district is situated."

At the sixth annual meeting of the claim owners of the district, held April 28, 1884, it was—

"Voted, that the by-law requiring annual meetings be changed and amended to holding meetings once in four years, dating from the 1st of January next, requiring the next meeting to be held on the 1st day of January, 1889. (2) Voted, that a road overseer be appointed for the district, whose duty shall be to oversee and direct the making and repairing the roads in the district, as laid out and approved by the road committee. (3) Voted, that J. C. Udall be the recorder of the district for the above term of four years, and until his successor is duly qualified. (4) Voted, that J. F. Dye, H. Haines, and J. C. Udall be the road committee for the district for the above term of four years. (5) Voted, that J. C. Udall be the road overseer for the district for the term of four years. * * * (8) Voted, that for the next four years from date all of the claims situated above and between the Los Angeles claim and Squaw flat be held responsible to the overseer for their equal proportion of the expenses of making and maintaining the roads in that part of the district. (9) Voted, that J. C. Udall, the overseer, have power, and is hereby delegated the power, to sell any claim, or sufficient portion thereof, to the highest bidder, for cash, to pay said proportional expenses, "the owner of which, after being duly notified by publication or otherwise, refusing to pay his or their proportions or shares of said road expenses."

The rules so adopted by the miners of the district, except where in conflict with some law of the United States or of the state of California, being authorized and sanctioned by express statutory enactment, are, where in force, as valid and binding as if they were a part of the statute itself. It will be seen that by the first local rule respecting the location of claims the locator is required to post a notice on the claim, and to show it, together with the corners of the claim, to a witness, who is required to be a claim owner within the district, who must sign the notice as a witness, a copy of which is required to be given to the recorder for recordation. There is nothing in these requirements in conflict with any of the pro-

visions of the statutes of the United States or of the state of California, but they are subject to the provision of the former that the location must be distinctly marked on the ground, so that its boundaries can be readily traced. The act of congress does not itself require a mining claim to be recorded (*Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Sawy. 96, 11 Fed. 666), but the local rules of the district in question declare that all such claims shall be recorded with the recorder of the district within 30 days from the date of location. The local rules do not prescribe what the notice shall contain, but the act of congress of May 10, 1872, declares that—

"All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

We see, then, that one of the essentials to a valid location within the Little Sespe petroleum mining district is the posting by the locator of a notice of location on the claim, signed also by a witness who is himself an owner of a claim within the district, and that such notice be recorded with the recorder of the district within 30 days after the making of the location; which record shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. The Whale Oil claim, which embraces almost all of the ground in controversy between the parties, was located July 15, 1878, by L. D. Gavitt and William Dryden, to whose interest Udall and Gird succeeded prior to the execution of the leases hereinafter mentioned, and the claim duly recorded; and this record constitutes the first ground of objection made by the defendant to the Whale Oil location. As contained in the records of the district, the description of that claim is as follows:

"Com'g at a point on Boulder creek, a tributary of the Sespe, at a point where a continuous ledge crosses said Boulder creek, and more particularly where the stream of water crosses the said ledge & has a fall of some 10 feet at a mark ^{ap} cut into the ledge; running thence west 16 2-5 chs. to mound of rocks, said last-mentioned line being 10 chains north of oak tree on which is posted notice of Oil Spouter claim [said tree being the S. W. corner of said last-mentioned claim], running thence north 15 chs. to mound of rocks; thence east 26 2-3 chs., crossing Boulder creek at 20 chs. at falls, & marked ^{ap} to accessible bluff; thence S. 15 chains to laurel tree, 4in. in diameter, marked ^{ap}; thence west 10 chains to point of beg. Cont'g 40 acres of land, situated in the Little Sespe petroleum mining district, Ventura Co., Cal., and known as the Whale Oil Claim. July 15, 1878."

In the record the words in brackets, "said tree being the S. W. corner of said last-mentioned claim," were erased, from which circumstance it is earnestly contended that the notice as recorded could not have been a copy of the notice as posted on the claim, but was written by the recorder Udall "to suit himself." It is said that, if the recorder was copying from a written notice into the book of records, he could not have inserted so many words not in the writing from which he was copying. It is not probable that he would; but by no means impossible. The recorder was a man then well advanced in years, and does not appear to be one of much edu-

cation, and, as he then had no interest in the Whale Oil claim, and did not acquire any for a long time afterwards, it is not possible to discern any motive on his part to make a false or fraudulent record. Moreover, it is not necessary that the record of the claim should be a literal and exact copy of the notice posted on it. The record of a mining claim, when one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it. This is clearly shown by the circumstance that the statute does not require any notice to be posted or recorded, but leaves the regulation of that matter to the miners of the district, subject, however, to the provisions that, if such record be required, it shall contain—

"The name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

In speaking of the distinction that exists between the notice posted on the claim and the statutory requirement respecting the record of such notice, the supreme court of Nevada, in *Gleeson v. Mining Co.*, 13 Nev. 465, said:

"There can be no question that the original paymaster notice was all that the law requires. The only objection to it is that it did not contain in itself a description of the claim by reference to some natural object or permanent monument. It was not necessary that it should. It is only the record of the claim that is required to contain such a description; and there are excellent reasons for making the distinction between the notice and record in this particular. A notice is generally, and for safety ought always to be, posted immediately upon the discovery of the vein, before there is any time to survey the ground, and ascertain the bearings and distances of natural objects or permanent monuments in the neighborhood; and, besides, the claim referred to by the notice is always sufficiently identified by the fact that it is posted on, or in immediate proximity to, the croppings. A notice claiming a location on 'this vein' has only one meaning. But the notice is exposed to the danger of removal by adverse claimants or destruction by the elements, and for permanent evidence of the location its record is provided for. The record, if it consisted of a mere copy of the notice, would not identify the claim, and there would be an opportunity, as well as a temptation, to the locators, upon the discovery of a more valuable mine in the vicinity, to prove, by perjured witnesses, that their notice was posted on that mine. The floating of claims was by no means an infrequent occurrence prior to the act of 1872, and, if such attempts were seldom successful, they were always vexatious, and often the means of levying a heavy blackmail. It was on this account that the record (not the notice) was required to contain 'such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.' Rev. St. § 2324. It is a sufficient compliance with this provision of the law if the description of the locus of the claim is appended to the notice when it is recorded."

The purpose of the marking of the boundaries of the claim, hereafter referred to, and of the record of the location, are further stated by the supreme court of Colorado, in the case of *Pollard v. Shively*, 5 Colo. 317, as follows:

"Marking the boundaries of the surface of the claim as required by statute is one of the first steps towards a location. It serves a double purpose; it operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another seeking the benefits of the law, going upon the ground, is distinctly notified of the appropriation, and can ascertain its boundaries. He may thus make his own location with certainty, knowing that the boundaries of the other

cannot be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating is one of the purposes served. The record also serves a double purpose. As between the claimant and the government, it preserves a memorial of the lands appropriated after monuments, in their nature perishable, are swept away. It also supplements the surface marking in giving notice to third persons."

It abundantly appears from the testimony that the description of the Whale Oil claim as recorded is sufficient for the identification of the boundaries as claimed by the plaintiffs. Indeed, this is not denied by counsel for defendant.

But it is further contended on the part of the defendant that no monuments were established, either on the Whale Oil or Intervenor No. 3 claim, as required by the rules of the district at the time of their location; that no notice was posted on either of the claims, as required by the rules; that, if the monuments were erected and notices posted, they were not kept up so as to preserve the validity of the locations, and that no work was done on either of the claims during any year since they were located. The Whale Oil, as has been said, was located July 15, 1878, by L. D. Gavitt and William Dryden. J. F. Dye was then living on the Kentuck claim, of which he was the claimant. During the preceding May, a claim called the "Oil Spouter" had been located by A. W. Potts and Alfred James, the notice of location of which was posted on an oak tree situated in Boulder canon above its junction with Sespe creek. Dye suggested to Gavitt and Dryden, who were visiting him, that they locate the ground claimed as the "Whale Oil," and they concluded to do so. Early in the morning of the day the location was made, Gavitt prepared a rope to correspond with a chain, with which to measure the distances, and Dye pointed out to him the oak tree on which the Oil Spouter notice was posted. From that tree Gavitt, assisted by the recorder, Udall, measured up Boulder canon 10 chains, which was the width of the Oil Spouter claim. At this point, which was on the northerly line of the Oil Spouter, there was a ledge of rocks and a waterfall of 8 or 10 feet, and this ledge was selected as the starting point of the Whale Oil claim. The ground there, and, indeed, the entire territory included within the district in question, is extremely rough and mountainous; so much so that Gavitt had great difficulty in establishing the corners of the Whale Oil claim, one of which it was necessary to fix by means of a witness stake. The witness Udall, by reason of his age and the roughness of the ground, was unable to go with Gavitt along the lines of the claim, but he saw Gavitt traversing them and erecting the monuments, who pointed them out to the witness, including the witness stake to mark the northeast corner, which could not be reached by Gavitt because the ground at that place is almost perpendicular. Gavitt worked several hours in thus marking the boundaries of the Whale Oil claim, and the notice posted by him on it was so exact and specific that the surveyors who were witnesses for the defendant on the trial of this case had no difficulty in finding the lines of the claim from the description given in the notice. At at least two of the corners of the claim they found a pile of rocks still existing, though they were not then two feet high, as required by the local rules. Nor is there any direct evidence that

any of the monuments were ever of the exact height prescribed by the rules of the district. But Gavitt, the man who erected them, was dead when the evidence was taken, and Udall, the only other witness to the building of the monuments, was unable to see, from the position he occupied, the height of them. Photographs introduced in evidence show that the locus in question is but a mass of boulders and rocks, broken and otherwise. Apparently they were the only things out of which the monuments could have been built, and as Gavitt was seen by Udall at work building them, and as he was engaged in making the location long enough to have built the monuments the required height, and as after the storms of 14 years, which the evidence shows to be heavy in those mountains, some of them still stand at a height of seven or eight inches, I think the court is justified in finding that, as originally constructed, they answered the requirements of the local rules.

The evidence in respect to the location of the Intervenor No. 3 claim, which covers a small strip of the disputed ground, is very different. That claim adjoins the Whale Oil on the east, and is claimed to have been located March 6, 1885, by the plaintiff Udall. The notice of location, as recorded in the records of the district, is as follows:

"Intervenor No. 3 — Lo

"Notice is hereby given that I the undersigned have this day located & claim 20 acres of this oil land for an oil claim to wit commencing at the northeast corner of the Oil Spouter claim running thence north 15 chs. to the northeast corner of Whale Oil claim thence east 20 chs. thence south 15 chs. to the northeast corner of the Intervenor claim thence west on the north line of the Intervenor claim 20 chs. to place of beginning, containing 20 acres to be known as the Intervenor No 3 J. C. Udall

"Little Sespe P. M. District Mar 6th 1885 at 10 a. m.

"Recorded Mar 12th 1885

J. C. Udall
"Recorder.

"Witness Mason Bradfield."

Although the notice purports to have been witnessed by Mason Bradfield, Udall himself in his testimony admits that Bradfield did not in fact witness the posting of the notice on the claim, nor did he (Udall) ever point out to him its boundaries, nor was Bradfield a claim owner within the district, but that he (Udall) signed Bradfield's name to the notice, and entered it in the record a long time after the pretended location. In none of these particulars did the locator conform to the requirements of the local rules. Besides, not only does the testimony of the very man who claims to have made the location fail to show the proper marking of the boundaries of the claim on the ground, but it is perfectly apparent therefrom that they were not so marked as that the boundaries of the location could be readily traced. The circumstance that the ground was extremely rough and mountainous did not relieve the locator of the obligations imposed upon him by the law. It is plain that the pretended location of the Intervenor No. 3 claim was invalid from its inception, and it need not, therefore, be further considered. The notice posted upon the Whale Oil claim remained so posted some months. Udall testifies that he saw it on the tree several months after it was put up, but never saw it afterwards, and there is no other evidence

that it was ever afterwards seen. It was probably destroyed by the elements. Nor is there any evidence that any of the monuments of the Whale Oil claim were kept up or rebuilt. It is not contended by the defendant that a location, valid when made, is lost by the temporary destruction of a notice or of monuments, especially where such destruction occurs without the fault of the owner; but it is contended that, as one of the purposes of the requirement that the locator shall so mark out his claim as that its boundaries may be readily traced is for the guidance and protection of other miners, a location thus valid cannot be maintained for a long series of years, without actual possession, unless the boundaries are kept so marked as that they can be readily traced. This question need not be decided, because of the view I take respecting the annual expenditures required by law to be made upon all claims prior to the issuance of a patent therefor. As has been seen, the requirement of the statute is "that on each claim located after the tenth of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year," provided that, "where such claims are held in common, such expenditure may be made upon any one claim." The statute further provides, as appears from the citation already made, that—

"Upon a failure to comply with its provisions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided, that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

From time to time after the organization of the Little Sespe petroleum mining district, a large number of claims were located within its limits. In 1878 a well was commenced on the Kentuck claim, and sunk until oil was reached. Shortly afterwards, two wells were sunk on the Los Angeles claim, at a cost of about \$60,000. In those days the difficulties of operating in the district were great, and the value of the territory had not been demonstrated. The result was that the locators began to move away, and by 1882 no one remained there as a permanent resident but the recorder, Udall. He remained and, personally and by employes, did more or less work on the roads, and sought to interest capitalists in the territory. By degrees he acquired a large number of claims in the district, in which, through him, the plaintiff Gird subsequently acquired an interest; and those two persons—Udall and Gird—thereafter, by written instrument under date January 19, 1886, and in which L. D. Gavitt, Edward Roberts, and E. G. Sobeý joined as lessors, leased, upon certain terms and conditions not here necessary to be stated, for the period of 99 years, to Lyman Stewart, Dan McFarland, and W. L. Hardison, 60 mining locations within the district in question. This lease, with the consent of the lessors, was subsequently assigned to the Sespe Oil Company, a corporation, to which corporation Udall and Gird, by a subsequent lease, of date May 14, 1887, leased, for a similar period of 99 years, and upon similar terms and conditions, 20 other mining claims in the Little

Sespe petroleum mining district. The 80 mining locations so leased embrace in the aggregate between 8,000 and 9,000 acres of land, and are widely scattered over the territory, which is many miles in extent, and through which run many mountain ranges and precipitous canons. Shortly afterwards, the defendant, California Oil Company, succeeded to all of the lessees' rights under these leases. Among the claims so leased were the Whale Oil and Intervenor No. 3. These 80 locations, the plaintiffs contend, constitute a consolidated claim, the working of which could be best done by one agency and pursuant to one general system, the expenditures in pursuance of which could be legally and properly proportionately applied to the respective claims included within the so-called consolidated claim. If this can be legally done, it is quite manifest that 80 locations, embracing more than 8,000 acres of land, would not necessarily constitute the limit, but that the system may as well embrace every claim within the district, and thus an entire district be acquired by one agency pursuing a general system of development of the whole, and making annual expenditures equal in amount to the aggregate required by law to be made or performed upon the separate and independent locations. It is endeavored to sustain this position upon the theory that, as it is the policy of the law to encourage the greatest and most economical development of the mineral lands, it encourages such consolidation of ownership and operation of claims "where all of the mineral can be extracted from a large body of land more economically under one ownership, one system of management, one combined operation, than by the diverse and antagonistic operations of many claims." And a great deal of testimony and other evidence was introduced to show that the nature of petroleum and the geological structure of the country comprising the Little Sespe petroleum mining district, and the effective drainage power of an oil well, are such that all of the locations can not only be best worked by one system, but that it is almost necessary that they should be so worked.

It is undoubtedly true that petroleum, with its natural gas, unlike other mineral deposits, is movable by virtue of its own inherent force, as well as by virtue of its liquid character, and that this gas may be, and is, greatly assisted by pumps. The evidence shows, too, that, if fresh water gains access to the oil rock, it will drive out of the rock all of the gas and oil, and will do this for great distances. The evidence of Mr. Minor and of other witnesses shows that many fine wells in Pennsylvania have been ruined from this cause by neglect or design. Their evidence also shows that there it was common for unscrupulous persons to bore wells on the margin of their own holdings for the very purpose of thereby drawing oil from their neighbor's premises. But, as the normal condition of petroleum is one of repose, and not of motion, and it belongs to the rock in which it is embedded, it would seem to be very clear that the only difficulty in the way of preventing the recovery by the owner of the oil so abstracted would be the difficulty of making the necessary proof. But the fact that an oil well will drain oil from adjacent ground for very considerable distances, and the further fact that

there is always danger of fresh water getting into the well and destroying the producing capacity, not only of that particular well, but also of neighboring ones, are strongly relied upon to sustain the contention that the 80 locations claimed by the plaintiffs may, and ought to, be considered as one consolidated claim. In support of the same contention much evidence was also given tending to show that the stratification of the district in question is so irregular that to work it judiciously and profitably it is necessary to develop the territory by successive wells, or, as expressed by some of the witnesses, "to feel one's way along." And it was also shown that, by machinery adapted to the purpose, a great number of pumps, operating as many wells, can be worked with one engine and steam plant, situated at a central point, and, by means of pumps and pipe lines connecting with the wells, the crude oil can be transported for long distances to reservoirs and to the refinery; and that one superintendent can as readily care for many miles of territory as for one claim, and that one man can operate an engine and boiler that will pump several wells, and that, by the use of a telephone line and telephones properly placed, the superintendent and foreman can direct the operation of their men, and care for the operation of a plant covering many miles of territory. And such, the proof shows, was the plan of operations adopted by the lessees of the plaintiffs, in the pursuance of which they have expended annually more than \$8,000, and in the aggregate more than \$300,000. All of this, no doubt, greatly conduces to the profits of the plaintiffs' lessees, and is very convenient. But I am unable to see that these facts at all answer the requirements of the law regarding the location and acquisition of placer mining ground, which is the same whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else, or the applicant for the government title be rich and able to conduct operations on a large scale, or poor and able only to make the annual expenditure of \$100 in work or improvements. That expenditure, up to the time of the issuance of the government patent, is essential, subject to the provision contained in the statute that, where the "claims are held in common, such an expenditure may be made upon any one claim." In speaking of this statute, the supreme court, in *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, after referring to the local mining rules requiring annual work to be done in order to hold a claim, said:

"Congress, when it came to regulate these matters, and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute; and, as to those made afterwards, it required \$100 worth of labor or improvement to be made in each year on every claim. Clearly, the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principle of the dog in the manger. When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them. The prin-

ciple is well stated by Judge Sawyer in the case of *Mining Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886. 'Work done,' he says, 'outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the cases of tunnels, drifts, &c., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed, well adapted and intended to work several contiguous claims or lodes; and, where such is the case, work in furtherance of the system is work on the claims intended to be developed.' "

In the case at bar, none of the work done or expenditures made by the lessees of the plaintiffs, relied on to sustain the claim to the Whale Oil, were done or made on any claim contiguous to it. It is true that the evidence shows that, prior to the making of the leases in 1886 and 1887, Udall from time to time, under and pursuant to the local rules of the district, did considerable work in building roads in the district, and on the road that led in the direction of the Whale Oil claim. But the local rules, in so far as they conflict with the act of congress are, of course, of no avail, and that, as has been repeatedly stated, requires an annual expenditure of \$100 in work or improvements on each claim, provided that, where the claims are held in common, such expenditure may be made upon any one claim. But, to come within this latter provision, the claims so held in common must, as said by the supreme court in *Chambers v. Harrington*, supra, be contiguous, and the labor and improvements relied on must, as held in *Smelting Co. v. Kemp*, 104 U. S., at page 655, be made for the development of the claim to which it is sought to apply them; that is, in the language of the supreme court, "to facilitate the extraction of the minerals it may contain." This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to, the Whale Oil. I have not overlooked the contention of plaintiffs' counsel that by the well the lessees of the plaintiffs commenced on the Kenyon claim they hoped and expected, in years to come, to draw the oil from the Whale Oil claim, which is distant from the Kenyon considerably more than a mile, and between which and the Kenyon is a mountain range. The time when this result might be reached was fixed by the plaintiffs' witness who advanced the theory at from 10 to 100 years. When to this is added the fact that the well that was thus expected to extract the oil from the Whale Oil claim was not commenced until 1891, which was after the location of the Razzle Dazzle claim, upon which the defendant relies, nothing more need be said to show that work upon the well upon the Kenyon claim cannot be counted to maintain the validity of the Whale Oil location.

It is further contended on the part of the plaintiffs that the failure to do the required annual work or make the required annual improvements on the Whale Oil claim was due to threats made by Dye to Udall, and by Bradfield to employes of the plaintiffs' lessees. The record does not sustain the contention. It seems that about 1886 Dye killed a man named Haines, and in 1888 he grossly insulted Udall, and threatened his life. The trouble between them grew

out of some matter connected with the prosecution of Dye for the killing of Haines. All of this was long after the making of the leases by Udall and Gird, which conferred on the lessees all the rights of the lessors in and to the leased premises for the period of 99 years, and by the terms of which leases the lessors were required to make the annual expenditures required to hold and perfect the respective claims embraced by them. Dye's threats against Udall had no application to the lessees of the plaintiffs. In respect to the alleged threats of Bradfield, the testimony shows that none were made by him, and that what was said by him to the employes of the plaintiffs' lessees had relation only to the Oil Spouter claim. For the reasons stated, I am of the opinion that the failure to do the required annual work or make the required annual improvements upon the Whale Oil claim is fatal to that location, and that the ground thereby covered became subject to relocation.

It remains to consider the Razzle Dazzle location, which was made December 6, 1890, and under and in pursuance of which the defendant asserts the right to a patent from the government. Mason Bradfield, George J. Henley, and John Thompson were the locators of this claim. It was witnessed by J. G. Barker. The location notice is as follows:

"Notice of Location of a Placer Claim.

"Notice is hereby given, to all whom it may concern, that Mason Bradfield George J. Henley and John Thompson citizens of the United States of America, over the age of twenty-one years, have this day located, under the Revised Statutes of the United States of America, chapter six, title thirty-two, the following described placer mining ground, viz. It being the north half of the N. E. quarter of the N. E. fractional quarter, and lot one of Sect. one, T. 4 N. range (20) twenty west S. B. M. and more fully described as follows, beginning in the center of lot (6) six S. (1) one T. (4) four N. (20) R. twenty west S. B. M. at a monument of Stone's, running north twenty four (24) and 40-100 chains, to a monument of stones, thence east twenty (20) chains to a monument of stones, thence south twenty four (24) and 40-100 chains to a monument of stones, thence west twenty (20) chains to a monument of stones which is the place of beginning this claim contains fourty eight (48) and 90-100 acres of Pet. Oil & Brown Stone Mining ground situated in what is called the Little Sespe P. O. mining district, county of Ventura state of California.

"This claim shall be known as the Razzle Dazzle Placer Mining Claim, and we intend to work the same in accordance with the Laws of the United States of America.

"Dated on the ground this 6th day of December, A. D. 1890.

"Attest

"J. G. Barker
"J. G. Barker

"Locators
Mason Bradfield
Geo. J. Henley
John Thompson"

The notice was placed in a small tin can, and the can placed by the locators on a little shelf in a rock mound, more than two feet high, erected by them near a tree on the claim, and a copy of it filed for record with the recorder of the district December 24, 1890. The evidence shows that the corners of the claim were marked by large rock mounds, considerably more than two feet in height, and near the northeast corner a diagram was cut in the rock, and measurements given by which the claim could be easily identified. The evidence, I think, clearly shows that the boundaries of the claim were

so marked upon the ground as that they could be readily traced. It is said for the plaintiffs that this location did not comply with the local rules requiring the notice of location to be posted on the claim; that putting it in the tin can, and the can in the pile of rocks, was hiding, and not posting, it. I do not think so. As has been already said, one of the main purposes of the rule requiring the posting of the notice on the claim is for the guidance and protection of other miners seeking to locate claims. And it cannot be doubted that a miner traversing a mining region in search of mining ground who should see such a mound of rocks as usually marks a mining claim, with a tin can carefully placed in it, and who was seeking in good faith to inform himself, would fail to examine the contents of the can. The very fact that such a can was put in such a place would indicate to the miner that it was put there for a purpose, and that purpose the protection of a notice of information from destruction by the rains or from other causes. The objection made, in my opinion, is without merit.

It is further urged that the notice itself did not convey any information as to the boundaries of the claim, and this because it refers to certain subdivisions of a United States survey which, it is said, was never in fact made upon the ground. A portion of the township in which the ground in controversy is located was surveyed prior to the location of the Whale Oil claim, and thereafter one Collins was deputized to survey the remainder of the township. This survey Collins claimed to have made, and he returned to the land office field notes thereof and a map, which received the approval of the land department. Upon information tending to show that the pretended survey by Collins was not in fact made in the field, the commissioner of the general land office subsequently, to wit, July 15, 1885, suspended all entries of land embraced within it pending an investigation of the matter. But, afterwards, filings and entries were permitted and patents issued by the officers of the land department, based upon that survey. I agree with counsel for defendant, however, that it is immaterial in this proceeding what may be the ultimate fate of the Collins survey. If it should continue approved and valid, the Razzle Dazzle location conformed to it as required by the provisions of section 2331 of the Revised Statutes; and, if it should be set aside, the map of record in the land office may still be as well referred to for a description of the ground located.

It is further urged on the part of the plaintiffs that, independent of the Whale Oil location, the ground covered by the Razzle Dazzle location was not at the time open to location by Bradfield, Henley, and Thompson, because it was then in the actual physical possession of David H. Irland, who was then, by his employes, engaged in putting down a well upon it, and that Bradfield and Henley were estopped from claiming the ground; the latter for the reason, it is said, that he was in the employ of Irland, and the former upon the ground that Irland was holding under him. But these positions are without support in the record. The evidence, I think, shows that Irland himself was in the employ of the defendant oil company, and that the work that he was doing on the ground in question at

the time of its location was the defendant's work, and that the location made by Bradfield, Henley, and Thompson was in reality made for the defendant company, which, through mesne conveyances made almost immediately afterwards, acquired all of the rights therein of Bradfield, Henley, and Thompson. Irland never held under Bradfield any interest in the ground covered by the Razzle Dazzle location. He did hold a lease of the Oil Spouter claim from Dye and a man named Beattie, who had previously succeeded to Bradfield's interest therein. And in respect to the Oil Spouter No. 2 claim, which, it is said for the plaintiffs, covered a part of the disputed premises, and of which it is said Henley was one of the locators, it is enough to say that that pretended location was invalid because the notice of location was neither recorded nor witnessed as required by the local rules. It appears, however, from the notice of location that the Razzle Dazzle claim contains 48.90 acres of land. It is declared by the act of May 10, 1872, c. 152 (17 Stat. 91), and the provision was afterwards carried into the Revised Statutes, that no placer location "shall include more than twenty acres for each individual claimant." Sec. 2331, Rev. St. If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley, and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because, in that event, the location would have been made upon ground, not vacant and open to location, but upon ground in the actual and adverse occupancy of another. But, as already observed, I think the evidence shows that Irland, Bradfield, Henley, and Thompson were, in truth, all acting for the defendant company at the time of the location of the Razzle Dazzle claim, and therefore that the location should be considered and treated, not as made by the three individuals, Bradfield, Henley, and Thompson, but as made for and in the interest of the defendant company, and must, under the provision cited, be limited in amount to 20 acres of land. That defendant has expended upon the ground in question, annually since its location, much more than the amount required by the statute, and much more than the \$500 required by statute to entitle the applicant to apply for and obtain a patent, clearly appears from the evidence. For the reasons given, I am of the opinion that the right of possession of the disputed ground, to the extent of 20 acres, is in the defendant, and that the plaintiffs have no right thereto. There will be judgment in accordance with these views, with costs to the defendant.

BIGBEE & WARRIOR RIVERS PACKET CO. v. MOBILE & O. R. CO.¹

(Circuit Court, S. D. Alabama. December 30, 1893.)

1. INTERSTATE COMMERCE ACT—DISCRIMINATION—PLACE OF ORIGINATION OF GOODS.

All goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, regardless of the place where they originated.

¹ Reported by Peter J. Hamilton, Esq., of the Mobile bar.

2. SAME--TRAFFIC AGREEMENTS.

The fact that cotton is offered for shipment at Mobile for New Orleans by a packet company which had carried it from Demopolis does not make a case of dissimilarity of circumstances or conditions allowing the carrier which had no line to Demopolis to charge more than the established rate between Mobile and New Orleans, regardless of its agreements with other roads as to cotton so received.

At Law. On demurrer to answer.

Pillans, Torrey & Hanaw, for relator.

E. L. Russell, for respondent.

TOULMIN, District Judge, sitting as Circuit Judge. The facts in this case, as stated and admitted in the pleadings, are that the relator is a corporation of the state of Alabama, and is engaged in transporting cotton and other merchandise upon its vessels plying on the Bigbee river in the state of Alabama; that the respondent is a common carrier of goods, engaged in interstate commerce, and over its line and connecting lines undertakes to carry, as such common carrier, goods, including compressed cotton bales, from Mobile, in the state of Alabama, to New Orleans, in the state of Louisiana; that respondent, as such carrier, has for a long time, and does yet carry and transport compressed cotton bales from Mobile to New Orleans at and for the price of 80 cents a bale to ship's side at New Orleans, and the 80 cents a bale is the usual and customary rate charged from Mobile to ship's side at New Orleans on compressed cotton. Relator, having in the city of Mobile 400 bales of compressed cotton which it had brought on one of its boats from Demopolis, Ala., for reshipment to New Orleans, delivered the same to respondent at its freight sheds in Mobile, the place provided for receiving such goods for carriage, and requested and demanded of respondent that said cotton be shipped as customary, and at said customary rate of 80 cents a bale, and tendered the freight money in advance to respondent. Respondent refused to transport the cotton, as it was requested to do, at the rate of 80 cents a bale, and demanded \$1.25 a bale. One dollar and a quarter a bale was and is a higher rate than is charged by respondent to others and the general public for transporting cotton of like kind and condition from Mobile to New Orleans. Respondent sets up in justification of its refusal to receive and transport said cotton at 80 cents a bale, and of its demand of \$1.25 a bale, substantial dissimilarity of circumstances and conditions from those under which other cotton is offered by other shippers at Mobile, and received by respondent, to be transported to New Orleans. The substantial dissimilarity of circumstances and conditions as averred by respondent is the fact that the relator was engaged in transporting cotton and other merchandise upon its vessels on the Bigbee river, and that this cotton was received by the relator at Demopolis, Ala., and was transported upon its vessels to Mobile for the purpose of reshipping the same over respondent's line, or some other line of railroad, to New Orleans. And respondent further says, in justification, that it had agreed with the Louisville

& Nashville Railroad Company, and certain other railroad companies within a specified or given territory, for the purpose of maintaining a uniform rate upon all shipments of cotton from Demopolis and some other points in Alabama, in vessels plying the Alabama rivers, and received at Mobile to be reshipped and transported to New Orleans, that it would charge \$1.25 a bale for such transportation, and that the 400 bales of cotton in question were so received from Demopolis. Respondent, in short, says that it refused to receive and transport said cotton, as stated by relator, (1) because it was not offered under like circumstances and conditions as an ordinary or usual shipment of cotton over its line and connecting lines from Mobile to New Orleans; and (2) because of the agreement referred to.

The interstate commerce law, among other things, provides that it shall be unlawful for any common carrier, subject to the provisions of the law, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any services rendered or to be rendered in the transportation of property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic, under substantially like circumstances and conditions (section 2, "Act to Regulate Commerce," 24 Stat. 379); and by section 3 of the act it is provided that it shall be unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person or locality, in any respect whatsoever, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is contended on part of respondent that the proposed shipment of the cotton in question was not as an original shipment from Mobile to New Orleans, but was shipment from Demopolis, Ala., through Mobile to New Orleans. The cotton was shipped from Demopolis to Mobile to be forwarded to New Orleans, but was not shipped by through bill of lading from Demopolis, via Mobile, to New Orleans. It was shipped from Demopolis to Mobile, consigned to relator at Mobile, to be reshipped at Mobile. It was tendered by relator to respondent, to be shipped over its line and connections to New Orleans, and a bill of lading therefor demanded of respondent. The fact is that all cotton shipped from Mobile to New Orleans by any person comes from some point outside of Mobile. What substantial dissimilarity in circumstances and conditions is there, then, between a shipment of cotton from Mobile to New Orleans by a person who has received the cotton from Tuscaloosa, or any other part of Alabama, for illustration, and a shipment of cotton from Mobile to New Orleans by a person who has received it from Demopolis, Ala.? There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity of circumstance or condition that justifies a

dissimilarity of rates. "That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true." *Interstate Commerce Commission v. Texas & Pac. Ry. Co.*, 6 C. C. A. 653, 57 Fed. 955. The circumstances and conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is conducted. They must have direct bearing upon the traffic over the line on which the discrimination is made. The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or any other competitive railroad line not subject to the interstate commerce act. Respondent's position on this point cannot be sustained. I am unable to see that the circumstance that the cotton in question came from Demopolis to Mobile, to be re-shipped thence to New Orleans, has any direct bearing upon the traffic over respondent's line to New Orleans. I am unable to see how the fact or circumstance that the cotton came from Demopolis can in any way affect transportation or traffic over respondent's line and connecting lines to New Orleans. The respondent has no line to Demopolis, Ala., and no connecting line or joint traffic arrangement with the relator, the Bigbee & Warrior Rivers Packet Company, and hence there is no question of a proportion of rates involved in the case.

It is further contended by the respondent that to grant to the relator the right to ship its cotton from Mobile to New Orleans at the same rate given to other shippers of cotton from the one point to the other at what the counsel calls "the Mobile rate of 80 cents on a bale," would give to every town located on the Alabama rivers equal facilities and advantages with those of Mobile. That is true, and that is what I understand the interstate commerce act provides for and is designed to protect, when it says that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. I consider that any person who receives cotton at Mobile from Demopolis, or any particular point on the Alabama rivers, whether it comes by boat, by wagon, or any other way, and desires to ship it from Mobile to New Orleans by respondent's railroad line, is as much entitled to have it shipped at the Mobile rate of 80 cents a bale as any other person is who receives his cotton from any other point, or who may have bought it at Mobile. To deny the former this right while it is given to the latter would, in my judgment, be subjecting him and the locality from which he got his cotton to an undue and unreasonable disadvantage, and would be violative of the act to regulate commerce. *Crews v. Railroad Co.*, 1 Interst. Commerce Com. R. 401. The United States supreme court in the case of *Railroad Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, say, in substance, that it was designed by the act to

regulate commerce "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities; that carriers are bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all their patrons upon an absolute equality." Relative to the agreement set up in the defense I will say that "if the respondent is acting, or claims to act, under the compulsion of circumstances and conditions of its own creation or connivance in the making of an exceptional rate, then these will not avail it" (*Business Men's Ass'n of Minnesota v. Chicago, St. P., M. & O. R. Co.*, 2 *Interst. Commerce Com. R.* 52); and, further, that, in my opinion, such an agreement contravenes the act to regulate commerce. My conclusion is that no justification has been shown by the respondent for the discrimination complained of, and that relator's demurrers to respondent's answer should be sustained; and it is so ordered.

CARROLL v. ALABAMA G. S. R. CO.¹

(Circuit Court, N. D. Alabama, S. D. November 11, 1893.)

1. LIMITATION OF ACTIONS—EXCEPTIONS—REVERSAL OF JUDGMENT.

Code Ala. § 2623, providing that, in case of the reversal of a judgment on appeal, the action may be commenced again within one year, though the period limited may in the mean time have expired, was intended to relieve parties from the consequences of some error, mistake, or oversight in bringing or prosecuting the action, and applies only where the judgment of reversal is fatal to plaintiff's right to maintain the action in the form in which it was first brought.

2. SAME—EFFECT OF REVERSAL.

It does not appear that the effect of a reversal was to prevent plaintiff from recovering where the court on appeal held that plaintiff could not recover in the case made on the record, and that the lower court erred in not so instructing the jury, and such a case is not within the statute.

At Law. On demurrer to rejoinder.

This suit is an action for personal injuries. Among other defenses set up by the defendant is that of the statute of limitations. It is pleaded that the cause of action accrued more than one year before this suit was brought. The plaintiff replies that it is true that the cause of action accrued more than one year before this suit was brought, but that he had sued on the same cause of action in the city court of Birmingham within one year after the cause of action accrued; that he recovered a judgment in said suit; that the judgment was appealed from by the defendant, and on such appeal the supreme court of the state reversed and remanded the cause to the said city court (11 *South. 803*); and that afterwards, and before the expiration of one year from such reversal, the plaintiff brought this suit. To this replication the defendant rejoins, and says it is true that the judgment rendered in the city court for the plaintiff was reversed and remanded by the supreme court to said city court, but that said reversal was not for any error, mistake, or oversight of the plaintiff in bringing or prosecuting the suit, nor for any defect of form therein, but was reversed on the merits of the case, as shown by the record before the supreme court; that, after said cause was reversed and remanded, the plaintiff, of his own motion, appeared in said city court, and voluntarily dismissed the cause out of said court; and defendant therefore claims the plaintiff, in this suit, does not come within

¹ Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

the exception to the bar of the statute of limitations, as provided by section 2623 of the Code of Alabama, which reads as follows: "2623. On Arrest or Reversal of Judgment, Suit Brought within a Year. If any action is brought before the time limited has expired and judgment is rendered for the plaintiff, and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence suit again within one year from the reversal or arrest of such judgment, though the period limited may in the meantime have expired; and, in like manner, if more than one judgment is arrested or reversed, suit may be recommenced within one year." To this rejoinder the plaintiff demurs, and in substance says that it does not appear from any of the averments of the rejoinder that the plaintiff should not have and maintain his present action.

Brooks & Brooks, F. S. Ferguson, and S. W. John, for plaintiff.
A. G. Smith, J. W. Fewell, and Geo. Hoadley, for defendant.

TOULMIN, District Judge (after stating the facts as above). The statute of limitations is no bar to this suit if the plaintiff brings himself within the exception of section 2623 of the Alabama Code, referred to; but, if his case does not come within the operation of that section, it is conceded, as I understand it, that he cannot maintain this action; that the statute of limitations of one year is a bar to it. To determine this question, which is the one raised by the pleadings now presented to the court, we must consider what the object of the legislature was in enacting the statute referred to,—what cases it was intended to apply to. In *Roland v. Logan*, 18 Ala. 307, the supreme court says:

"If a judgment be rendered against a plaintiff for a defect of form, not touching the merits, he would be without remedy if the statute perfected the bar during the pendency of the first suit. To remedy this defect, the act referred to was passed. It contemplated the bringing of another suit within a year after a judgment in a suit at law for the same cause of action had been rendered against the plaintiff, but not upon its merits."

It may be that this declaration of the court was unnecessary in the case then before it; that there was nothing in the case then under consideration that called for this expression of opinion by the court. However this may be, it was an expression of opinion bearing on a statute similar to the one now being considered, and it is entitled to great respect. In the case of *Napier v. Foster*, 80 Ala. 379, Stone, C. J., speaking of this statute (section 2623 of the Code), says, in the opinion of the court, that:

"It is only in cases where some error, mistake, or oversight is fatal to the right to maintain the action in the form in which it is first brought that it can ever become necessary to invoke the provisions of the statute; that the statute was intended to relieve parties of the consequences of some error, mistake, or oversight in bringing or prosecuting the first suit."

It seems to me, then, that the test by which we are to determine the issue now before the court on the pleadings is whether the judgment of reversal was fatal to the plaintiff's right to maintain the action in the form in which it was first brought, or, in short, whether the judgment of reversal rendered necessary the dismissal of the first suit,—the suit in the city court of Birmingham. Now, was the dismissal of that suit rendered necessary by the reversal of the supreme court? It does not appear that it was. It does not appear that the effect of the reversal was to prevent the plaintiff from re-

covering in that suit. The supreme court held that the plaintiff could not recover in the case made on the record then before it, and that the lower court erred in not so instructing the jury. But it did not follow that on another trial the plaintiff might not be able to make a stronger or better case in the same action. The reversal of the case by the supreme court did not have the effect of defeating the plaintiff's right to continue the suit, and recover in it. The reversal did not render necessary the dismissal of that suit. It was a voluntary dismissal. While the case at bar may come within the letter of the statute, is it not manifestly opposed to the spirit of it? The supreme court of Alabama, in the case of *Napier v. Foster*, supra, say:

"There are cases which require us to disregard the letter of a statute when they are manifestly opposed to its spirit. It should be a clear case, however, to justify the application of this rule. There must be a moral conviction, based on the unreasonableness of the application sought to be made, that the legislature could not have intended such result."

It seems to me that the application of the statute here sought to be made would be very unreasonable. It would be unreasonable to hold that the legislature intended to except from the operation of the statute of limitations a person who voluntarily dismisses his suit because of some adverse ruling of the supreme court in it, which did not render the dismissal necessary, but which had the effect only of declaring that on the facts of the case, as shown by the record before it, the plaintiff was not entitled to recover, and that the case should be remanded for another trial, wherein the plaintiff could have an opportunity of making a better case, if within his power to do so. As suggested by the supreme court in the case just referred to:

"The statute was intended to relieve parties of the consequences of some error, mistake, or oversight in bringing or prosecuting the first suit. If no oversight or mistake had been committed in the first suit, it would seem there could be no occasion for the statute. It is only in cases where the error, mistake, or oversight is fatal to the right to maintain the action in the form in which it is first brought that it can ever become necessary to invoke the provisions of the statute."

Is the plaintiff suffering the consequences of any error, mistake, or oversight in bringing or prosecuting the suit in the city court of Birmingham? Is it a case where there was error, mistake, or oversight on his part that was fatal to his right to maintain the action in the form in which it was first brought? If not, there could be no occasion for the statute, and it could not become necessary to invoke its provisions. The dismissal of the former suit was not rendered necessary by the judgment of reversal, and my opinion is that the statute invoked has no application. The conclusion, therefore, is that the rejoinder is a sufficient answer to the replication, and that the demurrer thereto should be overruled. It is so ordered.

PORT ROYAL & A. RY. CO. v. STATE OF SOUTH CAROLINA.

(Circuit Court, D. South Carolina. March 6, 1894.)

1. COURTS—JURISDICTION—CROSS BILL AGAINST A STATE.

A state brought a suit in equity against certain corporations in one of her own courts. The cause was then removed to a federal court, and a cross bill was filed by one of the defendants. *Held* that, as the state had voluntarily submitted herself to the jurisdiction, and as a cross bill is not an original suit, the same could not be dismissed on the ground that suit will not lie against a state.

2. SERVICE OF PROCESS—SUBSTITUTED SERVICE ON STATE.

When a suit is instituted by a state, and a cross bill is filed against it, it is proper to serve the state by making substituted service upon the attorney general, by whom the bill was filed.

The original bill in this case was filed in the court of common pleas for the county of Beaufort, S. C., by the state of South Carolina vs. the Port Royal & Augusta Railway Company and the Central Railroad & Banking Company. It was removed into this court, whereupon, after this removal, the cross bill was filed by the Port Royal & Augusta Railway Company. Subpoenas were issued, and the state of South Carolina was served by substituted service on the attorney general, by whom the original bill was filed. A motion is now made to set aside the service of the subpoena, and dismiss the cross bill, upon the ground that it will not lie against a sovereign state.

Mitchell & Smith and Lawton & Cunningham, for complainant.
O. W. Buchanan, Atty. Gen., and Smythe & Lee, for defendant.

SIMONTON, Circuit Judge. There can be no doubt that a suit cannot be instituted in this court against a sovereign state of the Union without its consent. The whole point, therefore, turns upon the further question, is a cross bill a suit? Story (Eq. Pl. § 399) says:

"A cross bill is a defense to an original bill, or a proceeding necessary to a complete determination of a matter already in litigation. It is treated as a mere auxiliary suit, or as a dependency upon an original suit."

A cross bill, says Mitford (Eq. Pl. 99, pp. 81, 82), is considered as a defense or as a proceeding to procure a complete determination of a matter already in litigation. Foster (Fed. Pr. § 169) gives the same definition. Daniell (Ch. Pr. [3d Eng. Ed.] 1647) gives this definition:

"As a defendant cannot pray anything in his answer except to be dismissed the court, if he has any relief to pray or discovery to seek, he must do so by a bill of his own,—what is called a 'cross bill.' A cross bill is a bill brought by a defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill. It is treated as a mere auxiliary suit, or as depending on the original suit, and can be sustained only on matter growing out of the original bill."

In *Ayres v. Carver*, 17 How. 595:

"A cross bill should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit."

And in that case, giving the same definition of a cross bill as is given by Daniell, the supreme court, as a corollary, thereupon approve the saying of Lord Hardwicke, quoted in *Field v. Schiefelin*, 7 Johns. Ch. 252, "that both the original and cross bill constituted but one suit, so intimately are they connected with each other."

A sovereign state cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the state comes into court of her own accord, and invokes its aid, "she is, of course, bound by all the rules established for the administration of justice between individuals." *State v. Pacific Guano Co.*, 22 S. C. 74. Of course, she is only bound quoad the matter submitted by her in her suit. *Louisiana v. Jumel*, 107 U. S. 728, 2 Sup. Ct. 128. If this cross bill, on examination, be found to relate to any other matter than that contained in the original bill; if it seeks to inject new and foreign matter in the suit; if we find it abandons the proper office of defense, and seeks original and independent relief,—it is an improper cross bill, and is demurrable. We have not reached this point. The only question now before us is, can the state be called to make defense to a cross bill filed in a suit instituted by herself? As by her own volition she is already in court, and as the cross bill is but a part of the defense to her suit, ancillary to and dependent upon it, we hold that she has by her own act subjected herself to all the rules established for the administration of justice between individuals, and must make her defense to this cross bill. The mode of service adopted in this case by substitution is approved. The attorney general is the representative of the state in all matters involving her rights in a court of justice.

ANGLIN v. TEXAS & PAC. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 200.

MASTER AND SERVANT—RISKS OF EMPLOYMENT—TRIAL—DIRECTING VERDICT.

Plaintiff, who was an old, experienced railroad man, in defendant's service, was directed to assist in moving a "dead" engine in the company's yard, and while so doing was injured, by being caught between that engine and another one that was standing on an adjoining track. The work was done in open day. Plaintiff could see both engines, and judge of the distance between them, and he was not directed to take any particular position in working. *Held*, that the evidence justified a peremptory verdict for the defendant, since the danger was one incident to the service.

In error to the Circuit Court of the United States for the Northern District of Texas.

Action by John G. Anglin against the Texas & Pacific Railway Company. The court directed the jury to find for the defendant, and judgment was rendered accordingly. Plaintiff brings error.

E. W. Tempel, for plaintiff in error.

T. J. Freeman, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. On the assignment of errors in this case, the only question to be considered is whether it was proper for the trial court to instruct the jury to find for the defendant, or whether the case should have been left to the jury. It is well settled by the decisions of the United States supreme court that "a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had, upon any view which can be properly taken of the facts the evidence tends to establish." *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Gardner v. Railroad Co.*, 14 Sup. Ct. 140. And it is equally well settled that, where the undisputed facts of a case are such that all reasonable men must draw the same conclusion from them, the trial court is justified in withdrawing the case from the jury. Are the undisputed facts in this case such that the court below was justified in withdrawing the case from the jury? Are they such that all reasonable men must draw the conclusion that the plaintiff assumed and exposed himself to obvious risks and dangers in the work in which he was engaged at the time he was injured? The general rule is that one who engages in an employment of a hazardous nature assumes the risks and dangers incident thereto; but increased risks and dangers, caused by negligence on the part of the employer, are not deemed to be incident to the business, within the meaning of the rule. A duty rests upon the employer which requires him to exercise due care on his part that no risks and hazards to those in his employ shall be unnecessarily increased. When he performs this duty, in view of the particular employment, then the risks and dangers pertaining thereto are assumed by the employee. *Gardner v. Railroad Co.*, supra.

The facts of this case are, in substance: That the plaintiff was in the employ of the defendant as day watchman at defendant's roundhouse. His principal duty was to watch the premises, but was to obey all orders given him by the foreman, whatever they might be, in regard to any work about the premises. That it was customary, and the duty of all employees, when ordered to do so, to assist in moving "dead" engines into the roundhouse for repairs, and that plaintiff was called out by the foreman to assist in such work on the occasion of his unfortunate injury. A dead engine is described as one without steam, or power to move itself. Plaintiff was injured while assisting in moving a dead engine onto a turntable for the purpose of placing it in the roundhouse for repairs. Certain tracks of defendant's railway converged to the turntable, or diverged therefrom. Over one of these convergent tracks, plaintiff was ordered to assist in pushing said dead engine onto the turntable. A short while before this, another engine of the defendant had been removed from the turntable onto one of the divergent tracks, to allow room for the dead engine to get onto the turntable, and was left standing a few feet therefrom. While engaged in pushing the dead engine, the plaintiff was caught between it and

the stationary engine referred to, and was severely injured. Plaintiff was an old, experienced railroad man, and was perfectly familiar with the movements of engines, and had frequently assisted in moving engines in the same manner as this one was being moved. The work in which he was assisting was done in broad, open daylight. The position of each engine was seen by him before he commenced, and he had equal opportunities of knowing, with the others, whatever danger there might be incident to the work. In his testimony he says: "A. I went down in front of the two engines, or at least in front, and between the two engines. I could see both engines as I approached them, and their location." He was not directed or commanded to work at any particular place at the engine, and the position taken by him was of his own choice, and with the full knowledge of the fact that said engine, as it would be moved forward, would come closer to the one standing on the other track. There were some 30 or 40 men engaged in the work. The general foreman and the roundhouse foreman were both present when the first engine was removed from the turntable to make room for the dead engine, and the proof shows that they and others who assisted in its removal believed there was sufficient space for the dead engine to pass without any difficulty. The plaintiff himself said he thought there was plenty of room to get between the two bumper beams of the two engines, but that, in the hurry and excitement of the occasion, he was "considerably confused," and that before he knew it he was made fast, and could not extricate himself. Indeed, the evidence tended to show that by the use of due care the plaintiff could have escaped all danger. We think it is clearly to be deduced from the evidence that, whatever may have been the risks incident to the work, they were patent and obvious and were assumed by the plaintiff. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, and authorities therein cited; *Railway Co. v. Minnick* (decided by this court at last term) 57 Fed. 362.¹ On the facts of the case, the injury to the plaintiff was not caused by any negligence of the general foreman, or of the foreman of the roundhouse. We are therefore of opinion that it was proper to direct a verdict for the defendant. The judgment is affirmed.

McGRATH v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 181.

1. MASTER AND SERVANT—RISKS OF EMPLOYMENT—RAILROAD BRIDGE.

A railroad employé, who, when engaged in removing a wrecked train, goes upon a bridge which is obviously a new and temporary structure, the defects of which are patent, assumes the risk arising from such defects.

2. SAME—NEGLIGENCE OF FELLOW SERVANT—WRECK MASTER.

A railroad employé, who is one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the

¹ 6 C. C. A. 387.

negligence of the wreck master, who has charge of the wrecking car. *Railroad Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, followed.

In Error to the Circuit Court of the United States for the North-east District of Texas.

Action by John McGrath against the Texas & Pacific Railway Company for personal injuries. Defendant obtained judgment. Plaintiff brings error.

Wendel Spence, for plaintiff in error.

T. J. Freeman, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. The facts disclosed by the testimony are that the plaintiff was a car repairer in the car department of the defendant; that one White was the foreman of the car department, in which was included the wrecking department of the company. White had authority to employ and discharge persons working in that department, and did employ the plaintiff. There was a wreck on defendant's road. White sent one Schmalzreid and the plaintiff and others to the scene of the accident with a wrecking car, on which were a derrick and appliances with which to remove the wreck. Schmalzreid had charge of the wrecking car and machinery while it was operated in removing the wreck, and while in charge of the work was called the "wreck master," and had experience as such. The wrecking car was placed on a bridge, at the place of the wreck, which the evidence tended to show was defective and insecure. It had been damaged at the time of the recent wreck, and had been but temporarily repaired. The evidence also tended to show that, while the wrecking car was provided with sufficient and suitable ropes to secure and keep the derrick on the car in position, they were not properly fastened or used at the time of the injury complained of. The plaintiff was working on the car, and participated in handling the ropes, and had been so working for a day and a half before the injury occurred. The car and derrick toppled over, and he was severely injured. The evidence further tended to show that the injury resulted from Schmalzreid's negligence in placing the car on the bridge to do the work, when it was unnecessary to do so, and in not properly fastening the ropes to secure and keep the derrick in position. The general charge of the court, to which the plaintiff excepted, and now assigns as error, was as follows:

"So far as the faulty construction of the bridge is objected to by plaintiff, it was obviously a new and temporary structure, the defects of which, so far as they may have contributed to the injury of plaintiff, were patent, and open to the eyes of the plaintiff. Under the evidence in this case, you are instructed that plaintiff cannot recover under his allegations of negligence on the part of Schmalzreid, the wrecking master. You will therefore find for the defendant."

The plaintiff also requested several special charges, which were refused by the court, and to which plaintiff excepted.

We think the facts of this case bring it directly under the ruling

in the case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, and of the case of Railway Co. v. Rogers (decided by this court at the last term) 57 Fed. 378,¹ and that there is no error in the charge of the court, and therefore none in its refusal to charge as requested by the plaintiff. Judgment affirmed.

HAILE'S CURATOR v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 167.

COMMON CARRIERS OF PASSENGERS—NEGLIGENCE—INSANITY.

Where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement, hardship, and suffering resulting therefrom, the company is not liable in damages therefor, since insanity is not a probable or ordinary result of exposure to a railroad accident.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by the curator of James T. Haile, a lunatic, against the Texas & Pacific Railway Company, for injuries to plaintiff's ward. Defendant obtained judgment on exceptions to the petition. Plaintiff brings error.

In his petition the plaintiff in error (also plaintiff in the lower court) avers: That on or about January 29, 1892, in company with James T. Haile, his ward, he took passage on the passenger train of the defendant company, at Dallas, Tex., and paid fare, and provided tickets, for himself and his brother, to Baton Rouge, La., in consideration of which fare the said company contracted and bound itself to convey them safely, and without delay and harm, to such destination. "That this trip was undertaken under directions of a physician, who advised that rest, quiet, and change of scene would restore to full vigor of mind and body the said James T. Haile, who had for some time previous been suffering from an attack of grippe, and was at this time, and in consequence thereof, greatly depressed, mentally and physically, and in an intense nervous condition. That the greater part of said journey had been accomplished in safety, and without any bad effect upon the said James T. Haile, until on the next day, January 30, 1892, about 8 a. m., when near the town of Robeline, La., the said train was suddenly, and without warning, precipitated through a burning bridge, and was completely wrecked, and immediately after caught fire and was destroyed. That the shock from the accident was so great that it hurled said James T. Haile from his seat to the floor, where he lay utterly helpless and prostrated by the shock, and unable to move. The train having in the mean time caught fire, petitioner was forced to carry his brother out of the car, and, on account of the marshy condition of the surrounding country, and his nervous and prostrated condition, to place him on the roadbed, where he was in full view of the burning wreck, and in the midst of the wounded and dying, whose cries and lamentations, added to his already intense nervous state, caused by the accident itself, threw him into a state of excitement, so that petitioner, and those around him, were unable to control or quiet him. That his nervous state became greatly worse during the several hours they were forced to wait on the scene of the wreck for conveyance to the town of Robeline, where they were to wait for the relief train to be sent out by the railroad company. After a further delay of some hours, the relief train arrived, consisting, as petitioner afterwards found, of what is known as an 'emigrant

coach,' drawn by a freight engine. The coach was overcrowded with passengers from the wrecked train. The seats and other accommodations were of the crudest kind, entailing great discomfort and inconvenience upon the passengers, and especially upon petitioner's ward, who, in his exhausted, excited, and overwrought state of mind and body, was forced to use same. That the hardships, together with the constant and sudden jerkings and stoppings of the train, caused by the engine used not being properly constructed for such purposes, or because it was improperly handled, kept petitioner's ward and the passengers in constant fear and excitement; and finally, on entering the company's yard in Algiers, La., the train on which was petitioner and his ward was suddenly and violently run into from the rear by a switch engine, through the negligence of defendant's employes. The shock was so violent as to knock petitioner's ward off the seat, to the car floor, and caused great excitement among the passengers, who feared another accident had befallen them. Now, petitioner alleges that since this time his ward has become rapidly worse, as a result of the shock, excitement, and hardship he suffered from the said accident, and he is now insane, and confined in a bettering house, with little or no hope of recovery; and he has therefore been interdicted, and petitioner duly appointed his curator. Petitioner therefore alleges and charges that the present state of his ward's mind was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships aforesaid; and he alleges that the said accidents and injuries were caused by the negligence of the defendant company, its employes and agents, for the reason that, by the exercise of due care and caution in the management of its road and the selection of agents, the said accidents could have been avoided. That the said road employed no track walkers to guard against such accidents, and to see that the road was in proper condition, and safe for travelers on the company's trains, as it was in duty bound to do. And by reason of the fact that this section of the road was made up of wooden trestlework, which needed constant vigilance and care to keep it in safe condition, the burning of this bridge for hours before the accident was evidence of gross negligence on the part of the company. That the train to which the accident happened was running at a rate of speed that was dangerous and negligent, considering the character of the roadbed, and the fact that a dense fog obscured the view of the trainmen. For these reasons, and for the conduct of the company and its agents in the careless transportation of petitioner and his ward, the said company is chargeable with gross negligence. Petitioner alleges and avers that for the pain, anxiety, and loss of his mind, the expense he has incurred, and in the future must incur, petitioner's ward has been damaged in the sum of twenty-five thousand dollars by the said company." The defendant company, also defendant in error, excepted or demurred to the petition on the following grounds: "Because said petition, on its face, shows no cause of action against defendant. Because, under the law, no right of action can arise for damages for the insanity of a human being. Because said petition does not show any right to recover damages for insanity. Wherefore, defendant prays that these exceptions may be maintained, and plaintiff's suit dismissed, with costs." The exceptions were sustained by the lower court, and judgment was rendered dismissing the suit. This ruling is assigned as error.

W. B. Spencer and Charles Payne Fenner, for plaintiff in error.
W. W. Howe and S. S. Prentiss, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge (after stating the case as above). The first and third grounds of exception to the petition are, in effect, the same, and if they are well taken the judgment of the court below must be affirmed. The plaintiff claims damages for the pain, anxiety, and loss of mind alleged to have been suffered by his ward,

James T. Haile, and avers that this state of said Haile's mind, which is now one of insanity, "was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships" complained of. He avers that the shock of the accident was so great as to hurl Haile from his seat to the floor of the car, where he lay prostrated by the shock. A shock is a sudden agitation of body or mind. It may affect the body or mind. The petition avers that Haile lay helpless and prostrated, but whether from a bodily or mental shock is left somewhat uncertain by the averments of the petition. The shock averred may reasonably be construed to mean the one or the other. But there is no charge that any bodily injury was sustained by the shock, and no claim for damages for any such injury. The charge is that Haile's insanity was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships complained of; and the claim for damages is for the pain, anxiety, and loss of his mind, and the expenses incurred and to be incurred incidental thereto. The learned counsel for the plaintiff concedes "that pain and anxiety of mind the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." They say that the plaintiff, in this case, is not seeking to recover for the mental pain or anxiety of his ward, but for his insanity,—the loss of his mind,—and they present to the court an able argument to show that "the two are entirely separate and distinct phenomena." They contend that insanity is not to be "placed in the same category with such trivial mental phenomena as mere anxiety and worry." They say, "It is a disease of the mind, and the law could as well weigh and determine the damage a man has suffered by the loss of his mind as it could the loss of his leg, or of the power of sight," etc. It is not necessary for us to decide the question raised by this contention, which is whether, under the law, any right of action can arise for damages for the insanity of a human being. The question we are called on now to decide is whether the facts set forth in the petition show any right to recover damages for insanity, as is therein claimed. That question we will proceed to consider.

The negligence of defendant, as charged, being admitted by the exceptions, the question is, was that negligence the proximate cause of the injury complained of? It is well settled that the damages sustained by a wrongful act must be the natural result of the act,—such a consequence as, in the ordinary course of things, would flow from it. As expressed by some of the authorities, "Proximate damages are those that are the ordinary and natural results of the negligence, such as are usual, and might therefore have been expected." "Remote damages are such as are the result of an accidental or unusual combination of circumstances, which would not be reasonably anticipated, and over which the negligent party had no control." *Ewing v. Railroad Co.* (Pa. Sup.) 23 Atl. 340; *Commissioners v. Coultas*, L. R. 13 App. Cas. 222; *Cooley*, Torts, 69; 2 *Thomp. Neg.* 1083. The contention is that the insanity for which damages are claimed was caused by the excitement, hardship, and suffer-

ing which resulted from the accident. According to the great current of modern medical authorities, insanity is a disease,—a disease of the mind,—the existence of which is a question of fact, to be proved, just as much as the possible existence of any other disease. As said by Dillon, C. J., in *Felter's Case*, 25 Iowa, 68, "That insanity is the existence of mental disease, both medicine and law now recognize." While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury, and would produce fright and excitement, it had no reason to anticipate that the latter would result in permanent injury, as a disease of the mind, or any other disease that might be caused by excitement, exposure, and hardship sometimes incident to travel. If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen, in the light of the attending circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Haile's mind as to produce disease,—the disease of insanity,—any more than that the exposure and hardships he suffered would produce grippe, pneumonia, or any other disease. He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and an excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity. The defendant owed him the duty to carry him safely,—not to injure his person by force or violence. It owed him no duty to protect him from fright, excitement, or from any hardship that he might subsequently suffer because of the unfortunate accident. The case of *Scheffer v. Railroad Co.*, 105 U. S. 249, was where, by reason of a collision of railway trains, a passenger was injured; and, becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. The court held, in a suit by his personal representative against the railroad company, that, as his own act was the proximate cause of his death, there could be no recovery. In the opinion the court said:

"The suicide of Schaffer was not the result naturally and reasonably to be expected from the injury received on the train. * * * His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes intervening between the act which injured him and his death."

There was no error in the ruling of the circuit court, and the judgment is affirmed.

GREENWOOD et al. v. TOWN OF WESTPORT.

(District Court, D. Connecticut. March 8, 1894.)

No. 915.

1. MUNICIPAL CORPORATIONS—NEGLIGENCE—DRAWBRIDGES.

Defendant town assumed the obligations of a private corporation chartered to construct and maintain a drawbridge across a navigable stream. Neither the corporation nor the town was required by law to operate the draw in such bridge, but after a time the town undertook such operation

by a draw tender appointed first at a town meeting and afterwards by its selectmen. *Held*, that the town, having voluntarily assumed the obligation of operating the draw, is liable for the consequences of its negligence in such operation.

2. SAME—ACTION FOR.

The rule that a private action will not lie against a town for the neglect of a public duty is confined to the case of public governmental duties; while the obligation, voluntarily assumed, of operating a draw in a drawbridge is a mere private corporate duty.

3. ADMIRALTY—MARITIME TORTS—DRAWBRIDGES—TOWNS.

An injury to a vessel from negligence in operating a draw in a drawbridge is a maritime tort, and a court of admiralty will entertain an action against a town therefor.

4. MUNICIPAL CORPORATIONS—NEGLIGENCE—DRAWBRIDGES.

A town maintained and operated a drawbridge across a stream which was navigable only at high tide. Libellant's barge approached the bridge about high water, and signaled for the opening of the draw. The draw tender was absent, and one of the selectmen undertook to open the draw; failing in his attempt, he discovered that it was locked underneath, and he then procured a boat, and opened the draw. In the mean time the barge had been delayed about half an hour, the tide had fallen some six inches, and, while passing through the draw, the barge struck on the bottom, and sank, suffering serious injury. *Held*, that there was negligence on the part of the town.

5. SAME—CONTRIBUTORY NEGLIGENCE.

The proper course of the barge was straight through the middle of the draw. She sunk diagonally across it, and witnesses for the town testified that her master's negligent steering turned her bow to starboard, and caused her to strike the pier. The master denied that he so steered her, and testified that her wheel touched bottom, causing her to strike her port bilge; and her bow took a shift to starboard when the engines were reversed. The shipwright who repaired her testified that her port side was broken, but that she had struck nothing on the starboard side. *Held*, that she was properly navigated through the draw, and the master was not negligent.

6. SAME—BEACHING.

Nor was he negligent in attempting to pass through the draw notwithstanding the fall of the tide, where it appeared that he could neither go back nor turn around, and that it was dangerous to ground the barge on the flats, on account of rocks which would go through her bottom.

7. SAME—UNLICENSED MASTER.

As there was no negligence on the master's part contributing to the injury, the fact that he had no pilot's license is no defense to the town; especially where it was shown that he had passed the draw several times before, and had examined the channel at low water in a skiff.

In Admiralty. Libel by Sylvester Greenwood and others against the town of Westport. Decree for libelants.

Carpenter & Mosher and Samuel Park, for libelants.

C. R. Ingersoll and Carter Thompson, for defendant.

TOWNSEND, District Judge. This is a libel in personam against the town of Westport, in the district of Connecticut, to recover damages to the steam barge Hebe, alleged to have been caused by the negligence of said town in not seasonably opening a drawbridge across Westport river, by reason whereof said barge was delayed until she was carried away by the ebb tide, and struck the bottom, and sank. The defenses are denial of negligence, and denial of liability even if there was negligence. The question of jurisdiction has

already been presented upon exceptions, and decided adversely to the defendant. 53 Fed. 824.

The defendant town is located on the banks of Westport river, which is navigable for steam barges such as the Hebe only at or about high tide. In said town, and some 250 to 300 feet above said drawbridge, are certain stores and wharves. At a short distance beyond this point the river becomes a mere shallow stream, and is not navigable. A drawbridge was originally built across said river at the point where the present bridge is located, under a charter granted in 1796 to a private corporation. Said charter provided that the company should make a draw in said bridge "sufficient to accommodate all the navigation which may pass up and down said river," but nothing was said about operating said draw. In 1857, said corporation abandoned said bridge, and the defendant town then took charge of, and has ever since maintained, it. No obligation was ever imposed upon any one to operate said draw, and, down to 1880, the persons in charge of vessels passing through said bridge opened and shut said draw. In 1880, complaint was made that persons passing through said draw did not fasten it properly, and a draw tender was appointed at the town meeting to take care of the draw. After that time a draw tender was appointed at every annual town meeting until recently, when the selectmen took charge of the matter, and employed the draw tender. Such draw tender, with the aid of the selectmen and others, has opened the draw since 1880, and has been paid for such services by the town. It does not appear that any notice of the proposed appointment of such draw tender was inserted in the warning of such meetings, but this does not seem to be material, for, even if such notice might originally have been necessary, the action of the town and of its selectmen since 1880 would constitute a ratification of such appointment. *Town of Rocky Hill v. Hollister*, 59 Conn. 434, 22 Atl. 290. A further reason why this point is not material is to be found in the fact that the alleged omission to act, or acts of misfeasance, occurred on this occasion when the draw was in the charge of the first selectmen and agent of the town. The town of Westport has never been required by any legislative act to provide an attendant to operate said draw. In other cases where such operation is required, a special provision to that effect has been inserted in the charter for such bridge. The town has provided various kinds of draws at said bridge. The present one was put in some years ago. It is a substantial iron draw, which swings in the arc of a circle, is fastened at the ends, and is so locked, when closed, that it can only be opened by a person who understands how to operate it. The commerce above said bridge is confined to a few vessels delivering coal at the wharves aforesaid in the town of Westport.

On the evening of October 27, 1891, said steam barge Hebe, 97½ feet long and 17½ feet beam, and drawing about 6 feet 4 inches, with Sylvester Greenwood, her master and owner, in charge, having 205 tons of coal on board, consigned to Taylor's dock, just above said drawbridge, reached Saugatuck, some distance below Westport, on said Westport river, and lay there overnight. On the following

morning, at about quarter past 7, she started for Taylor's dock. It was a fair day, and there was a moderate wind from the north-east. She passed through the lower bridge on said river, and, when about half a mile below the upper drawbridge, where the accident occurred, Greenwood commenced to blow his whistle as a signal to open the draw, and kept up the signaling for a considerable time, and until he was close to said draw. Greenwood was an experienced navigator, and had charge of and managed the barge. He had been up this river with similar loads of coal on four or five previous occasions, and was familiar with the channel, and the course and current of the river, and the bottom. He knew that, in order to get through said draw, it would be necessary to reach it when the tide was rising, or at about high water, which would be between 8 and 9 o'clock. It was the first day of the apogee tides. He had always heretofore found the draw open when he reached it, or within a couple of minutes thereafter. The draw tender was not at the drawbridge that morning before or at the time of the accident.

The facts stated above are admitted or proved. As to the state of the tide, and the time when the barge neared the draw, and what then occurred, there is the usual irreconcilable conflict of testimony. Samuel B. Wheeler, the town agent and first selectman, having heard the signals to open the draw, came down on the bridge, and, having secured the assistance of several persons, tried to open the draw. The lever would not move, as the draw was locked underneath. They got a boat, unlocked the draw, and finally succeeded in opening it. Meanwhile the barge had slowed up, and was waiting at a distance of about 75 feet from the drawbridge. When it was opened, she came up into the draw, and, in attempting to go through, and when about half way through, struck and sank. By reason of this stranding, her timbers and sides were broken, and she was badly twisted and strained. The libelant claims that he was delayed about three quarters of an hour by reason of the negligence of the defendant in failing to open the draw, and that, while there would have been an abundance of water if the draw had been seasonably opened, the tide had so fallen while he was kept waiting that, when he got up into the draw, it was impossible to pass through. The defendant denies that it was negligent, and claims that the libelant was not delayed; that the Hebe did not reach the drawbridge until the tide was so low that she could not have passed through; that the libelant was incapable and reckless and "intoxicated or rattled," and so steered the barge improperly; and was negligent in not laying his vessel on the mud flats, instead of trying to pass through; that the defendant was not bound to open the draw; and that it would have been better for libelant and the public travel if defendant had not opened it. The defendant further shows that neither the libelant nor his engineer was properly licensed. The question as to the obligation of the defendant to operate said draw, and its liability for negligence, will be discussed later.

Assuming such obligation to exist, was the town negligent? The only time when said river was navigable for ordinary vessels on said day at said drawbridge was at or about high water. At that time the draw was locked, and fastened at the ends. The draw tender was away. While the town agent and the persons assisting him were opening the draw, the Hebe was delayed for a considerable time, and when she struck, half way through the draw, the tide had fallen at least six inches. It seems to me clear that the town was negligent, and that the injury complained of resulted from such negligence. The town having maintained said drawbridge, under the charter of 1796, which provided that there should be a draw therein sufficient to accommodate all the navigation which should pass up and down said river, and having voluntarily assumed, since 1880, the operation of said draw, failed to exercise the degree of care proportioned to the responsibility assumed and the dangers involved which the law requires under such circumstances. *Pennsylvania R. Co. v. Central R. Co. of New Jersey*, 59 Fed. 190, affirmed *Id.* 192; *Wiggins v. Boddington*, 3 Car. & P. 544; *Blanchard v. Steamboat Co.*, 59 N. Y. 292; *In re Pratt*, 24 Fed. 335, 25 Fed. 799; *Edgerton v. Mayor*, 27 Fed. 230; *Weisenberg v. Town of Winneconne*, 56 Wis. 667, 14 N. W. 871.

The next question is, was the libelant negligent? The only charges of negligence supported by evidence are in not laying the barge on the flats, and in navigating her in the draw. The preponderance of testimony as to the fall in the tide when the barge struck, together with the other evidence as to the time of high water, shows that the barge could have gone through the draw if she had not been delayed. Guyer, one of defendant's witnesses, thinks it took half an hour to open the draw. Kemper, another of defendant's witnesses, says the tide appeared to have fallen six inches or more when the barge struck. Even the absent draw tender, who swore there was not water enough to go through, admits that the average tide under the draw rises and falls about six feet, and that when you can get over the shoal ground below, and to the bridge, you can get through. It is claimed that when libelant found the tide had begun to fall, and the bridge was not opened, he should have backed out and lain on the flats for another tide, as he had done on a former occasion. The libelant claims that he thought he could get through, even then; that he could have done so if he had had an inch more water; that he had been within 75 feet of the draw for 20 minutes before the tide began to fall; and that he could neither turn around nor back out with safety. In this statement he is supported by the testimony of several witnesses. Guyer testified that, although it was all soft bottom below a certain dock, which extends about 250 feet below the drawbridge, yet that a boat which lay on the bottom anywhere between said dock and said Taylor's wharf would be in a dangerous condition. He also stated that there would be a great deal of difficulty in laying a canal boat, all the way up the river; as, if it gets on a stone, the stone will go through it. Other witnesses explain that

the danger lies in the fact that in the channel and on the flats there are rocks which would make a hole in the bottom of a vessel.

The other claim of negligence is in steering the vessel in the draw. It is agreed that the proper course is straight through the center of the draw. It is further agreed that, after the barge had struck, she lay across the draw in a diagonal position. The libelant claimed that this swinging was caused by the Hebe striking her port bilge, owing to the catching of her wheel in the mud when in the best water in the draw, and that, as her engines were reversed, her bow shifted over to starboard. In this claim he is supported by Buckley, one of defendant's witnesses, who had been in the coasting business for 30 years, and who testified that the barge "looked as though she might have caught her stern on the west side, and her bow swung around against the pier." And Mr. Wheeler, the selectman, who was on the bridge when the barge grounded, testifies that she entered the bridge about in the center of the channel, and that, in his judgment, the boat was steered so, or rather went so, that she struck the abutment, but that he did not know what part of the barge first struck; she might have struck first amidships, or on her port quarter. The defendant claims that the libelant turned the bow of the barge to starboard too soon, and caused her to bring up on the foundation stones of the abutment. The evidence upon the hearing to this effect was largely based upon conjecture. But, after the hearing, the deposition was taken of one Gokey, the shipwright who repaired the Hebe after the accident. He stated that all the damage was on the port side, and that it appeared from the broken planking and splintered and slivered floor timbers that she had grounded or stranded on that side, and that her starboard side was down, making a twist, and that there was no chafe on the starboard side. This testimony, if true, should outweigh the other testimony, for it would be impossible to say, from the movements of the boat, just as she struck, or from her position after she stranded, which of the conflicting claims was correct. I am therefore disposed to accept this testimony, which directly confirms the theory of Capt. Buckley, the witness for the town, whose testimony has already been referred to, and also supports the claim of libelant. There is no evidence that the libelant ported his wheel, so as to throw the bow to starboard. For these reasons, I am of the opinion that the evidence shows that the libelant did not contribute by his negligence to cause the disaster.

Furthermore, while there is no evidence to justify the charge that the libelant was drunk, yet if, as is claimed, he was rattled, and for that reason did not use as good judgment as he might otherwise have used, this is not a defense which ought to avail the defendant in this case. It is well settled that if a plaintiff acts erroneously, through excitement induced by defendant's negligence, or adopts a perilous alternative in the endeavor to avoid an injury threatened by such negligence, he is not guilty of contributory negligence, as a matter of law. "And even though the injured person might have escaped the injury so brought upon him but for his hasty and mis-

taken conduct in the face of danger, yet defendant's negligence is the sole juridical cause of the injury, and plaintiff's error of judgment only its condition, when plaintiff was placed in the position of danger without previous negligence on his own part." 4 Am. & Eng. Enc. Law, 48, and cases cited. Here the libelant had been unreasonably delayed,—slowing up and backing his boat in a narrow, shallow channel, with a falling tide; unable to go backward or forward,—until it became a doubtful question whether he could pass through to his destination or must be stranded. If, under these circumstances of peril, he may have failed to take what subsequent events show might have been a wiser course, the error was one in extremis, and was not a fault. *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764; *The Chatham*, 3 C. C. A. 161, 52 Fed. 396. These considerations seem to dispense with the necessity of guessing out the truth from the mass of conflicting testimony as to the time when the barge reached the draw, the duration of the delay, the hour of high water, the alleged conversation with bridge tenders and selectmen, etc. It is admitted that the tides are irregular, and that the almanac is not a safe guide. The facts found adversely to the town, and which have seemed alone decisive upon the question of negligence, have either been proved by its witnesses or by other unquestioned evidence. I conclude, upon uncontradicted or incontrovertible evidence, that the libelant was delayed at the draw, at or about high water and thereafter, for such a length of time that the tide had fallen so far when he attempted to pass through that he stranded, and that such delay was inexcusable and unreasonable at the only time of day when such vessels could pass through said draw.

Assuming the correctness of the conclusions of fact already stated, there remains for consideration the effect of the failure of the libelant to obtain for himself a license as pilot, or to have some other person, so licensed, on board of said barge. "The mere omission of any or all of the safeguards provided by the federal and state legislatures and the boards authorized to ordain and make laws upon the subject, and a disregard of the laws of the sea, or of the waters upon which the vessel may be, do not, per se, place a vessel thus derelict out of the protection of the law and at the mercy of a wrongdoer, and necessarily leave her remediless for injuries sustained while thus inattentive to laws enacted to secure greater safety in the navigation on the high seas and navigable rivers. The most that can be claimed is that a noncompliance with legal regulations may authorize a presumption, in the absence of evidence, that a collision may have resulted from other causes; that it was attributable to said noncompliance and the absence of the statutory precautions. If there is evidence tending to prove that a collision, and consequent injury, were caused solely by other means, or the negligence or wrongful acts of others, it becomes a question of fact, and the circumstance that the injured vessels were not manned, or did not carry the lights or take the course prescribed by law for vessels in the same situation, is to be considered as one of the circumstances to be taken into consideration in determining the liability of the

parties, but not as of itself necessarily in all cases controlling or decisive." *Blanchard v. Steamboat Co.*, 59 N. Y. 292, 296. *The Farragut*, 10 Wall. 334. In cases of collision, "it is to be presumed against a vessel which, at the time of the collision, is in violation of a statutory rule intended to prevent collisions, that her fault was at least a contributory cause of the disaster, and that the burden rests upon her of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." Judge Wallace, in *The Bolivia*, 1 C. C. A. 221, 49 Fed. 169. *The Pennsylvania*, 19 Wall. 125; *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 422, 10 Sup. Ct. 934. That the engineer had no license certainly did not contribute to cause the injury. It seems to me clear, also, that the violation of the statutory rule as to a pilot could not have contributed to cause said injury, for the following reasons: The libellant was an experienced navigator, and had been through this bridge on several occasions under similar circumstances. He had examined the channel at and about the bridge, at low water, in a skiff. Clearly, upon a showing of these facts, he would have been entitled to receive a license as pilot. But such license to him, or the presence of any licensed pilot, could not have prevented the disaster, provided she stranded, as the preponderance of evidence proves, by reason of her wheel striking the mud in the center of the channel. Nor would a licensed pilot have been justified in attempting, or required to attempt, to turn around or back out, and lie in the river or on the flats below, if it was either unsafe to lie on said flats or impossible to turn around or back out, when it was too late to pass through by reason of the falling tide. If there was any error, which does not seem to be the case, it was an error of judgment. But, even if there had been such an error under such circumstances, it would not have been negligence. *The Thingvalla*, supra; *The Chatham*, supra; *The E. A. Packer*, 49 Fed. 92; *The Havana*, 54 Fed. 201, and cases cited; *The Havilah*, 1 C. C. A. 519, 50 Fed. 331. In *The Pennsylvania* and *The Bolivia*, supra, it appeared that the violation of the statute was a fault, and that it probably contributed to cause the collision, and therefore the rule above stated was applied. But in *Bentley v. Coyne*, 4 Wall. 511, *The Farragut*, 10 Wall. 334, and *The Chatham*, 3 C. C. A. 164, 52 Fed. 396, it is held that where a peril is impending, or where the danger, caused by a party in fault, is such as to induce a mariner of ordinary skill and competent knowledge to conceive it to be inevitable, the violation of a statutory rule is an error, and not a fault. The language of Mr. Justice Bradley, in *The Farragut*, 10 Wall. 338, seems to be peculiarly appropriate to this case. He says, citing the act of congress for the protection of navigation:

"But it would be against all reason to contend that the master or owners of a vessel should be made liable for the consequences of an accident by reason of not having a special lookout, where the collision or loss could not have been guarded against by a lookout, or where it is clear that the absence of a lookout had nothing to do in causing it. * * * We are not to shut our eyes and to accept blindly an artificial rule which is to determine, in all cases, whether the navigator is liable to the charge of negli-

gence in causing any loss or damage that may happen. A lookout is only one of the many precautions which a prudent navigator ought to provide, but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service. * * * It is perfectly evident that the absence of a special lookout had nothing at all to do with the happening of the accident, and therefore it can have nothing to do with fixing the liability of the parties."

The question now presented is whether the town of Westport, being under a statutory obligation to maintain this highway and bridge over a navigable stream, but under no obligation to operate said drawbridge, having voluntarily operated it for 10 years, and, on the day of this accident, the bridge tender being absent, having undertaken, through its first selectman and others, to operate said draw, and having been negligent therein, is liable to this libellant for damages suffered by reason of such negligence. One branch of the question involved was raised and discussed upon exceptions to the jurisdiction, and was decided adversely to the defendant. 53 Fed. 824. But the forcible and ingenious argument of counsel, after hearing on the merits, has seemed to call for a consideration of the whole question in the light of the facts developed at the trial. The argument of the senior counsel for defendant asserts, and proceeds upon the assumption, that the breach of duty complained of consists in an omission or neglect to perform the public duty of opening a draw, and that this duty could only result from the duty imposed by the General Statutes of Connecticut upon the town of Westport to maintain in proper condition the highways and bridges of the state within that town, and that the defendant town cannot thus be held liable for such negligence in the absence of a statutory provision to that effect. The libel merely alleged that said drawbridge was part of a public highway crossing public navigable waters of the United States, and as such was in the care, control, and management of the defendant. The breach of the duty complained of was the negligent failure of the town to open said draw, or negligence in its control and operation. It was not claimed that there was any public duty or obligation to operate said draw arising from any general statute or other legislative act. On the contrary, the counsel for defendant who tried the cause proved upon the trial, and claimed in his argument and brief, that the defendant town in 1857 voluntarily assumed the obligations of a charter granted in 1796 to a turnpike company, that neither said company nor said town was ever under any obligation, by legislative act or otherwise, to operate said draw, and that, down to 1880, said draw had always been operated by the persons passing through it in vessels, but that in 1880 the town voluntarily employed a draw tender to operate it. There is no statute requiring towns to open or close drawbridges, or to provide draw tenders therefor, and it is admitted that, where a draw tender is required, such requirement is uniformly provided for by charter. Inasmuch, therefore, as there is an express statutory obligation resting upon towns to maintain highways for public travel, and none in reference to the operation of drawbridges, the legal position of the town in reference to the two matters is necessarily radically different. It is well settled that the liability of a municipal

corporation created by charter is greater than that of involuntary quasi corporations, such as towns. Dill. Mun. Corp. § 961. It is settled in Massachusetts that, where public or governmental duties are imposed by statute upon a town or other quasi corporation solely for the benefit of the public, such corporation is not liable to a private action for neglect in the performance of such corporate duty, unless such action is given by statute. *Hill v. Boston*, 122 Mass. 344. And it has been held in Connecticut that a municipal corporation is not liable for the negligent performance of a strictly governmental duty. *Hewison v. New Haven*, 37 Conn. 475; *Jewett v. New Haven*, 38 Conn. 368. That such exemption from liability is not in harmony with the general rule of liability in this country, nor with the decisions of the federal courts, is settled by the repeated adjudications of the supreme court of the United States. *Barnes v. District of Columbia*, 91 U. S. 540, citing *Jones v. New Haven*, 34 Conn. 1; *Evanston v. Gunn*, 99 U. S. 660; *Chicago v. Robbins*, 2 Black, 428; *Nebraska City v. Campbell*, Id. 590; *Weightman v. Corporation of Washington*, 1 Black, 50; *City of Detroit v. Osborne*, 135 U. S., at page 498, 10 Sup. Ct. 1012. See, also, *Patton v. Montgomery*, 96 Ind. 131; *City of Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657. But for the present consideration of this question it will be assumed that the federal courts are bound herein to follow the decisions of the highest court of this state.

In view of the further claim of the defendant that, if no statutory obligation was imposed upon the defendant to operate said draw, it cannot be liable for negligence, because it was without legal power to maintain or manage it, it becomes important to consider the powers of the town, the character of the acts undertaken by it, and the rules of law applicable thereto. It will not be denied that the duty of operating the draw is one which might have been imposed upon the town by the legislature, just as the duty of building drawbridges across navigable streams has been imposed by the act of 1880. *Escanaba, etc., Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185; *Miller v. Mayor*, 109 U. S. 385, 3 Sup. Ct. 228; *Weisenberg v. Town of Winneconne*, 56 Wis. 667, 14 N. W. 871. A town has the power to acquire and hold all such property as may be reasonably necessary for those purposes of municipal government for which it exists. Dill. Mun. Corp. § 562, p. 657; *White v. Stamford*, 37 Conn. 578. And "towns may make such regulations for their welfare, not concerning matters of a criminal nature, nor repugnant to the laws of the state, as they may deem expedient." Gen. St. 1888, p. 31. Under such authority, the town of Westport acquired said bridge and draw, and at its town meetings, and through its selectmen, provided for the appointment of a draw tender and the management of said draw. Towns are required to build and maintain all necessary highways and bridges within their limits. The town, having assumed the construction and maintenance of a bridge at this point, will not now be allowed to claim that it is not required to maintain it. *Village of Marseilles v. Howland*, 124 Ill. 547, 16 N. E. 883; *Requa v. City of Rochester*, 45 N. Y. 129. As already seen, under the statute of 1873 it was further enacted

that no bridge without a draw should be built or maintained across any water navigated by open or deck vessels. Under these circumstances, I do not see how it can be claimed that the town had no power to determine whether it would permit its draw to be managed and operated by its own agent, or would leave it to be operated, as formerly, by any irresponsible person who might have occasion to pass through it. If it has thus undertaken to manage its property, it should not now be allowed to claim that such undertaking was unauthorized or ultra vires. *Williams v. Cummington*, 18 Pick. 312; *Mayor v. Sheffield*, 4 Wall. 189. All the cases cited by defendant, upon the claim of ultra vires, to show that the town cannot be held liable for the negligence of its agents, are where acts were done, or contracts made, which were necessarily wholly outside of the corporate powers of the town,—such as, appropriating money from the treasury of the town to pay bounties to inhabitants of the town drafted for the war, or to such substitutes as they might furnish, or for a Fourth of July celebration; or the expending of money by a committee for a certain purpose beyond the amount specifically appropriated for such purposes in the town meeting. The question of liability in such cases is governed by an entirely different principle from that applied in actions ex delicto. *Dill. Mun. Corp.* § 971; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055. If the wrongful act be not wholly ultra vires, then the corporation is liable for such negligence. *Dill. Mun. Corp.* § 968, and cases. The general rule is well settled that a municipal corporation is liable for the negligence of its agents or officers in reference to matters within the general powers of the corporation, though not specifically conferred. *Id.* §§ 971, 979, 980. In *Weisenberg v. Town of Winneconne*, supra, the supreme court of Wisconsin says, in reference to the management of a drawbridge by the defendant town: "The town had the right to assume such power, right, and duty; and, this being so, the town is liable for neglect of such special duty, as any corporation or individual would be under the same circumstances." And in the carefully considered case of *Houfe v. Town of Fulton*, 34 Wis. 608, where a town sought to escape liability for injuries caused by the insufficiency of a bridge over a navigable stream, on the ground that it was not a lawful structure, Chief Justice Dixon held that the maintenance of such bridge was within the scope of the corporate powers of said town, and that said bridge having been adopted by said town, it was estopped to set up such defense. See, also, *Mayor v. Sheffield*, supra. If these conclusions be correct, there can be no question that the town is liable for negligence in the exercise of this power in the same way, and to the same extent, as a private corporation exercising such powers. "Municipal immunity does not reach beyond governmental duty." Judge Pardee, in *Weed v. Borough of Greenwich*, 45 Conn., at page 183. It is settled that a private corporation would be liable under such circumstances. *Pennsylvania R. Co. v. Central R. Co. of New Jersey*, supra; *Blanchard v. Telegraph Co.*, 60 N. Y. 510; *In re Pratt*, 24 Fed. 335, 25 Fed. 799; *The City of Richmond*, 43 Fed. 85. In voluntarily assuming such undertaking, the town is held to im-

pliedly contract for the exercise of due care, and that it will respond in damages resulting from negligence therein. *City of Galveston v. Posnainsky*, 62 Tex. 118. The town, having voluntarily undertaken to operate said draw, could not wait until the vessel came up to the bridge, and then, having led the libellant to believe that it would open the draw, and having failed so to do, escape liability on the ground that it was under no legal obligation to operate it. It was at least bound to give seasonable notice that it disclaimed such obligation. *Jones, Neg. Mun. Corp.* § 119, and cases cited; *Edgerton v. Mayor*, 27 Fed. 233, and cases cited; *Thorp v. Brookfield*, 36 Conn., at page 323; *Sewell v. Cohoes*, 75 N. Y., at page 52, and cases; *Village of Marseilles v. Howland*, 124 Ill. 547, 16 N. E. 883. Public governmental duties are such as pertain to the administration of general laws for the benefit and protection of the whole public, the discharge of which is delegated or imposed by the state upon the municipal corporation. *Hart v. Bridgeport*, 13 Blatchf. 293, Fed. Cas. No. 6,149; *City of Galveston v. Posnainsky*, 62 Tex. 118. "If such duty is granted or imposed upon the municipality as a public instrumentality of the state, for public purposes exclusively, it belongs to the corporate body in its public, political, or municipal character." *Bailey v. Mayor*, 3 Hill, 539; *Hill v. Boston*, supra. "There is no mode by which to determine whether a power or duty is governmental or not except to inquire whether it is in its nature such as all well-ordered governments exercise generally for the good of all, and one whose exercise all citizens have a right to require directly or by municipal agency, and whether it has ever been assumed or imposed, as such, by the government of this state, and would have been exercised by the state if it had not been by the city. Tested by these criteria, the extinguishment of fires is not a public governmental duty." Chief Justice Butler, in *Jewett v. New Haven*, 38 Conn. 389.

Tested by these criteria, it does not seem that the voluntary action of this town in opening and closing this draw, in the absence of general or special legislation for the protection of the bridge itself, or for the convenience of navigators and the benefit of the wharves above the bridge, or to provide for the convenience and safety of those persons having occasion to travel across the bridge, and to avoid unnecessary obstructions to the highway, can be considered, in any sense, a public governmental act. *Maxmilian v. Mayor*, 62 N. Y. 160. Furthermore, even if the town, acting under the authority of the state, might have obstructed navigation at this bridge, congress might at any time interfere to remove such obstruction. *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811; *South Carolina v. Georgia*, 98 U. S. 4. And it may fairly be assumed that the town has undertaken thus to operate said draw for its own welfare and in order to avoid the effects of such interference by congress, and has, therefore, impliedly contracted with those having occasion to pass through said draw that it will seasonably operate the same, provided no such congressional legislation is sought. *Edgerton v. Mayor*, supra. "Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which

it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit." Judge Shipman, in *Hart v. Bridgeport*, 13 Blatchf., at page 293, Fed. Cas. No. 6,149. Where an element partly commercial comes in, a liability is usually enforced, the ultimate question being whether the legislature intended that the town should be liable. *Mt. Hope Cemetery v. City of Boston*, 158 Mass. 513, 33 N. E. 695. The distinction between the public capacity of towns, in the discharge of duties imposed on them by the legislature for the public benefit, and their private character, in the management of property and rights voluntarily held by them, is not unworthy of remark in determining this question of liability. In this case, the town voluntarily assumed the rights and obligations of a private chartered corporation, and has ever since exercised them without other authority than that derived from the town meeting and the acquiescence of its inhabitants. See *Mt. Hope Cemetery v. City of Boston*, 158 Mass., at page 512, 33 N. E. 695; *Dill. Mun. Corp.* §§ 66, 68, 971, 985; *Oliver v. Worcester*, 102 Mass. 489; *James v. New Haven*, 34 Conn. 1; *Hill v. Boston*, supra; *Haskell v. New Bedford*, 108 Mass. 208. It is further to be borne in mind that the rule that a private action cannot be maintained against a quasi corporation for neglect of public duty unless the action be given by statute is of limited application. "It is applied, in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed upon all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter case, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect, as well as the wrongful acts, of their officers and agents." Mr. Justice Metcalf, in *Bigelow v. Randolph*, 14 Gray, 541. Judge Carpenter, in *Jones v. New Haven*, 34 Conn., at page 13, says: "This rule of law is of very limited application. It is applied, in the case of towns, only in the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and exclusively for public purposes." It is well settled that for acts causing injury in performing work which is within the general powers of a town, though not specifically conferred, or for negligence in the performance of a corporate duty in which the party injured has an interest, or for the improper management and use of its property, a town is liable in the same manner as private corporations and natural persons. *Dill. Mun. Corp.* §§ 971, 980, 985. As is said in the leading case cited by counsel for defendant, in Massachusetts, where the doctrine of exemption of towns from liability has been carried further than in any other state, "If a city or town negligently constructs

or maintains the bridges or culverts in a highway across a navigable river or natural watercourse so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts," because "in such cases the cause of action is not neglect in the performance of a corporate duty rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act causing a direct injury to the property of another outside of the limits of the public work." Chief Justice Gray, in *Hill v. Boston*, *supra*. The court further says, at page 365: "In *Brownlow v. Board*, 13 C. B. (N. S.) 768, 16 C. B. (N. S.) 546, a public board, authorized to construct sewers, but which, in excess of its authority, had made an obstruction which was a public nuisance in the bed of a navigable river, was held liable to one whose vessel suffered injury thereby. These cases fall within the same principle as *Haskell v. New Bedford*, 108 Mass. 208, and other decisions of this court, already cited, in which, by a wrongful act, a direct injury was done to the plaintiff's property beyond the lawful limits of the public work."

An examination of these cases will show that they conclusively establish liability in a case like the present.

From these considerations, I am led to conclude that the defendant town, having acquired the property of the private corporation, and, in addition to the duties exercised by it, having without any statutory or other obligation, voluntarily assumed and undertaken, under its general powers, since 1880, to open and close the draw for purposes which, under the circumstances, may be assumed to have been, or which do not appear not to have been, for its own benefit or the benefit of its property, and having recognized the right of commerce, to have said draw so operated, and having either impliedly contracted with the public to operate it, or having, at least, invited the public to believe that it had recognized such right, cannot withdraw from said undertaking without seasonable notice; and that it is under the same obligations in reference to the performance of said undertaking, and is liable to the same extent for negligence therein, as a private person or corporation engaged in a similar undertaking for a purely private purpose. Here the damage was the direct result of the negligence of the town in the ministerial execution of an undertaking which it had assumed and attempted to perform. It seems to me, further, that these conclusions are supported by the cases cited in Connecticut and Massachusetts. Thus, in *Mootry v. Danbury*, 45 Conn. 550, the town, being bound to maintain a bridge across a stream of water on a highway, so constructed it that there was not sufficient space to allow the water to pass off freely, and thereby caused it to set back on the land of the plaintiffs. The court, in its opinion, having cited from and approved the dissenting opinion of Chief Justice Butler, in *Judge v. Meriden*, 38 Conn. 90, said:

"It seems that that learned jurist had no doubt that towns were liable for the consequences of an improper construction of a highway. We discover nothing in the opinion of the court which is inconsistent with that view.

The chief justice and the other members of the court differed only in the construction of the record. But the case of *Danbury & N. R. Co. v. Town of Norwalk*, 37 Conn. 109, is more directly in point. The only difference between that case and this is that that was a petition in chancery to restrain the town from committing the wrong, and this is an action at law to recover damages for the wrong committed. The principle applicable to the two cases is the same. The injunction was granted only because the contemplated action of the town was an invasion of the legal rights of the railroad company. If that was so in that case, it is in this; and, if the defendants have invaded the legal rights of the plaintiffs, they are responsible. The conclusion is inevitable. The reasoning of the court assumes that a town would be liable in a case like this. In speaking of the power and duty of towns in respect to highways, the court says (page 119): 'The authority is clear and the duty imperative; always subject, however, to the salutary qualification, interposed for the protection of others, that this authority shall be so exercised, and this duty discharged in such a manner, as to occasion no wanton injury to the property or rights of other persons, natural or artificial.' This is sound law, and is abundantly sustained by the authorities cited. It seems to us impossible to hold that this town is exempt without overruling that case. We regard the principle there enunciated as sound, and in harmony with decided cases elsewhere."

In *Danbury & N. R. Co. v. Town of Norwalk* the town had undertaken to construct a drain which was to discharge water into a cut, to the injury of the property of the railroad company. The court there said:

"The question whether such a corporation as the respondent, in consequence of any immunity inherent in its municipal character, is exempt from those liabilities, for malfeasance for which individuals and private corporations would be liable in a civil action by the party injured, is no longer an open one. The acts of the character of those now in question involved in the necessary performance of a duty prescribed by a municipal ordinance are strictly ministerial, and, when performed by an officer or agent by direction and for the benefit of the corporation, no exemption from liability by the principal can be interposed when from negligence or willfulness they are so performed as to produce unnecessary damage to other parties. *Perry v. City of Worcester*, 6 Gray, 544; *Sprague v. City of Worcester*, 13 Gray, 193; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 464; *Mayor v. Bailey*, 2 Denio, 433; *Mayor v. Furze*, 3 Hill, 612; *McCombs v. Town Council*, 15 Ohio, 476."

In *Carson v. City of Hartford*, 48 Conn. 90, in *Morse v. Fair Haven East*, Id. 222, in *Healey v. New Haven*, 47 Conn. 305, and in *Bronson v. Borough of Wallingford*, 54 Conn. 520, 9 Atl. 393, the court cites and approves *Mootry v. Danbury*, supra. In the latter case, where there was no accusation of negligence, but merely of an intent to change the grade of a highway, the court distinguishes between the facts therein and the case of *Mootry v. Danbury*, and says:

"It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that they [towns] can be held responsible."

And in *Healey v. New Haven*, supra, the court says:

"The town or city, as the case may be, is practically the owner of the land for all the purposes of a highway. So long as it is used strictly for those purposes, with due regard for the rights of others, no liability attaches. If, however, the work is improperly or negligently done, thereby causing damage to others, the corporation, like an individual, is liable. *Mootry v. Danbury*, 45 Conn. 550.

Further cases upon this subject are collected and discussed in *Weed v. Borough of Greenwich*, 45 Conn. 170, where the borough was empowered to remove an encroaching fence, for the advantage of the borough, and to improve property therein. The principles therein involved are strikingly like those in the case at bar, and the decision is a direct authority in support of the rule that corporate liability, in such cases, is the same as individual liability. In Massachusetts the same distinction is made, and the rule as above stated is supported by the following, and many other, cases, in addition to those already cited, namely: *Perry v. City of Worcester*, 6 Gray, 544; *Hawks v. Charlemont*, 107 Mass. 417; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Doherty v. Inhabitants of Braintree*, 148 Mass. 495, 20 N. E. 106. In the latter case the town voted to take charge of the work, and appointed a committee of five to act with the selectmen, all as agents of the town. It seems to me from these decisions that, even if the operation of this draw was connected with the maintenance of the highway, or for other reasons was the performance of a public governmental duty, the defendant would be liable for negligence upon the facts proved in this case. It will be noticed that most of the Connecticut cases cited have been decided since the cases relied on by the learned counsel for defendant. The well-recognized distinction is nowhere more clearly and accurately stated than in *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, 24 Atl. 958, decided in 1892, where the court, reviewing the Massachusetts decisions, says:

"The distinction between the two classes of cases is clear. In the one class the municipality has interfered by giving directions, or taking charge of the work by its own agents, as in *Woodcock v. Calais*, 66 Me. 234. In the other class, the municipality has not interfered, but has left the work to be performed by the proper public officers, in the methods provided by the general laws."

But the defendant contends that in this case the question of liability must be determined by the law of Connecticut, and that what the law of Connecticut is appears from the cases cited by him, and from the case of *French v. Boston*, 129 Mass. 592. The libellant contends that this is a question of general common law or commercial law, and that, if there is any conflict between the law of Connecticut and the general law, this court should be governed by the general rules of law, and especially by the decisions of the federal courts. He further contends that, upon this question of damages arising from a maritime tort, it is the duty of a court of admiralty to administer relief according to its own procedure and rules, and to enforce its rules of liability so as to do justice. As already stated, it does not seem that there is any conflict, under the facts in this case, between the decisions of Connecticut and the general rules of law.

As has been already shown, it is settled by the repeated adjudications of the supreme court of the United States that the rule of liability established in Massachusetts is not in harmony with the general rule in this country, nor with the decisions of the federal courts. In this connection it seems desirable to examine the decisions of the supreme court of the United States upon the distinction between

local laws, where the federal courts follow the decisions of the courts of the state, and general law, where the federal court is bound to exercise its independent judgment. "What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment." *Myrick v. Railroad Co.*, 107 U. S., at page 109, 1 Sup. Ct. 425. "On a question of general common law, the federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that state." *Railroad Co. v. Lockwood*, 17 Wall. 357. When private rights are to be determined by the application of common-law rules alone, the federal courts are not bound by the decisions of the state courts. *Chicago v. Robbins*, 2 Black, 428, 4 Wall. 657. Nor are they bound by the decisions of said courts on general questions of commercial law. *Hough v. Railroad Co.*, 100 U. S. 213; *Oates v. Bank*, 100 U. S., at page 246. This whole subject is exhaustively discussed by the supreme court of the United States in *Railroad Co. v. Baugh*, 149 U. S. 371, 13 Sup. Ct. 914, reviewing *Swift v. Tyson*, 16 Pet. 1, and all the leading cases decided since that date in said court. Under said decisions, and especially the decision in *Clai-borne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, it seems clear that a federal court administering the rules of the common law within a state is bound by the local policy of each state as to the extent of the powers and liabilities of its municipal corporations, wherever such powers and liabilities have been determined by legislative authority or the settled decisions of its highest courts, but that, where the law relating to such a question "is unsettled and doubtful, such court must exercise its independent judgment, and declare the law upon the best light it can obtain." "Where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrine of commercial law and general jurisprudence." *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10. In the present case, there is neither legislative act nor decision of a Connecticut court establishing freedom from liability for negligence, in the absence of legislation, before the court. But in *French v. Boston*, supra, cited by defendant, the city of Boston was held not liable for damages caused by the detention of a vessel owing to the fact that the draw was of insufficient width for the vessel to pass through. And, while the case may be distinguished from the one at bar in the fact that, while the obligation was imposed by statute, no liability was imposed for negligence, and the municipality "had left the work to be performed by the proper public officer," and for other reasons, yet it is an authority in support of the claim of defendant. But, even if it were a direct decision in its favor, it would not show that the courts of Connecticut would follow such decision. For this reason, and because of the conclusion reached after the very careful examination of the decisions of this state as to the law herein, it seems to me that, at most, the defendant is only entitled to claim that the question herein presented is still an open one so far as the courts of Connecticut or the acts of its legislature are concerned.

It remains to consider whether the principles thus far stated are applicable in a court of admiralty. How far the maritime law, administered by this court of admiralty, may be enforced for the removal of obstructions in navigable rivers, is still an open question. *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811. But there is no question, upon authority or principle, as to the power of a court of admiralty to administer relief under the facts in this case. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S., at page 443, 9 Sup. Ct. 469, Mr. Justice Gray, delivering the opinion of the court, says:

"The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution of the United States."

The admiralty and maritime jurisdiction is conferred on the courts of the United States, and state laws cannot enlarge or restrict said jurisdiction, but the admiralty courts have jurisdiction to enforce admiralty rights according to their own procedure. Upon such questions the decisions of the highest court of the state do not relieve the admiralty court from the duty of exercising its own judgment. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498; *The Lottawanna*, 21 Wall., at page 580; *The Guiding Star*, 18 Fed. 263. In *Steamboat Co. v. Chase*, 16 Wall., at page 531, where an action had been brought under a state statute in the state court, by an administrator for damages for injuries by a collision, resulting in death, Justice Clifford said:

"If the injured party had survived, no doubt is entertained that he might have sought redress for his injuries in the proper admiralty court, wholly irrespective of the state statute enacting the remedy there given, and prescribing the form of action and the measure of damages, as the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction conferred upon such courts by the constitution and the laws of congress."

The general rule of the federal courts on this question is enforced in admiralty. *The Titan*, 23 Fed. 413; *Holt*, Con. Jur. 208. The various decisions of the federal courts hereinbefore cited, and the reasons leading to the conclusions therein, seem to show that, where a question of maritime right is presented to an admiralty court, that court, at least in the absence of legislation establishing a contrary rule, may enforce said right, and provide remedies for its violation in accordance with the rules of admiralty. In *City of Boston v. Crowley*, 38 Fed. 202, Judge Colt, affirming the decree of the district court in admiralty, in a case almost precisely like the one at bar, held the city of Boston liable, and examined therein the cases bearing upon the questions raised in this case. He held that the question involved was one "of general municipal or commercial law, and, as such, this court should follow the decisions of the supreme court of the United States." In *Edgerton v. Mayor*, 27 Fed. 230, Judge Brown, upon a careful consideration of the same question, held the city of New York liable for negligence in operating a draw in a bridge across the Harlem river. He held, citing several cases, that, by undertaking to manage the draw, the state and city had recognized the right of

vessels to pass through without any appeal to the national authorities to protect that right, and that the city was therefore responsible for negligence therein. And in *Hill v. Board*, 45 Fed. 260, Judge Green, sustaining the jurisdiction of admiralty over a claim for damages for negligence in the management of a drawbridge, declares that the action therefor is based upon a maritime tort, of which courts of admiralty have plenary jurisdiction. The same general rule of obligation and liability is laid down, in *Weisenberg v. Town of Winnebconne*, supra, by the supreme court of Wisconsin. Where municipal corporations control drawbridges, they must furnish a reasonably safe passageway for vessels, and are responsible for damages coming from a neglect of this duty. *Jones, Neg. Mun. Corp.* § 123. The duty of maintaining a drawbridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw. 2 Am. & Eng. Enc. Law, 549. In the case of *Wiggins v. Boddington*, 3 Car. & P. 544, cited by the circuit court of appeals, in *Pennsylvania R. Co. v. Central R. Co. of New Jersey*, supra, the bridge was erected in pursuance of the acts of parliament, and the corporation was established for the express purpose of improving the port of London, but the rule of liability for negligence was the same as that applied by the circuit court of appeals in the above case, and which, it seems to me, should be applied herein.

It is finally to be borne in mind that, in actions for torts arising from negligence, courts of admiralty have not circumscribed themselves within the positive boundaries of mere municipal law, but have proceeded, in regard to questions of damages, upon enlarged principles of equity and justice. Thus, in cases of mutual fault the damages may be divided. And this amelioration of the common-law rule is no longer limited to cases of collision, but is applicable to all cases of marine torts founded upon negligence and prosecuted in admiralty. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29. When a party elects to bring his suit in the admiralty court, he is bound by the rules and course of proceedings, and is entitled to the remedies, applied in that forum, including its rules for estimating damages. *Atlee v. Packet Co.*, 21 Wall. 389; *The Max Morris*, supra. If a court of admiralty can thus enforce its rules of damages so as to authorize a recovery when justice requires it, although no such right of recovery exists at common law, I see no reason why it should not enforce its rule of liability in accordance with enlarged principles of justice in a case like the present.

In view of the foregoing considerations, it seems to me that the town is liable. The libel may be amended in conformity with the facts herein found. Let the case be referred to a commissioner to find the damages and report, in accordance with the ordinary rules in such cases.

VAN ETTEN v. TOWN OF WESTPORT.

(District Court, D. Connecticut. March 21, 1894.)

No. 916.

MUNICIPAL CORPORATIONS—NEGLIGENCE—DRAWBRIDGES.

A steam barge approaching a drawbridge on a rising tide gave the customary signal when half to three-quarters of a mile away. Perceiving no movement to open the draw, she slowed down to about a mile an hour. Afterwards she kept stopping, backing, and going ahead, until, being from 75 to 150 feet from the draw, she sheered, became unmanageable, struck bottom on the flats, and sank. The draw tender was absent, but the first selectman and town agent heard the signals, and attempted to open the draw, but did not get it started open until after the barge sheered. *Held*, that the town, which maintained the bridge, was negligent, and therefore liable for the loss.

This was a libel by Ambrose Van Etten against the town of Westport to recover damages for the loss of a steam barge through the alleged negligence of the defendant in the opening of a drawbridge.

Carpenter & Mosher and Samuel Park, for libellant.

C. R. Ingersoll and Curtis Thompson, for defendant.

TOWNSEND, District Judge. This is a libel in personam for damages alleged to have resulted from the negligence of defendant in the operation of the draw in a bridge across the Westport river in said town. The facts in regard to the assumption of the maintenance and management of the bridge and draw by said town and its selectmen, and the questions of legal liability arising thereon, are the same as those already stated and considered in *Greenwood v. Town of Westport*, 60 Fed. 560. The course of Westport river is about south. It is crossed by a lower drawbridge and by the upper drawbridge, where the damage hereinafter considered was sustained. The draw of this upper drawbridge swings around in the arc of a circle, on a center pier, and has two openings, each 59 feet wide. The channel through the east opening is from 6 to 9 feet deep at high water, and is the only navigable one.

On the morning of December 12, 1891, the steam barge *Col. W. C. Squires*, 97 feet long, 17½ feet wide, and then drawing about 6 feet and 8 inches, loaded with coal consigned to Taylor's dock, some 250 feet above said drawbridge, with an experienced pilot (Allen) in charge, and having her master, Capt. Moys, who was a part owner, a licensed engineer, Ross Knapp, and a deck hand, Edward Staats, also on board, started on her course up said Westport river, and, after having passed through the lower drawbridge, proceeded towards the upper drawbridge, with the tide still rising, and ample water to pass through said draw to her destination. When she was between a half and three quarters of a mile below said bridge she commenced to give the customary signals, by whistle, to open the draw, and kept repeating them until she was close up to the drawbridge. She had a schooner in tow part of the way, and was then going at the rate of perhaps three miles an hour. When she got within half a mile of the draw, as the captain saw no movement

made to open the bridge, he slackened her speed down to a rate of about a mile an hour. Afterwards, the draw being still closed, she kept stopping, backing, and going ahead for some time, waiting for it to be opened. Finally, when within from 75 to 150 feet of the bridge, she commenced to sheer off across the flats towards the west end of the draw, and, after she had thus changed her course, the persons on the bridge began to open the draw. The Squires ran up close under the west side of the draw, struck bottom on the flats, and sank. An unsuccessful attempt was made to back her off, and another steam tug tried to haul her off, but it only succeeded in swinging her bow around for a few feet.

The draw tender was not at the bridge prior to the accident, but several citizens, including the first selectman and town agent, Wheeler, heard the signals, and went on to the bridge when the barge was from one-quarter to one-half of a mile away, and, after having waited a few minutes to let the people on the bridge get across, they commenced making efforts to open the draw. It was not until after the barge had sheered as aforesaid, and was 50 or 100 feet off, that they succeeded in getting the east end of the draw open some 4 to 12 feet, just before the Squires struck as aforesaid. At no time was the draw open a sufficient distance for the Squires to have passed through.

That the barge slowed down, backed, or stopped, is not admitted by the defendant's witnesses who were on the bridge; but, as they were not in a position to judge with any certainty, and as they admit that she might have done so without their knowledge, I have followed the usual rule in such cases, and adopted the statements of the captain, pilot, and engineer on this point. *The Avon*, 22 Fed. 905; *The Alberta*, 23 Fed. 810; *The Columbia*, 29 Fed. 718; *The Hope*, 4 Fed. 89; *The Wiman*, 20 Fed. 245; *The Alexander Folsom*, 3 C. C. A. 165, 52 Fed. 411; *The Havana*, 54 Fed. 413.

The theory of the defendant, as stated in its answer, was that the draw was open and the way clear for the barge to pass through. This theory was abandoned on the trial, and an amendment permitted, alleging, in substance, that the draw was being opened, and would have been open sufficiently for the barge to go through if she had kept on her course. The defense further proceeded upon the theory that there was no unreasonable delay; that the barge did not stop or back; and that the draw would have been open for the libellant to pass through if he had kept in the channel, but that "this barge was either deliberately, or so unskillfully, handled as to be driven aground." A further theory that the engine did not work properly was disproved by the testimony of defendant's witnesses, and was abandoned on the trial. No positive evidence was introduced to support the claim of negligent handling, except that of George W. Kirk, who testified that, standing in the middle of the bridge when the boat was 200 feet away, in the channel, and coming towards him, he saw the pilot turn the wheel to starboard, and saw the top of the rudder, and that it was "hard aport." This statement is not supported by the evidence of any of the other persons on the bridge, and Capt. Moys, by his testimony, and sketch of his boat and rudder, has

satisfied me that, with the boat loaded, and drawing 6 feet 8 inches of water, her rudder must have been entirely under water. Furthermore, the witness could not have seen the rudder from the center of the bridge, with the boat coming towards him in the channel. One other witness thinks if the boat had been handled right, she would have stayed in the channel, and gone through the bridge, but suggests no other reason for his belief. The rest of the witnesses agree that they do not know, and cannot explain, why the barge should have run up on the bank, instead of keeping in the channel.

The witnesses for libellant claim that from the time the barge slowed down at Wright's Island, nearly half a mile below the bridge, until she went aground, three-quarters of an hour elapsed; that during this time she was slowing, stopping, or backing, to try to keep afloat in the channel until the bridge should be open, and that, when they got up within 25 or 50 feet of the draw, having proceeded as slowly as possible, expecting every moment that the drawbridge would be opened, they found they were going to run into the draw, and so tried to back off, but that, either by reason of the wheel striking the mud and sucking bottom, or because of the fresh water running down and meeting the tide, or because they could not get stern steerage way after reversing the engine, the captain was unable to keep the barge in the channel, and she became unmanageable, and stuck on the mud, and her bow sheered off to the westward. According to the testimony of several of defendant's witnesses, the barge was from 140 to 190 feet from the bridge, and coming straight along slowly, without backing or stopping, and in that distance, as would appear from the testimony of defendant's witness McKenna, in about a minute, she sheered four points. The captain and pilot both testify that, if the wheel had been put hard to starboard, as testified, she could not possibly have made such a sheer, and give their reasons therefor. In the absence of expert testimony to the contrary, I think this evidence should have some weight upon the question of comparative probabilities. On the other hand, defendant strenuously claims that, if the barge sheered because the engine was reversed, she would have stopped, and not continued to run up to the bridge. It seems to me that this claim has considerable force upon the question of probabilities.

From the best consideration of all the evidence and the surrounding circumstances, I conclude that the total lack of proof to support the claim that the vessel was steered to port, or of any reason why it should have been so steered, makes it seem improbable that said claim is correct. The admitted facts that the barge, going slowly, had come almost up to the bridge, and that, as testified to by one of the defendant's witnesses, "they commenced to open the draw when she had changed her course, and was going across, towards the west end of the draw," and had got about a quarter of the way across the flats, coupled with the fact that when she ran aground her stem was close to the bridge, if it did not strike it, seem to show that either to steer to port or reverse the engine were the only things the libellant could have done. The draw was still closed. He could not tell, if he kept on, that it would be open

to pass through, as alleged in the amended answer. If it remained closed, he must run into it, and damage it and his barge. While it seems to me that the testimony of libelant's witnesses as to the cause of the disaster is true, yet I am of the opinion that, even if the libelant had steered to port, under these circumstances, it would not have constituted negligence on his part. See cases cited in *Greenwood v. Town of Westport*, supra. "If the situation was as defendants claim, the Thingvalla was not in fault for porting. * * * Looking at the situation after the event, it may be apparent that such a change of course would have avoided the collision; but the Thingvalla's navigation must be judged by the knowledge she had, or ought to have had, at the time." Judge Lacombe, in *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764. Whether the delay in opening the bridge was unreasonable does not seem to be a mere question of time, but one of conditions. Under the conditions stated of tide, signals blown, and peril and damage caused by the delay, the absence of a bridge tender, the interval before commencing to attempt to open the draw, and the final failure to open it until such opening was manifestly too late to serve any useful purpose, the delay seems unreasonable and inexcusable. It is admitted that the town had ample notice when the barge was at least half a mile away, and that, through its first selectman and his volunteers, it had ample time to open the draw seasonably after they first came on to the bridge. Assuming the legal obligation of the town, it was its duty to have the bridge tender there, or, in his absence, it was the duty of the first selectman and town agent, who was there presumably representing the authority of the town, to see that the bridge was opened before the conditions already considered developed the disaster, and caused the damage on account of which these proceedings are brought. Furthermore, the captain testified that, if they had notified him of their inability to seasonably open the draw before he got close up to the bridge, he could have stopped and held the boat. No notice was given, but, on the contrary, the libelant had every reason to suppose, from the presence of the town agent and other persons on the bridge, and from their movements, that the draw would be open when he came up to it. I have not discussed the claim of libelant that the draw was never opened at all, because it is admitted that, if opened, it was closed immediately afterwards. I have not discussed the fact that, when the boat got close up to the bridge, the captain took the wheel, because it does not appear that this had anything to do with the disaster. The conclusions reached render it unnecessary to consider the question of compliance with the statutory requirements concerning licenses. The evidence clearly shows that the disaster could not have been caused by the violation of said statute. *The Pennsylvania*, 19 Wall. 125; *The Bolivia*, 1 C. C. A. 221, 49 Fed. 169. In view of the conclusions of law stated in the case of *Greenwood v. Town of Westport*, I am of the opinion that the defendant is liable. The libel may be amended in conformity with the facts herein found. Let a decree be entered for libelant, and let the usual reference be had to a commissioner to assess damages.

PARK BROS. & CO., Limited, v. BUSHNELL.

(Circuit Court of Appeals, Second Circuit. March 12, 1894.)

No. 69.

1. TRIAL—EXCEPTIONS TO CHARGE—APPEAL.

In the federal courts, exceptions to the charge will not be considered on appeal, unless they are definite, and are publicly taken before the jury retires.

2. MASTER AND SERVANT—RIGHT TO DISCHARGE—INSTRUCTIONS.

In an action for wrongful discharge, where it appears that the plaintiff was engaged for a long term of years as superintendent of a large and important business, and was constantly obliged to represent the defendant in different states, and to attend with promptness, resoluteness, and good judgment to large pecuniary interests, it is proper to charge the jury that what would justify discharge of a mere clerk or workman might not justify the discharge of one like the plaintiff, and that where a contract has been substantially performed as to time and its most material parts the employer has no right to dismiss an employe for mere disobedience of general orders of a slight character, which involve no serious consequences or danger to the business, unless such disobedience is perverse or unreasonable.

3. SAME—HARMLESS ERROR.

An instruction, leaving to the consideration of the jury the question whether plaintiff's disobedience of his employer's definite instructions was material or injurious to the employer, is inconsistent with an instruction that violation of definite instructions is sufficient ground of discharge; but such inconsistency is harmless error where the evidence clearly shows that no definite instructions were violated.

4. SAME.

An instruction that, if an employe is competent to discharge his duties, his dismissal is unjustifiable, is not misleading, as withdrawing the jury's attention from other causes for dismissal, where they are also instructed to consider all the evidence as to ill health, absence from business, and failure to obey special instructions; and that if, for any reason, the dismissal was justifiable, the employer is not estopped from setting up such ground of discharge by the fact that the dismissal was not expressly based upon it.

5. SAME—DISOBEDIENCE TO ORDERS—EVIDENCE.

An employer telegraphed to his agent to accept an offer to buy 2,000 tons of steel at a certain price, but to give no option for a further amount. The agent, who had general charge of the sales, found that the purchaser had made no such offer, and thereupon agreed to sell him 2,400 tons at the stated price. *Held*, that he had not disobeyed orders, since the telegram did not limit the amount to be sold.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Robert G. Bushnell against Park Bros. & Co., Limited. Plaintiff obtained judgment. Defendant brings error.

Joseph H. Choate, for plaintiff in error.

John E. Parsons, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an action at law, which was originally brought in the supreme court of the state of New York, by Robert G. Bushnell against Park Bros. & Co., Limited, and,

upon the petition of the defendant, was removed to the circuit court for the southern district of New York. The action was to recover the unpaid contract price which accrued before and after the plaintiff's discharge from the service of the defendant for the period of time during which the defendant had agreed to employ him. The verdict of the jury was in favor of the plaintiff for \$71,587.33 and interest. A bill of exceptions having been settled and allowed, and judgment having been entered, the defendant brought the cause to this court by writ of error.

The defendant is a large manufacturer of steel. The plaintiff was an exceedingly competent and successful salesman, and superintendent of agencies for the sales of steel. He had been in business with the firm which subsequently became the defendant corporation from December, 1861, to December, 1879, when he became a member of another firm, and so continued until September, 1884. On September 30, 1884, the defendant, by written agreement, employed his whole time for a period of six years, beginning August 1, 1884, at a salary of \$8,000 per annum, payable monthly, and, in addition, a commission of 4 per cent. on the annual net profits of the entire business of the defendant, payable on demand, after the result of the year should be ascertained. His business was to sell the plaintiff's steel, and to be its superintendent of agencies in the eastern district, which included the territory east of the Alleghany mountains and north of Washington, but only that part of the state of New York east of Syracuse. On December 28, 1887, the defendant notified Bushnell that on account of his ill health the contract would cease after January 1, 1888. He remonstrated, and on January 20, 1888, the defendant proposed a reduction of the commission to 2 per cent. of the net profits. He declined, and on February 3, 1888, the defendant agreed to go on with the old contract. About this time—perhaps a little before—it relieved him of the Philadelphia business, and placed him at the head of the business of the New York house. On November 19, 1888, the defendant notified him that the contract must be terminated for violation of orders, alleged to be explicit and peremptory, in regard to a sale of 2,000 tons of steel to Shuler & Co. This transaction will hereafter be more particularly stated. Correspondence ensued, and on December 1, 1888, he was dismissed, and in September, 1890, he brought suit against the defendant, in which he claimed the balance of the agreed compensation from December 12, 1888, to the end of the contract period. The defendant, by its counsel, pleaded that the discharge was for cause, and alleged as causes the plaintiff's inattention to business, inefficiency, repeated disobedience of orders, among which it alleged his failure to obey the order of the defendant to make daily reports of its business in his charge to the home office in Pittsburgh, and his disobedience of explicit instructions in the matter of the Shuler sale.

At the close of the trial, which lasted 11 days, and in which divers important and unimportant issues were presented, the defendant made 74 requests to charge. At the close of the charge the defendant's counsel took sundry exceptions, and said that, after

he had received the charge from the stenographer, he would make them more specific. The plaintiff's counsel acquiesced in this suggestion, but the court made no expression of its views. Thereupon, after the verdict of the jury, and after the stenographer's minutes were written out, the defendant's counsel stated 13 additional specific exceptions. The rule in the federal courts is explicit that all exceptions to the charge of the jury must be definite, and not general, and must be publicly taken before the jury retires. The reason is obvious, and is that, the charge having been made for the instruction of the jury, the judge has the right, upon his attention being called to any misstatement or error in the charge, to explain, modify, or withdraw any portion which he deems vague, erroneous, or liable to mislead. Counsel are not to be permitted, especially after having laid the foundation for exceptions by an inordinate number of written requests, to prevent an opportunity for explanation of the several sentences of a charge, and to postpone explicit exceptions, either for the purposes of a microscopic investigation, or to turn an exception which had neither meaning nor validity into one which is believed to have importance, or to amplify general into particular exceptions to the different sentences of a charge. The practice which was attempted is one which tends to inexactness of counsel at the time of the charge, is a temptation to subsequent controversy, and possibly unfairness of dealing, and should not receive the favor of counsel or court. No exception will be examined in this case which was not taken in conformity with the foregoing customary rules of the federal court.

In this case the alleged disobedience was of two classes,—one of disobedience of general orders in regard to the general conduct of a large and important business, and the other of disobedience of specific orders in regard to a particular sale. One of the defendant's requests was as follows:

"That refusing to obey the reasonable orders of the defendant was a good ground for dismissal from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the lawful and reasonable commands of his master."

It is manifest that the relations of Bushnell to the defendant were not those of a menial or domestic servant to his master. He was the superintendent of a large and important business for a long term, was constantly obliged to be the representative of the defendant in different states, and to attend with promptness, resoluteness, and good judgment to its large pecuniary interests. The judge, in view of these considerations, charged that what would justify the rescission of a contract for employment in the case of a mere workman or clerk might not justify it in the case of a person whose duties were of such a character as those which were intrusted to the plaintiff; and also that—

"Under the contract the plaintiff became the agent or servant of the defendant corporation. It had a right to direct him as to his duties in the conduct of his business, and, so far as those directions were reasonable and lawful, the plaintiff was bound to obey them."

And further charged as follows:

"Disobedience of the reasonable orders of an employer is good ground for such discharge where such disobedience is material; that is, where serious danger is occasioned to the business of the employer by the conduct of the servant, even where no resulting loss can be shown. But where a contract has been substantially performed as to time, and its most material parts, the employer has no right to dismiss an employe for a mere disobedience of orders of a slight character, which involve no serious consequences or danger to the business, unless such disobedience is perverse or unreasonable."

This sentence of the charge was duly excepted to. The judge was here referring to general orders relating to the general conduct of business of a character like that of the plaintiff. The defendant's request covered any disobedience of any reasonable orders, and called for an instruction that any such disobedience was a good ground for dismissal. The judge properly qualified the too broad and sweeping statement which the defendant desired, and added to it the just limitations which the character of the service required. It is impossible to state a perfectly definite and exact rule which shall be applicable to all the varied cases of master and servant. A rule which might be perfectly applicable to the precision with which a coachman or gardener should be required to obey the directions of his master or mistress in regard to the details of the service which involved the comfort of the household, might be inapplicable to the case of exact compliance by a manager of a large factory with a general rule which required him to render daily memoranda of his business life for the inspection of the directors. The rule which the judge announced was sufficiently exact, was properly guarded, and is clearly sustained by adequate authority. *Turner v. Kouwenhoven*, 100 N. Y. 115, 2 N. E. 637; *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162. The jury manifestly and properly found under the statement of the law that there was no substantial violation of the defendant's rule which called upon the plaintiff to write daily letters to the home office.

The second charge of disobedience was of a different character. Davis W. Shuler & Sons were large spring manufacturers in Amsterdam, N. Y. In 1887-88 the defendant supplied them entirely with spring steel, and in June, 1887, Mr. Park, the president, wrote to Bushnell he hoped he (Bushnell) could soon arrange something with Shuler; that he (Park) wanted their whole trade; that a portion would be only moderately satisfactory to him. In the autumn of 1888 a new contract was to be made. Verbal negotiations were had between Shuler and Bushnell and between the two and Park in the latter part of October, which resulted in nothing. On November 7th plaintiff telegraphed to defendant:

"Shuler expects to see me in Amsterdam not later than Thursday. Please send me early mail or wire your final wish in the matter, so that I may know how to act intelligently."

On the same day defendant writes to plaintiff:

"Referring to the Shuler matter, would say we do not think there is any necessity for hurry, and you had better postpone seeing them until Monday. We do not think we will do any better than the proposition made by the writer."

That proposition is unknown. On November 9th plaintiff telegraphed to defendant:

"Please write to-day to [meaning about] Shuler, as I must receive it to-morrow. Expect to be in Amsterdam Monday, early."

On November 9th defendant wrote to plaintiff, speaking of the Shuler matter:

"We wish you now to make sure a proposition for one thousand or twelve hundred tons, to be delivered between now and July 1st, at 2.20, less 3 per cent. discount for cash, delivered. If they wish to buy 1,000 or 1,200 tons more for the latter part of the year, we will accept it at 2.30, less 3 per cent. discount, delivered. * * * We make this offer subject to decision after your visit Monday. Don't leave it open."

On November 10th plaintiff saw Shuler in New York, and wrote to defendant:

"Mr. Shuler is here, and positively declines to arrange with us for a supply of steel where deliveries are limited to July next, and also refuses to purchase at a higher price for the last six months of 1889. * * * Messrs. Shuler are willing to close with us for a specified quantity, say 2,000 tons, to be furnished during the year 1889, monthly deliveries, to be not less than 175 nor more than 225 net tons per month, at 2.20c. per pound, note four months, or subject to 3 per cent. discount for cash in 30 days, delivered. * * * Messrs. Shuler & Sons say they cannot delay this matter any longer, and, if you are unwilling to close on this basis, must and will make other arrangements at once. I have promised to give them a definite reply at Amsterdam on Monday morning next, and will expect final telegraphic instructions from you there, care Hotel Brunswick, at that time. Messrs. S. & Sons feel that we should be willing to give them an option for an additional quantity of steel, provided that their business during this period actually requires it; such option not to exceed 250 tons. This request for option is not, however, positively imposed."

This letter closes with request that defendant wire instructions on receipt of letter. Defendant telegraphed on November 12th to the plaintiff at Hotel Brunswick, Amsterdam:

"Take Shuler's offer for 2,000 tons for whole year, monthly delivery as named, at 2.20, usual terms, but give no option for further amount."

On November 12th, Bushnell went to Amsterdam. The Shulers said he had misunderstood their proposition, and that they could get the steel at less than 2½ cents per pound. Bushnell made a contract with them for 2,400 tons for the year, at monthly deliveries of not less than 175 nor more than 240 tons per month, at 2.20 cents per pound, on the usual terms, and gave no option. He also agreed that he would personally pay them a rebate of 18 cents per ton if the defendant did not agree to make this concession. The contract was for \$105,000. This rebate amounted to \$432. The defendant did not agree to this concession, and was paid the full contract price. In January, 1889, Shuler offered to cancel the 400 tons of the contract, but Mr. Park declined. The whole quantity was delivered. On November 16, 1888, the defendant wrote the Shulers, "We are very glad to have closed contract with you for next year;" and on November 19, 1888, wrote to Bushnell that his disregard of their orders was flagrant, and that his connection with the company must terminate.

In regard to the Shuler transaction, the judge charged that, under the instructions of the telegram, plaintiff was limited to the maxi-

imum amount of 2,000 tons, and to a minimum price of 2.20 cents per pound, provided Shuler & Co., on their part, were ready to stand by their offer. He further charged:

"And if the correspondence between defendant and plaintiff prior to the Shuler sale resulted in definite instructions to plaintiff by defendant as to price or quantity to be adhered to in negotiating with Shuler, such instructions were binding upon plaintiff; and their binding nature was not to be impaired by any belief on plaintiff's part that he had been previously intrusted with discretionary power as to the prices and quantity of his sales generally. Where a salesman understands that he has a general authority to fix the price and quantity of his sales, he cannot allow such understanding to conflict with his employer's express instructions as to the price or quantity of any particular sale. If you should be of the opinion that the Shuler sale violated positive instructions of the defendant, it is proper for you to consider whether it was an effort on the part of the plaintiff to carry out, even if erroneously, the instructions and authority which he supposed he had from the defendant, or was a willful disobedience of positive instructions. But this evidence is only admissible for the purpose just stated. It is not admissible as a justification of such violation of instructions, for an employer may dismiss an employee who fails to follow directions because he thinks another course proper, or more to the employer's interest."

He also charged:

"But the defendant's telegram of November 12, 1888: 'Take Shuler's offer of two thousand tons for whole year, monthly delivery as named, at twenty, usual terms, but give no option for further amount,'—did not of itself preclude the plaintiff from making a sale to Shuler, if, when he reached Amsterdam, he could not procure Shuler to make such an offer as the telegram referred to. So far as giving an option, the telegram constituted a positive limitation from the defendant. In no other respect did it constitute a positive limitation if Shuler's offer was not maintained."

These portions of the charge were duly excepted to. There can be no objection to the statement that the telegram, by itself, and without reference to any other correspondence, did not of itself preclude Bushnell from making a sale of more than 2,000 tons if Shuler's supposed offer was not adhered to, or had not been made. The residue of the paragraphs are to the effect that, if Bushnell had received definite instructions respecting the Shuler sale, they were to be adhered to, without reference to any general discretionary powers, and without reference to the agent's opinion that another course would conduce to his employer's interest; and that a mistake in supposing he had general instructions, rather than a willful disobedience of positive instructions, is not admissible as a justification of a violation of the latter instructions. In other words, he charged that a salesman must obey the definite and positive instructions of his employer in regard to the terms and amount of a proposed sale, and that disobedience of such instructions justifies a discharge. The charge in these respects was correct. The remark in regard to a consideration whether the Shuler sale was caused by an error in regard to the extent of the agent's authority or by willful disobedience would have been misleading if it had not been followed by the declaration that evidence of that sort was not admissible as a justification of the violation of positive instructions. The attention of the jury was adequately called to the fatal consequences of a disregard of positive instructions in regard to a particular sale.

The judge also charged that, while subsequent obedience by Bush-

nell, or the subsequent reduction or attempted reduction of the 400 tons, could not of itself effect a rescission of the plaintiff's discharge, or entitle him to recover, yet the fact that the defendant made the statement in his letter of November 16th to Shuler, and declined to take advantage of the plaintiff's offer to get the contract altered, was proper conduct to be considered upon the question whether disobedience (if the jury found that plaintiff was disobedient) was material or injurious to the plaintiff. This was excepted to by the defendant. Its language was inconsistent with the previous part of the charge, in which he had told the jury, in substance, that violation of definite instructions was a sufficient ground for a discharge. The violation by a salesman or superintendent of his employer's definite and positive instructions in regard to the terms or amount of a particular pending sale of merchandise is adequate cause for discharge, and the question of the extent of the injury to the employer is immaterial. This presupposes that the violation is not of such slight character as to make the maxim "*de minimis non curat lex*" applicable.

This inconsistency and consequent error in the charge would require a new trial if the correspondence between the parties had created positive and definite instructions, or if the question of the character of the instructions was such that it must necessarily be left to the jury. It is true that not infrequently the meaning of commercial instruments and the "true interpretation of mercantile phrases in such instruments or orders is not always a question of law, but may in many cases be properly left to a jury to decide when the phrases admit of different meanings" (Story, Ag. § 75); but in this case the instructions were written, and the interpretation is not dependent upon conflicting testimony as to usage or the practice of the parties. We assume that the testimony on both sides supports the defendant's position that it established the minimum price upon this class of steel, and that the plaintiff was to make the best attainable contracts in accordance with the known prices and wishes of his employer. It is also plain that the employer was urgent that the agent should complete contracts in accordance with established prices, and not leave them unfinished, and the co-contracting party open to the solicitations of a competitor. The judge who tried the cause could properly have construed the correspondence. An examination of it will clearly show the state of the negotiations. On November 9th the defendant informed Bushnell that negotiations were pending between a competitor and the Shulers for all their business at 2 1-8 cents per pound, and that it wished him to make sure a proposition for 1,000 or 1,200 tons, to be delivered before July 1st, at 02.20 per pound, and, if 1,200 tons more were wanted in the latter half of the year, they would accept on that an offer of 02.30. This offer was to be subject to decision on the following Monday, and not afterwards. It was refused on November 10th. The defendant was forthwith informed of the refusal, and of the offer of the Shulers to take a specified quantity, say 2,000 tons, deliverable in 1889, at 02.20, in monthly deliveries of not less than 175 tons; and of the belief of Bushnell that accept-

ance of this offer was important. On November 12th the defendant telegraphed, "Take Shuler's offer of 2,000 tons, but give no option for further amount." When Bushnell saw the Shulers, he found himself in this position: The defendant's offer had been rejected, and the offer of the Shulers which he was instructed to take did not exist. The defendant had told him to take the offer for the specified quantity of 2,000 tons at the offered price, but to give no option. He was not told to sell no more than 2,000 tons, but he was instructed to accept a supposed offer for that amount. The telegram gave no instructions in the event that the Shulers had changed their views, and the existing circumstances on November 12th were not met by instructions adapted thereto. Bushnell made a contract at the price accepted by the defendant. His personal agreement to pay a rebate did not change the price so far as the defendant was concerned. He did agree to sell 2,400 tons, an amount which the defendant had already said it was willing to furnish. The question thus simply relates to positive and specific instructions in the telegram respecting the number of tons. The construction of the defendant is that it meant "take the offer for 2,000 tons, and no more." The language of the telegram does not compel or require that construction, and did not require Bushnell to stop negotiating, unless the Shulers would purchase only 2,000 tons. He made the contract in pursuance of the general duties which were intrusted to him, and not in excess of any expressed instructions. Mr. Park says that the company permitted the agents to exercise no discretion in going below the prices, or in selling in excess of the quantity, which it had named. Bushnell obtained its price, for the personal promise which he made to pay \$432 was known not to be a promise as agent or to be binding upon the corporation; and the limitation in regard to quantity is not to be found, unless the words "and no more" or "only" are to be read into the telegram after the words "2,000 tons."

Our conclusion is that there was nothing in this transaction which afforded any legal justification to the defendant in terminating its contract with the plaintiff, and that the trial judge should have informed the jury that the plaintiff had complied with his instructions, and that there was nothing in his conduct in the Shuler transaction of which the defendant had any right to complain. We think that, upon the face of the correspondence between the defendant and the plaintiff, he was authorized to make such a contract with Shuler & Sons as he did make, and that there was no express or implied limitation in his instructions which confined him to selling them only 2,000 tons, and that there was no departure from the instructions in respect to the price. He had no reason to suppose the defendant would be unwilling to sell Shuler & Sons 2,400 tons of steel. They had not proposed for that quantity and been refused. On the other hand, the defendant had requested plaintiff to procure an order from them for 2,400 tons, deliverable during the year. As the situation existed, and according to the rational construction of the correspondence which had taken place, the plaintiff had a right to understand that he was authorized to

sell Shuler & Sons a specific quantity, certainly 2,400 tons, and that the only limitation upon his discretion was in regard to price, and an option for an uncertain quantity. The defendant had asked plaintiff to get an order from Shuler & Sons for 2,400 tons, deliverable during the year,—1,200 tons before July, 1,200 tons after,—and naming the price. The plaintiff had replied that Shuler & Sons would not give such an order, but were willing to take a specified quantity at a lower price, and wanted an option for more if they should need it. The plaintiff did not write that Shuler & Sons were willing to buy 2,000 tons, but wrote that they would take approximately that quantity, "say two thousand tons." His letter stated that they would require at least 175 tons per month. It is absurd to suppose that defendant did not understand that Shuler & Sons required at least 2,100 tons during the year. The telegram directed him to accept the proposition of Shuler & Sons without the option. While it told him to take their proposition for the 2,000 tons, it also told him he might contract with them for monthly deliveries which would amount to a larger quantity. The final instructions which the plaintiff asked for and had received did not meet the situation. He was left in a situation where his own discretion was his only guide. The case is one for the application of the rule that, where instructions are ambiguous, and the agent acts bona fide in accordance with an interpretation of which they are susceptible, although they may also be susceptible of a different one, it is not competent for the principal to assert as against the agent that the act was unauthorized, because he meant the instructions to be understood in the other sense.

The defendant requested an instruction to the jury that "an employe who, for any cause, becomes incapable of performing his duties faithfully and efficiently, may be dismissed." The court so charged, and added, "If he was competent to discharge his duties, then his dismissal was unjustifiable." To this defendant excepted, and it is urged that the court erred because it places the plaintiff's right to a verdict solely upon the question of competency, and that he ought also to have submitted to the jury the question of shiftlessness or inattention to duty, or neglect of duty through sickness or other cause. The objection is not well founded, for the judge also charged as follows:

"You are not to consider the evidence piecemeal, but to take as a whole the evidence as to ill health, absence from business, neglect of duties, failure to comply with special instructions, and lack of success in the business, together with all evidence contradicting this evidence, and all other evidence which may bear upon the question of plaintiff's capacity, at the time of his discharge, to fill his position properly. If you find that for any reason the dismissal was justifiable, the employer is not estopped from setting up such ground of discharge, although it may not be the ground alleged at the time of dismissal, unless such ground of discharge has already been condoned."

The defendant requested the court to charge that, if the defendant improperly discharged the plaintiff, then his failure to seek other similar employment (if he failed so to do) was a breach of an active duty which he owes to the defendant, and was a fraud upon the defendant; and for a refusal to charge in the language of this re-

quest an exception was duly taken. The court thereupon properly charged, in conformity with *Howard v. Daly*, 61 N. Y. 362, and *Costigan v. Railroad Co.*, 2 Denio, 609, that the plaintiff's duty (if he was improperly discharged) was to use prompt and reasonable diligence to procure other employment of a similar character, and thus reduce the damages; and that, if the jury found that the plaintiff did not conform to this duty, they could mitigate the damages to the extent of the compensation which he might have received by proper effort in seeking employment. Upon the whole case, we think that no error of law was committed whereby the defendant was prejudiced, and the judgment is affirmed.

MORGAN v. HALBERSTADT.

(Circuit Court of Appeals, Second Circuit. March 13, 1894.)

No. 62.

1. LIBEL AND SLANDER—QUESTION FOR COURT.

Where the purport of the publication complained of is plain and unambiguous, the question, in a civil action, whether it is a libel or not, is for the court.

2. SAME—QUESTION FOR JURY.

The alleged libel charged that defendant, as agent of an insurance company, was short in his accounts, and that he had "boasted of the manner in which he had helped himself to the company's money." It further charged that the agents of the company "had been given unlimited opportunities to swindle the policy holders," and stated that its readers were familiar "with the methods and extent to which the agents named have availed themselves of their opportunities." *Held*, that there was no such ambiguity therein as to make a question for the jury.

3. ACTIONS—PARTIES—UNINCORPORATED ASSOCIATION.

Code Civ. Proc. N. Y. § 1919, provides that any action that may be maintained against an unincorporated association may be brought against its president; and section 1921 provides that a judgment in an action so brought shall be satisfied out of the property of the association, and shall not authorize the issue of execution against the president. *Held* that, when the action has been brought against the president, an amendment to the complaint, substituting the association itself as defendant, does not introduce a new party to the action.

4. WITNESS—CRIMINATION—PRIVILEGE—WAIVER.

In an action against an unincorporated association the defendant cannot object to incriminating testimony given by one of the associates, where the witness himself fails to assert his privilege.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Sigismundo E. Halberstadt against Henry A. Morgan, as president of the New York Times, for libel. There was a verdict for plaintiff for \$15,000 damages, and judgment thereon, and defendant brings error.

Benjamin F. Einstein, for plaintiff in error.

Robert H. Griffin, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The complainant sets out four causes of action, based on separate articles, which appeared in the defendant's newspaper on September 5, September 30, October 10, and November 1, 1891, respectively.

The first of these is as follows:

"This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard street. Everything is done to avoid publicity and to screen the truth. Not one of the twenty men composing the board of trustees, save those two or three who hold executive offices, knew of the Merzbacher defalcation until the Times exposed it. Not one of these men—these alleged guardians of trust funds—knows that Halberstadt, Beers' Mexican agent, is short in his accounts \$28,000; and yet this same Halberstadt, while standing in the barroom of the Hoffman House, early last March, surrounded by such men as Merzbacher and Dinkelspiel, boasted of the manner in which he was helping himself to the company's funds."

The second is as follows:

"The policy of the New York Life with reference to its defaulting agents in Spanish America furnishes another explanation of the distrust with which the company has long been regarded by the policy holders in Rio. The career of John Davis, for instance, is familiar to everybody in the tropics who takes an interest in insurance matters. Davis, it will be remembered, handled a business of \$9,000,000 a year in Mexico. He led a fast life, and when he disappeared one day his accounts were found to be short \$30,000. No attempt was made to arrest him. The career of the two agents who immediately preceded Davis is equally notorious in the tropics. These agents, or one of them at least, owed his appointment to the defaulter Merzbacher. Their shortage was found to be \$60,000. Neither of them was arrested. The case of the intemperate German agent, who was found to be short in his accounts \$12,000, in Chile, and who was subsequently transferred to Mexico, is another familiar story. This agent was not only not punished, but he was transferred to another agency. Then came the defaulter Merzbacher, with a shortage of \$700,000 standing opposite his name. The news of his defalcation was received in Brazil with astonishment."

The third is as follows:

"The notoriously bad character of the agents whom Mr. Beers employs to do the work of the New York Life Insurance Company is a theme that constantly presents new features and new attractions. Dinkelspiel, Merzbacher, Webber, Stoddart, Moore, Halberstadt, Davis, and Vanuxem are names that stand at the head of the list of Mr. Beers' warm personal friends and admirers, and to each of these men he had given valuable appointments, with unlimited opportunities to swindle and deceive the policy holders. The readers of the Times are entirely familiar with the methods and the extent to which the agents named have availed themselves of those opportunities."

The fourth is as follows:

"Since the present feeling of distrust of the company's management arose efforts have been made to enlighten a deceived lot of policy holders concerning the abuses of various sorts committed by Messrs. Beers, Merzbacher, Dinkelspiel, Sanchez, and others, but, notwithstanding all that has been said, it is evident to those who, like myself, are acquainted with the management of the Spanish-American department, that there are details of an important nature lacking. It is a fact that the most immoral methods of doing business prevail in that department, and that the arch conspirator who, next to Beers, is responsible for these immoralities, is Sanchez himself. * * * He and his subagents have made use of all sorts of exaggerations and deceits in Spanish America, where the insurance public is completely ignorant of life insurance, and where the most improbable stories as to conditions of policies, and the results that will accrue from them, may be told with perfect safety. * * * S. E. Halberstadt is another one of the com-

pany's agents to whom attention must be drawn if the company's affairs in Spanish America are to be thoroughly exposed. This man is said to have been a defaulter while in the employ of the New York Life in Peru and Chile. He has been for some years the company's representative in Mexico, where his accounts have steadily run in arrears, as he himself boasted one night at the Hoffman House, in this city. The entire staff of the Spanish-American department have been witnesses to the scandalous quarrels that took place between Merzbacher and Halberstadt in the former's private office in this city. One of the most remarkable things about this man's career is the freedom with which he talks about the officers of the company, notably President Beers, and his son-in-law, Berthelot. Halberstadt was a candidate for Merzbacher's position, but he has not obtained it yet. Another agent who has stolen the company's money in Spanish America was until very recently manager at Buenos Ayres."

There was evidence showing that the plaintiff was the person referred to by name, and, in the second article, as "the intemperate German agent."

1. Plaintiff in error assigns error in the instructions to the jury, in that the circuit judge charged as follows:

"The articles in the New York Times are charged in the complaint to be each and every one libelous. The explanation (or, as it is called in legal phrase, the innuendo) which is given in the complaint of the meaning of the article represents that the articles were libelous. In my opinion, gentlemen, each article was in fact libelous."

—To which charge defendant duly excepted.

The very authorities cited by the plaintiff in error abundantly sustain this part of the charge. They hold that the language used must be given its ordinary meaning; that the test is whether, in the mind of an intelligent man, the language naturally imports a criminal or disgraceful charge; that the language is to be understood by the court in the sense in which the world generally would understand it, giving to the words their ordinary meaning; that the language is to be understood in the ordinary and most natural sense; and that, when the writing complained of is plain and unambiguous, the question in a civil action, whether it is a libel or not, is a question of law. *Hayes v. Ball*, 72 N. Y. 420; *More v. Bennett*, 48 N. Y. 472; *Williams v. Godkin*, 5 Daly, 499; *Weed v. Foster*, 11 Barb. 203; *Snyder v. Andrews*, 6 Barb. 43,—to which list of authorities may be added *Rue v. Mitchell*, 2 Dall. 58, holding that "the sense in which words are received by the world is the sense which courts of justice ought to ascribe to them" on the trial of actions such as this. Plaintiff in error apparently concedes upon his brief that the court correctly construed the language of the second and fourth articles, but contends that the first and third were ambiguous, and should have been left to the jury. The contention is frivolous. No intelligent man reading these articles could fail to understand that the author of the first one charged an agent through whose hands moneys of a corporation passed, not only with being short in his accounts \$28,000, but also with openly boasting of the manner in which he was helping himself to the company's funds. Nor could the intelligent reader fail to understand that the third article charged that Halberstadt had been given unlimited opportunities to swindle and deceive the

policy holders, and had availed himself of such opportunities. If these excerpts do not charge the crime of embezzlement, they do certainly charge disgraceful conduct, exposing the party assailed to odium and contempt. And there is no ambiguity about the language used.

Defendant's counsel asked the court to charge that the words in the first article, "Halberstadt, Beers' Mexican agent, is short in his accounts," do not necessarily impute dishonesty. The court charged that "these simple words do not necessarily and of themselves, without anything else in the case, impute dishonesty;" but added that "the entire article, as set forth in that clause of the complaint, is libelous." This was all defendant was entitled to, for the article must be considered as a whole; and if, as a whole, it is libelous, the circumstance that it contains some innocuous statements will not relieve defendant from responsibility for its publication. The exceptions to this part of the charge are therefore unsound.

2. The plaintiff in error further contends that the circuit judge erred in refusing to charge, as requested by defendant's counsel, that the "words of the article of September 30th [second article], 'who was found to be short in his accounts \$12,000 in Chile,' are justified by the evidence." This request was made after the court had charged the jury. They had already been instructed that, in accordance with the accounts between the company and the plaintiff, the plaintiff appeared to owe the company various sums of money, which the court enumerated, aggregating over \$22,000. Their attention was also called to the explanation of this indebtedness proffered by the plaintiff, viz. that these several amounts were for traveling expenses, and excessive expenses in the business of the company in entering upon new fields of labor, and were to be repaid to the company out of plaintiff's commissions as they might mature; and it was left to them to find whether, in view of the explanation, the plaintiff was, as between himself and the company, short in his accounts, implying embezzlement by failure to account and remit. Having already told the jury that the face of the accounts showed the plaintiff to be indebted to the company as stated, the court was under no obligation to repeat that statement in the precise words of defendant's request.

3. Plaintiff in error further contends that the circuit court erred in allowing plaintiff to amend his complaint. Upon the trial, motion was made to amend the fifth paragraph of the complaint so as to read: "That on the 5th day of September, 1891, the defendant, *the said joint-stock association known as and for the New York Times, of which the said Henry A. Morgan is president*, maliciously published in the said New York Times," etc. (the words inserted by this amendment are those in italics)—and to similarly amend the several averments of the complaint under each cause of action. Defendant objected to the amendments "as, in effect, introducing a new party to the action," and reserved an exception. The summons and complaint were entitled "Sigismundo E. Halberstadt vs. Henry A. Morgan, President of the New York Times," and the complaint

averred that "the New York Times was, and still is, an unincorporated joint-stock association, consisting of seven or more associates, having its principal place of business in the city of New York," and that "the defendant, Henry A. Morgan, was, and now is, the president of said association; the said association being engaged * * * in the business of publishing, circulating, and vending a daily newspaper known as and called 'The New York Times,' the said association being * * * a citizen and resident of the state of New York." It is provided by section 1919 of the New York Code of Civil Procedure that—

"An action * * * may be maintained against the president or treasurer of such an association * * * for any cause of action, for or upon which the plaintiff may maintain such an action * * * against all the associates."

And section 1921 of the same Code provides that—

"In such an action * * * a judgment against the officer against whom it is brought does not authorize an execution to be issued against his property or his person; nor does the docketing thereof bind his real property or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same out of any personal property belonging to the association."

The amendment, therefore, is not obnoxious to the objection taken by defendant. It did not introduce any new party, since, under the operation of these sections, Morgan was only the nominal defendant, the real defendant being the association. *Bank v. Van Derwerker*, 74 N. Y. 234.

4. Upon the trial the plaintiff called as a witness Gilbert E. Jones, who testified that he was, and during the period covered by the complaint had been, a shareholder in the New York Times Association, and also its treasurer. Against the objection of defendant's counsel, he further testified that such association at the times referred to was engaged in publishing a newspaper known as the "New York Times;" that its place of business was in New York city, at Park Row and Spruce street, in the building known as "The Times Building;" that its newspaper had been published for several years; that its circulation was large; and that during the time he knew it its publication had not been discontinued. The grounds of the objection, as stated on the record, are that "the witness is privileged from answering, the object of the questions put to him being to try to prove the publication of a libel; and the witness, being a shareholder in the New York Times Association, is privileged from answering." Defendant's counsel also asked the court to instruct the witness that, if his answer to the questions would tend to criminate him, he had the right to refuse to answer. The court held that his answers would not tend to criminate him, and directed him to answer. The record does not show that the witness himself asserted any privilege, and he did answer. Exceptions were duly reserved, and the rulings of the circuit court are assigned as error. It is a sufficient answer to the contention of plaintiff in error to refer to the well-settled principle that such privilege belongs exclusively to the witness. The party to the suit has no right to insist upon it, except when he is himself the witness. And if

the witness waives his privilege, or the court disregards it, and requires him to answer, the party has no right to interfere or complain of the error. *Cloyes v. Thayer*, 3 Hill, 564; *Southard v. Rexford*, 6 Cow. 255; *Ward v. People*, 6 Hill, 144; *People v. Carroll*, 3 Parker, Cr. R. 73.

5. The testimony of Jones remaining in the case, the exception to the admission of copies of the New York Times newspaper is manifestly unsound. Judgment affirmed.

STOKES et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 174.

CIRCUIT COURTS OF APPEALS—JURISDICTION—INFAMOUS CRIMES—USING MAILS TO DEFRAUD.

The use of the mails for promoting a scheme to defraud (Rev. St. § 5480) being punishable by imprisonment in a state penitentiary not exceeding 18 months, is an "infamous crime;" and hence a conviction thereof is reviewable on error in the supreme court, and not in the circuit court of appeals. Judiciary Act March 3, 1891, §§ 5, 6.

In Error to the District Court of the United States for the Southern District of Alabama.

Indictment of J. T. Stokes, Abram Kendrick, A. J. Kendrick, E. H. Cook, Samuel H. Mixon, Morgan Mixon, D. J. Morgan, J. D. Pinkerton, and B. S. Lane. Defendants, having been tried, convicted, and sentenced, sued out a writ of error to this court.

J. D. Burnett, for plaintiffs in error.

J. N. Miller, for the United States.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. Section 5480 of the Revised Statutes of the United States provides:

"If any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."

For conspiring to violate this statute, J. T. Stokes, Abram Kendrick, A. J. Kendrick, E. H. Cook, Samuel H. Mixon, Morgan Mixon, D. J. Morgan, J. D. Pinkerton, and B. S. Lane were indicted, tried, and

convicted, and upon conviction were sentenced as follows: Each of them to pay a fine of \$100, with the costs of the prosecution; and Morgan Mixon and Abram Kendrick to be imprisoned in the county jail of Conecuh county for a period of 6 months; E. H. Cook and Samuel H. Mixon to be imprisoned in said county jail of Conecuh county for a period of 8 months; A. J. Kendrick and B. S. Lane to be imprisoned in the state penitentiary at Anamosa, Iowa, for a period of 15 months; and J. T. Stokes, D. J. Morgan, and J. D. Pinkerton to be imprisoned in said penitentiary at Anamosa, Iowa, for a period of 12 months. All of the said parties sued out this writ of error.

We are of the opinion that it must be dismissed for want of jurisdiction in this court to review the case. The fifth section of the "Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, declares that "appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: * * * in cases of conviction of a capital or otherwise infamous crime, * * *." The sixth section of said act gives "jurisdiction to the circuit courts of appeals in all cases other than those provided for in the preceding [fifth] section of this act," etc. The question, then, is whether the plaintiffs in error were convicted in the court below of an infamous crime. An infamous crime, within the meaning of the fifth amendment to the constitution, has been clearly defined by the supreme court of the United States in *Ex parte Wilson*, 114 U. S. 417-429, 5 Sup. Ct. 935, as follows: "Our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment to the constitution," and in *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777, as follows: "A crime punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime, within the provision of the fifth amendment to the constitution." According to these cases, the test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. These decisions have been followed in *Ex parte Bain*, 121 U. S. 1-13, 7 Sup. Ct. 781; *Parkinson v. U. S.*, 121 U. S. 281, 7 Sup. Ct. 896; *U. S. v. De Walt*, 128 U. S. 393, 9 Sup. Ct. 111; and in *Re Mills*, 135 U. S. 263-267, 10 Sup. Ct. 762. All these decisions were rendered prior to the passage of the act of 1891 establishing the circuit courts of appeals; and therefore the words "infamous crime," in the fifth section of the act of 1891, had a fixed and definite meaning, declared by the courts at the time the law was passed, and that meaning must be given effect in construing the statute (*The Abbotsford*, 98 U. S. 440; *Logan v. U. S.*, 144 U. S. 263-301, 12 Sup. Ct. 617), even if it were not apparent, as it is, that the words "capital or otherwise infamous crime" were used with reference to the fifth amendment to the constitution. In the case in hand the punishment, in addition to a fine which the court was authorized to impose, was imprisonment not exceeding two years in a state penitentiary. See Rev. St. U. S. § 5440, as amend-

ed (21 Stat. 4), and Rev. St. U. S. § 5541. We are therefore compelled to hold that the plaintiffs in error were convicted of an infamous crime, and that no writ of error lies to this court to review such conviction. Dismissed.

In re SMITH, Surveyor.

In re RHEINSTROM et al.

(Circuit Court, S. D. Ohio, W. D. March 31, 1894.)

No. 4,555.

CUSTOMS DUTIES—CONCENTRATED CHERRY JUICE.

Cherry juice so concentrated that five gallons, in its natural condition, are reduced to one gallon, the entire amount of acidity and coloring matter being retained, and the bulk of the water eliminated, is dutiable as cherry juice, under paragraph 339 of the tariff act of 1890, and not as an alcoholic compound, under paragraph 8.

At Law. Appeal by Amor Smith, Jr., surveyor, etc., from a decision of the board of general appraisers in favor of Rheinstrom Bros.

John W. Herron, U. S. Atty., and Henry Hooper, Asst. Atty.
Jacob Shroder, for Rheinstrom Bros.

SAGE, District Judge. Rheinstrom Bros. imported what they claimed to be cherry juice, subject, under paragraph 339 of the tariff act of October 1, 1890 (Supp. Rev. St. U. S. [2d Ed.] p. 835), to a duty of 60 cents per gallon, it containing not more than 18 per centum alcohol. The appraiser at Cincinnati liquidated the imported article as an alcoholic compound, under Schedule A, par. 8, Supp. Rev. St. U. S. p. 813, dutiable at \$2 per gallon and 25 per centum ad valorem. The board of general appraisers reversed his action, and liquidated the importation as cherry juice, under Schedule A, par. 339, or as under section 5 of the act (p. 857 of the Supplement), which provides that each and every imported article not enumerated in the act, but similar either in material, quality, texture, or the use to which it may be applied, to any article enumerated in the act as chargeable with duty, shall pay the rate of duty levied on the enumerated article which it most resembles in any of the particulars above mentioned.

From the testimony it appears that the cherry juice in question is so concentrated that five gallons, in its natural condition, are reduced to one gallon; the entire amount of acidity and coloring matter being retained and concentrated, and the bulk of the water eliminated. It is claimed for the surveyor that the resulting fluid is not the cherry juice described in the act known to the trade to-day. So far as appears, Rheinstrom Bros. are the only importers of it; and, according to the testimony of one of the firm, it was made at his suggestion. It is insisted that "extracts," as the term is employed in the pharmacopoeias, result from the evaporation of the solution of vegetable principles, obtained either by exposing a dried drug to the action of a solvent, or by expressing the juice

from a fresh plant. U. S. Dispensatory (16th Ed.) p. 586. But this claim omits the qualification that the extracts described are declared in the text to be solid preparations, being reduced to at least a pilular consistence. On pages 587 and 588 of the same work, under the head of "Extraction of the Soluble Principles by Expression," the author refers to a greenish precipitate formed by heating the juice of the plant to about 160° Fahr. He says that this precipitate may be incorporated in the juice when that is reduced by evaporation to the consistence of syrup, and that in this way the juice of belladonna has been kept more than 10 years, and at the end of that time found to yield an extract equal to that obtained from the fresh juice. Under the head of "Extract of Aconite," there is an account of the process for inspissated juices. These references make it clear that concentrated juices are not regarded as extracts. Moreover, it is expressly stated on page 594 that extracts are prepared in two different degrees of consistence; soft, so that they may be readily made into pills, and hard, that they may be pulverized. If we turn over to page 596, where fluid extracts are treated of, we find that they are made by the use of the powdered drug or extract, and never by condensation of the juice of the plant or fruit. The general formula is described at page 597. The required number of grammes of the powdered drug or extract is moistened with a certain quantity of menstruum or solvent, and enough menstruum added to saturate the powder, and leave a stratum above it. The lower orifice of the percolator is closed when the liquid begins to drop, and the percolator is closely covered to prevent evaporation and permit maceration for a specified time; additional menstruum is poured on, and percolation continued until the drug is exhausted. Reference to the formulas for the different fluid extracts described in this book shows that, without exception, they are prepared from the powdered extract. The same is true of the fluid extracts, the formulas for which are given in the Pharmacopoeia of the United States of 1890, including formulas for fruit extracts and for extract of wild cherry. The formula for fluid extract of wild cherry is 1,000 grammes of No. 20 powder, 100 cubic centimeters of glycerin, and of alcohol and water a sufficient quantity. Taking, therefore, the authorities cited for the surveyor, they establish conclusively the proposition exactly opposite to that claimed, and make it clear that the imported article, in this instance, is not an extract, but is nothing more than concentrated cherry juice. There is not a formula given in either of the books referred to in which a fruit extract is prepared from the juice of the plant or fruit. In every instance it is prepared from the solid powder or extract.

The objection that the importers, by the condensation of the cherry juice, succeed in escaping four-fifths of the duty, is immaterial. They accomplish this without evading or violating any provision of the tariff act. That act does not prescribe what shall be the strength of cherry juice. If Rheinstrom Bros., by importing condensed and concentrated juice, could avoid the payment of duty, they had a perfect right to do so. The authorities estab-

lish this proposition beyond question. *Hartranft v. Wiegmann*, 121 U. S. 616, 7 Sup. Ct. 1240; *Seeberger v. Farwell*, 139 U. S. 611, 11 Sup. Ct. 650; *Magone v. Luckemeyer*, 139 U. S. 612, 11 Sup. Ct. 651; *U. S. v. Schoverling*, 146 U. S. 81, 13 Sup. Ct. 24; *Merritt v. Welsh*, 104 U. S. 694. Even if the avoidance of the payment of duty were the only reason for ordering the concentrated juice, it would not affect the case. But it is apparent upon a moment's consideration that, by concentrating at the rate of five gallons into one, they save four-fifths of the expense of casks or barrels, and four-fifths of the freight or cost of carriage. The presumption that the condensation was simply and only to avoid the payment of duty is not warranted. The only remedy for it is by so amending the tariff as to ratably increase the duty on the condensed article. The decision of the general appraisers is approved, and will be confirmed.

MARINE, Collector, v. GEORGE E. BARTOL & CO., Limited.

(Circuit Court, D. Maryland. March 14, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—SULPHATE OF AMMONIA—MANURES.

Sulphate of ammonia, though made exclusively from bone, is dutiable as such at half a cent per pound, under paragraph 10 of the tariff act of October 1, 1890, and cannot be admitted free of duty, under paragraph 600, as a substance "expressly used for manure," even when imported and actually used for the manufacture of fertilizers. *Magone v. Heller*, 14 Sup. Ct. 18, 150 U. S. 70, followed.

This was an appeal by William M. Marine, collector of the port of Baltimore, from a decision of the board of general appraisers classifying for duty 470 bags of sulphate of ammonia imported by George E. Bartol & Co., Limited.

John T. Ensor, U. S. Dist. Atty.

Robert H. Smith, for Bartol and others.

MORRIS, District Judge. The importation in this case consisted of 470 bags of sulphate of ammonia, manufactured in England, exclusively from bone, and the question is whether it should be classified under paragraph 10, as "sulphate of ammonia," at a duty of one-half a cent per pound, or should be admitted free of duty, under paragraph 600, which admits "guano, manures, and all substances expressly used for manure." It is proved that the article was imported for the purpose of being sold to manufacturers of fertilizers, and was before arrival actually sold to one, and was in fact afterwards used for that purpose, and, in combination with other substances, was manufactured into a fertilizer. It is also proved that the substance is known in commerce as "sulphate of ammonia," and that sulphate of ammonia is a commercial article, large quantities of which are used for making aqua ammonia, anhydrous ammonia, alum, nitrate of ammonia, and many ammoniacal compounds, as well as in making ammoniated fertilizers; much the larger quantity being used, not for fertilizers, but in the arts.

It is shown that there is a small difference in price between the sulphate of ammonia produced from bone and that produced from gas liquor, and that the difference arises principally from the lower percentage of pure ammonia usually found in the bone product, and also, somewhat, from an objectionable odor which the bone product retains, particularly if not carefully prepared. It thus happens that manufacturers of fertilizers, in whose goods the odor is not objected to, generally buy the bone sulphate, because it is somewhat cheaper, and the manufacturers of other preparations requiring ammonia buy the gas-liquor sulphate, because it is usually richer in ammonia, and free from bone smell.

But this is by no means invariably the case. It is proved that there is manufactured in this country large quantities of bone sulphate of ammonia so rich in ammonia and free from smell that it is largely used in all the arts, and hardly at all for fertilizers. It was testified by a witness connected with the business of one of the very largest manufacturing chemists in this country that they use sulphate of ammonia made from bone and made from gas liquor without discrimination, provided they are well made, and do not fall below the standard of 25 per cent. of ammonia, and that they were then actually using bone sulphate of ammonia in manufacturing alum when the witness was testifying. It is also proved that this particular importation was of a very high grade, containing 25.4 per cent. of ammonia (25 per cent. being the standard), and when examined by the experts was declared free from smell of bone.

There is no question that the article imported was commercial sulphate of ammonia suitable for profitable use for any ordinary uses, such as the manufacture of aqua ammonia, anhydrous ammonia, nitrate of ammonia, or alum. It depended only upon a slight difference in price, or the demands of the market, whether it should be used for one of those purposes, or for producing ammoniated fertilizers. The ruling of the supreme court in *Magone v. Heller*, 150 U. S. 70, 14 Sup. Ct. 18, is that, if the only common use of a substance is to manufacture it into manures, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption; but if it is commonly, practically, or profitably used for a different purpose, it cannot be considered as "expressly used for manure," even if, in a majority of instances, it is so used. The words "expressly used for manure," are thus construed to mean substances, the only use of which is for making manures. In the case in hand, we have a substance widely known in commerce, used for a great many different purposes; and whether it is ultimately used for one or the other depends merely on slight differences of price or quality, and upon the judgment of the buyer. The decision of the board of general appraisers was given before the decision of the supreme court in *Magone v. Heller*; and the appraisers were controlled by circuit court decisions, which held that, if the substance was proved to have been actually imported and used for manufacturing fertilizers, the words "expressly used for manure" were gratified, and the substance must be admitted free, and they felt con-

strained to decide favorably to the importer. But, under the construction of the law established by the supreme court, their decision must be reversed. The substance must pay duty as sulphate of ammonia, as it is not a substance "expressly used for manure."

NATIONAL CASH-REGISTER CO. et al. v. LAMSON CONSOLIDATED STORE-SERVICE CO.

(Circuit Court, D. New Jersey. February 9, 1894.)

1. PATENTS—INTERFERENCE—PRIORITY—CASH REGISTERS.

Charles A. Juengst invented an improvement in cash registers, consisting in the combination with the registering keys of a key coupler adapted to couple the displaced keys together during their registering motion, and an arrester for compelling the displaced keys to make a complete stroke before returning to their normal position. In 1886, Juengst constructed and operated, with entire practical success, a machine embodying the improvements. This machine, however, lacked a casing and cash drawer, and was never brought to a finished state, so as to be fit for use as a cash register in ordinary business. *Held*, that the machine contained the inventions in a completed form, and amounted to a reduction thereof to practice.

2. SAME.

The Juengst patent, No. 499,294, for an improvement in cash registers and indicators, *held* to be entitled to priority over the earlier patents to Lord and Boyer, numbered, respectively, 398,898 and 416,029.

This is a suit brought under Rev. St. § 4918, by the National Cash-Register Company and Charles Edgar Lord, against the Lamson Consolidated Store-Service Company, in respect to certain interfering patents for improvements in cash registers and indicators.

Edward Rector and Melville Church, for complainants.

Gilman & Rusk, M. B. Philipp, and Keasbey & Sons, for defendant.

ACHESON, Circuit Judge. This suit is brought under section 4918 of the Revised Statutes of the United States, relating to interfering patents. The plaintiffs are the owners of two letters patent, namely, No. 398,898, dated March 5, 1889, granted to Charles Edgar Lord on an application filed October 11, 1888, and No. 416,029, dated November 26, 1889, granted to Israel Donald Boyer on an application filed July 8, 1889. The defendant is the owner of letters patent No. 499,294, dated June 13, 1893, granted to Charles A. Juengst on an application filed September 24, 1890. The inventions in controversy relate to, and are improvements in, machines known as "cash registers and indicators," and consist in the combination with the registering keys of such a machine of a key coupler adapted to couple the displaced keys together during their registering motion, and an arrester for compelling the displaced keys to make a complete stroke before returning to their normal position. The improvements are capable of conjoint use, and are covered, on the one hand, by the Lord and Boyer patents, and on the other by the Juengst patent. In the patent office there were interference proceedings between Juengst and Lord, and between

Juengst and Boyer, resulting, in each case, in a decision by the commissioner of patents awarding priority of invention to Juengst; and, a patent having been issued him, this bill was filed to avoid the same.

The dates of filing the applications by Lord and Boyer, namely, October 11, 1888, and July 8, 1889, are to be accepted as the dates of their respective inventions, no evidence having been given to establish earlier dates therefor. The invention by Juengst is alleged to have been made in the year 1886, and embodied in a machine (Juengst Exhibit No. 2) put in evidence by the defendant. That this exhibit is the original machine made by Charles A. Juengst, that it was constructed by him in its present form in the summer of 1886, at the works of Juengst & Sons at Croton Falls, in the state of New York, and that it fully illustrates the improvements in controversy, are matters not seriously contested, and indeed, under the evidence, are not open to doubt. The case, then, seems to turn upon the question whether this machine was a reduction to practice of the inventions, or an abandoned experiment. The Juengst Exhibit No. 2 lacks a casing and a cash drawer, but it has all the other necessary parts of a cash register. It is a full-sized working machine, of permanent structure, and made of the usual materials. As respects the keys, the key coupler and arrester, its mechanism is complete and practically operative, and undoubtedly contains the inventions involved in this suit. A number of credible witnesses testify that in the summer of 1886 this mechanism was operated with entire practical success in their presence. It fully accomplished the purposes for which it was intended, and its mode of operation and utility were understood by those persons, some of whom were practical machinists. It is true that the machine was never brought into such a perfectly finished state as to be fit for employment as a cash register for ordinary business purposes, and its registering and indicating devices are defective, and seem always to have been so. But the test of perfected invention here is not whether the various distinct mechanisms entering into Juengst's machine all worked with practical success. In themselves, cash registers and indicators were old, and were in common use. The inventions in question were only improvements upon such machines, —additions thereto designed to give them increased efficiency. The mechanism in which Juengst embodied his inventions was amply sufficient to demonstrate the practical success thereof. This it actually did, to the satisfaction of those to whom it was exhibited. To apply to the old machines the improvements which Juengst thus devised, put in operative form and disclosed, required only common mechanical skill. Upon the proofs and under the authorities, I am entirely satisfied that what Juengst did in 1886 was a reduction to practice of the inventions in controversy, and that his machine then built and operated, since preserved in its original shape, and now produced in evidence, contains the inventions in a completed and practical form. *Curt. Pat. § 87a; Reed v. Cutter, 1 Story, 590, Fed. Cas. No. 11,645; Coffin v. Ogden, 18 Wall. 120; Pickering v. McCullough, 104 U. S. 310, 319.* I am therefore of

the opinion that letters patent for the same were rightly granted to Charles A. Juengst, assignor to the defendant company.

Let a decree be drawn in accordance with this opinion.

BARNES AUTOMATIC SPRINKLER CO. v. WALWORTH MANUF'G CO.
et al.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

No. 96.

1. PATENTS FOR INVENTIONS—SUIT FOR INFRINGEMENT — PLEADING AND EVIDENCE.

Where the answer alleges that the grantee of a patent of later date than complainant's, but issued upon an earlier application, was the first inventor, evidence of the dates of the respective inventions is admissible, and public notice of the device described in the later patent must be carried back to the date of the application therefor. *Bates v. Coe*, 98 U. S. 31, distinguished. 51 Fed. 88, affirmed.

2. SAME.

It is a good defense to an action of infringement that the patented device was anticipated by a prior patent to the same patentee.

8. SAME—NOVELTY—AUTOMATIC FIRE EXTINGUISHERS.

The Barnes patent, No. 233,393, for an automatic fire extinguisher, is void as to its third, fourth, and fifth claims, for want of novelty. 51 Fed. 88, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit by the Barnes Automatic Sprinkler Company against the Walworth Manufacturing Company and others for infringement of a patent. The bill was dismissed. Complainant appeals.

The bill in this case is for an accounting and an injunction against infringement of certain claims of letters patent No. 233,393, for improvements in automatic fire extinguishers, issued October 19, 1880, to Charles Barnes, who assigned to the complainants. The court found that one of the claims in issue had not been infringed, and that the others were devoid of patentable novelty. For the opinion see 51 Fed. 88. The answer of the Walworth Manufacturing Company, besides denying invention and infringement, and showing the prior art, contains the following: "And this defendant, further answering, says that the said Charles Barnes unjustly obtained the said letters patent No. 233,393, for that which was in fact invented by one Charles W. Talcott, of Woonsocket, in the state of Rhode Island, who was using reasonable diligence in adapting and perfecting the same. That the said Talcott, long prior to the supposed invention by said Barnes, invented an automatic fire extinguisher in which was contained in combination a perforated distributor, a valve located within said distributor, and having a stem projecting through the shell of the distributor, and a lever to hold the valve to its seat until a fusible pin, or solder joint, holding such lever was released by the action of heat; that said apparatus was also provided with an elastic cushion to hold said valve to its seat with an elastic pressure; and that said Talcott perfected his said invention and filed his application for letters patent therefor in the United States patent office on the 8th day of April, 1879, and long prior to the supposed invention of the said Barnes, and prior to the application of said Barnes for said letters patent No. 233,393, and that letters patent No. 253,128, dated January 31, 1882, for said invention, were duly issued to said Talcott."

Geo. J. Murray and L. L. Bond, for appellant.

Willard & Evans and J. J. Myers, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement. The opinion delivered in the circuit court meets our approval, and, without going into the case at large, we deem it enough to consider two objections. The fourth and fifth claims of the patent in suit were held to be anticipated by the Talcott patent of January, 1882, of which it is said in the opinion: "The public notice of the device must be carried back to the date of filing the application," which was in April, 1879. This, it is insisted, is in clear conflict with the following declaration of the supreme court in *Bates v. Coe*, 98 U. S. 31:

"Neither the defendant in an action at law nor a respondent in an equity suit can be permitted to prove that the invention described in the prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to the same by the act of congress. Unlike that, the presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date."

This rule, it is clear, can be applicable only to the one defense "that the improvement had been patented or described in some printed publication prior to the supposed invention." In order to come under the provision of the statute which authorizes that defense, the patent or publication relied on must be prior in point of time to the patent in suit. And it is perhaps true in respect to any form of defense that if a patent is referred to simply by number and date, without averment of earlier invention and use, or of the date of the application upon which it was granted, evidence of those particulars would not be competent, because not within the issue. But when the answer is framed, like this one, to show, not a prior patent or publication, but that the grantee of the patent in suit was not, and that the patentee of a patent of later date, issued upon an earlier application, was the first inventor, it is an anomalous proposition that the fact which the statute declares to be a defense cannot be established by any proof which, under the ordinary rules of evidence, is admissible. In the case of *Western Electric Co. v. Sperry Electric Co.*, 9 U. S. App. —, 8 C. C. A. 129, 59 Fed. 295, where this court held that, when two patents for one invention had been issued, the owner of the second may sue the owner of the first, or those operating under it, without having obtained relief under section 4918 of the Federal Revised Statutes, it is said:

"Whether one patentee or the other, when he makes or uses the invention, is an infringer or trespasser depends upon the inquiry whether the one or the other was the first inventor, and not whether he was the first to obtain a patent; and this inquiry may as well be made in the ordinary suit in equity as in the proceeding provided by the statute."

If the parties in that case had been reversed, and the Western Electric Company had been made respondent to a bill by the Sperry Electric Company, either in a suit of the ordinary form in equity or

under the statute, its defense would have been that its patent, though later in date, had been granted upon the earlier application to the first inventor; and yet, if the rule quoted is to have the broad application contended for, the defense could not have been admitted, and the other party would necessarily have prevailed. The decision in *Bates v. Coe* involves no such absurdity as that in respect to a single dispute a party may have a cause of action against his adversary, and yet, if made a respondent, have no defense. It may be granted, in the very terms of that opinion, "that the patent or publication can only have the effect as evidence that is given the same by the statute," and yet, when the issue of priority of invention is presented, other facts necessary or proper for the determination of that issue may be proved.

It is further insisted that the court had no right to consider an earlier patent of Barnes as anticipating the one in suit; and reference is made to *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, for the proposition that:

"The defendant cannot excuse or defend himself against the charge of infringement of the letters patent in suit, by saying that he infringes an earlier patent rather than the patent claimed in this case."

The proposition is neither to be found nor has it support in the case cited, and the contrary is well settled. The decree of the circuit court is affirmed.

STIRRAT et al. v. EXCELSIOR MANUF'G CO.

(Circuit Court, E. D. Missouri, E. D. January 20, 1893.)

No. 3,255.

PATENTS—LIMITATION OF CLAIMS—IMPROVEMENTS IN STOVES.

The Stirrat patent, No. 357,874, for an improvement in stoves, must, in view of the prior state of the art, and of the modifications of the claims in the patent office, be strictly limited to the construction described, which includes as one essential element a removable top plate, or long center, cast hollow, or with a projection having a water passage through it. The patent therefore does not cover the idea of bolting a water pipe or water box to the long center for the purpose of cooling it, and giving it greater durability.

Suit in Equity by Robert J. Stirrat and others against the Excelsior Manufacturing Company for infringement of a patent.

Fowler & Fowler, for complainants.

Paul Bakewell, for defendant.

THAYER, District Judge. The file wrapper and contents of letters patent No. 357,874 show that when the application was filed the patentee (Robert J. Stirrat) supposed himself to be the inventor of the hollow long center for stoves and ranges. His sole claim was for "the long center of a stove or range, formed with a water passage or passages therein, communicating with induction and eduction pipes, substantially as and for the purpose set forth;" and in his specification he stated that his improvement consisted "in forming a water passage in the long center or cen-

ters, connected with the water tank by suitable pipes," and that the main purpose of thus casting the top plate or long center was to protect it from the action of heat, and to prevent it from becoming warped. In the first communication from the patent office the patentee was advised that the supposed new method of molding and using the long center of a stove as a water pipe, to render it more durable, was not new; that both the top plates and long centers of stoves and ranges had previously been molded with water channels, for the express purpose of distributing the heat, and preventing them from becoming warped. Vide U. S. letters patent No. 277,009, lines 40 to 45, inclusive. It would seem as though this first communication from the patent office ought to have satisfied the patentee that his claims as an inventor rested upon a doubtful foundation, and that very little scope could be given to any claim which he might eventually succeed in having allowed. Other inventors had already suggested the idea of casting the top plates of a stove hollow, and of permitting water to circulate therein, for the purpose of protecting the plates, in a measure, from the destructive action of heat. But, as usually happens in such cases, the patentee persisted in his efforts to obtain a patent on something, although his main idea had been anticipated. Having modified his specification by the additional statement that his invention related "to those water-heating devices in which the water to be heated is caused to pass through the long center and a water-back," and that his improvement consisted "in features of construction" merely, he subsequently laid claim to "a combined long center and water-back consisting of a top plate, C, having the chamber C, horizontal pipe section, F', F", eduction pipe, G, and induction pipe, F, substantially as set forth." This claim was likewise rejected, as containing nothing substantially new; but eventually, and after further changes in the specification, a patent was granted, containing three claims, of which the first claim may be taken as a fair sample. It is as follows:

"The combination, with the removable top plate of a cooking stove having a chamber therein, of an exit pipe leading from said chamber at one end of the plate, and an inlet pipe running parallel to the exit pipe, extending to the other end of the plate, and communicating with the chamber, substantially as described."

Before the issue, however, the descriptive part of the specification had been amended so as to state specifically that "the long center, C, is cast with a projection having a water passage through it almost from end to end."

The court has been thus particular in stating some of the proceedings in the patent office for the purpose of saying that, in view thereof, the complainants must expect a strict construction of the claims of their patent; and for the further purpose of showing that throughout those proceedings the patentee constantly described the long center as a hollow casting, which had been so made for the express purpose of carrying water therein, and resisting the action of heat. When the application for the patent was filed, the patentee evidently believed that his invention consisted in casting

the long center of a stove hollow, so that it might be used as a water pipe or water channel. This was what he first claimed, and all that he claimed. Before the date of his application it had long been the practice to heat water in stoves and ranges by conducting a water pipe into the fire box of a stove or range, and bending it somewhat into the form of an oxbow. The only change which Stirrat suggested in existing and well-known devices for heating water in stoves was the use of the long center of a stove as a water channel in lieu of the upper leg of the old oxbow pipe; and that this was the view entertained by the patent office is evident from the references given, and the correspondence that took place during the pendency of the application.

Under all of the circumstances, the court is of the opinion that the combination covered by Stirrat's patent must be limited very strictly to a combination of such parts as his specification describes, and that one of the essential parts of the combination is a removable top plate, or long center, cast hollow, or with a projection having a water passage through it. The margin of invention is very small when viewed in connection with the state of the art at the time the Stirrat patent was issued. The patent office in all probability acted upon the assumption that a long center, cast hollow, was an essential feature of Stirrat's invention, as otherwise the subsequent patent to O'Keefe & Filley, No. 358,123, for a water box bolted to the under side of the long center, would not have been granted. But, whether such was or was not the view entertained by the patent office, the court is of the opinion that such is the correct view. The specification describes the long center as being "cast with a projection having a water passage through it," and there is no suggestion in the specification that the object which the inventor hoped to accomplish in the way of preventing the long center from warping could be accomplished by other equivalent means, as by bolting a water pipe thereto, for the purpose of cooling and supporting it.

In conclusion it is only necessary to say that it is only by limiting the Stirrat patent to the precise form of device shown in the specification that the patent can be sustained as a valid grant in view of the prior state of the art. The long center, cast hollow, simply takes the place of one of the two water pipes which were formerly in use. Whatever advantage there may be in that precise mode of construction must be conceded to the complainants, but their patent cannot be so construed as to cover the idea of bolting a water pipe or a water box to the long center for the purpose of cooling it and giving it greater durability. The court holds, therefore, that defendants have not infringed complainants' letters patent, and the bill is accordingly dismissed.

SAUNDERS et al. v. ALLEN.

(Circuit Court of Appeals, Second Circuit. March 13, 1894.)

No. 75.

1. PATENTS—INVENTION—PIPE CUTTERS.

There is no invention in placing antifriction rollers in the jaw of a pipe cutter opposite the ordinary rotary cutter, when such rollers have already been combined with a cutter in which a fixed knife was substituted for the rotary cutter. 53 Fed. 109, affirmed.

2. SAME—INCREASED SALES AS EVIDENCE OF INVENTION.

A pipe cutter was seemingly without patentable invention, but it was shown that sales thereof had increased from 3,928 in 1885 to 10,727 in 1891. There was nothing to show to what extent price, workmanship, liberal discounts to dealers, and extensive advertising had contributed to the success in introducing the tool. It appeared, also, that an old form of cutter still remained in very general use, and that there was a strong competitor in another patented cutter. *Held*, that the increased use was not sufficient to show patentable invention.

3. SAME—ANTICIPATION—PLEADING AND PROOF.

The giving of notice of prior patents relied on to support the defense of anticipation, by stating the names of the patentees and the dates of their patents, is sufficient to warrant the introduction of such patents, if they describe the same invention, even though they do not claim it.

4. SAME—PARTICULAR PATENT.

The Saunders reissue patent No. 10,021, for a pipe cutter, is void, as to the second claim, for want of invention. 53 Fed. 109, affirmed.

Appeal from a Decree of the Circuit Court, Southern District of New York, dismissing complainants' bill. The suit was brought by Alexander Saunders and others against James P. Allen, for infringement of letters patent, reissue No. 10,021, dated January 31, 1882, to Andrew Saunders, for a pipe cutter.

James A. Whitney, for appellants.

Livingston Gifford, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. A pipe cutter is a tool, worked by hand, which grasps the pipe to be cut between two jaws, one or both of which is provided with a knife, and is then revolved around the pipe, the jaws being gradually brought nearer together, as the cut progresses, by means of a set screw or other device. So much of the invention as is covered by the second claim, which is the only one defendant is charged with infringing, is thus described in the patent:

"The invention further comprises a novel combination of an adjustable rotary cutter with the stock of a pipe-cutting device, and with two bearing or antifriction rollers so placed in said stock as to support and steady the pipe without material friction during the operation of the rotary cutter, in severing the same, and a screw for forcing the cutter against the material to be cut."

The stock is simply the support of the movable and moving parts of the apparatus. It is a C-shaped piece of metal, of which the lower curve constitutes one jaw of the tool, and the upper curve the other. As represented in the drawing and described in the

patent, the pipe to be cut is placed between the jaws resting at one side against the antifriction rollers, and with the rotary cutter pressed against its opposite side by means of the screw, which acts upon a pivoted arm in which the cutter wheel revolves. This pivoted arm is not an element of the claim averred to be infringed. The implement is then turned around the pipe in the usual manner of a pipe cutter (rotating the tool by means of the handle), and, as fast as the rotary cutter cuts into the pipe, it is fed inward by turning the screw in the requisite direction, so that, after a few revolutions of the implement around the pipe, the latter is severed. The claim declared on is as follows:

"(2) In a pipe-cutting implement, the combination of the antifriction rollers, a, and an adjustable rotary cutter, D, with a stock, and a screw for forcing the cutter towards the material to be cut, substantially as and for the purposes herein set forth."

The stock, the opposed jaws, and the use of a screw to make the jaws bite are concededly old. The complainants' only claim to invention is found in the combination of the rotary cutter in the upper jaw with the broad-bearing, antifriction rollers in the lower jaw. The circuit judge found that there was not patentable invention in this combination. This is a question to be determined by a consideration of the state of the art.

The complainants' implement is, as their counsel contends, an improvement on the Stanwood pipe cutter, patented in 1859, and which went into such general use that it is still commonly spoken of as the "ordinary pipe cutter." It has the stock, jaws, and screw, and the rotary cutter placed in the upper jaw. The pipe to be cut rests in the lower jaw, however, without the interposition of anything to relieve friction. The manifest drawback to this tool was that, in consequence of the friction, it required the exertion of more strength to turn it, and it had some tendency to twist the pipe. Its lower jaw had a broad bearing, which kept the cutter straight. The only change which complainants have made in this old form of cutter is to relieve the friction by placing two rollers in the lower jaw. Such a mode of relieving friction is so well known in the arts that it would seem not to require patentable invention to suggest its use in a pipe cutter to meet a recognized defect. The various patents introduced in proof, moreover, show that friction was understood to be a drawback in pipe cutters, and that antifriction rollers were used to avoid it, before the particular combination in suit was devised. In letters patent granted to Foster (No. 65,066) May 28, 1867, there are shown two friction rollers in the lower jaw, arranged substantially as are the complainants', "so as to bear against the pipe, receive all the pressure and working of the pipe, and thus relieve the claw." Had Foster retained the rotary cutter, his tool would have been a complete anticipation of complainants' device. He undertook, however, to further improve the Stanwood cutter by substituting a fixed knife blade for the rotary cutter in the upper jaw. He states that the pin of the rotary cutter has to bear the whole pressure, and, as both pin and cutter are made of small dimensions, they

soon wear out, and require to be frequently replaced. To remedy that difficulty, Foster substituted the stronger and more substantial fixed knife. Because he thus pointed out a mode of overcoming one difficulty, and embodied his supposed improvement in his patent, that patent none the less pointed out the device he embodied therein for overcoming the other difficulty. Given the Stanwood cutter and the desirability of relieving friction between the lower jaw and the pipe, and given the Foster antifriction rollers as a means of relieving such friction, there could be no patentable invention in placing the latter in the former, retaining still its rotary cutter.

Other patents, also, intermediate Stanwood's and the one in suit, show variations of combination which relieve friction in pipe cutters by the use of rollers. Getty's (No. 67,530, August 6, 1867; re-issue 3,549, July 13, 1869) shows a V-shaped cutter in the lower jaw, and rollers on the upper, giving the pipe "a recess in which to lie, regardless of size." Howarth's (No. 52,715, February 20, 1866) has a rotary cutter in the upper jaw, and two cutters in the lower. It has the advantage of being capable of use where the angle of a wall or floor prevents an entire revolution of the tool around the pipe, and the disadvantage of requiring more care to make the cuts true, as the knife edges of the lower jaw do not present a broad-bearing surface for the pipe to rest on. The British patent to Lier-nur (No. 1,648 of 1873) shows a "screw-cutting gear," having practically jaws, which the specification states may be so adjusted that the cutters will effect "a circular incision, the same as is effected by the well-known gas-pipe cutter." One modification of this, shown at Fig. 14, has two rotary cutters on the lower jaw and two anti-friction rollers on the upper one.

In view of the state of the art as thus disclosed, mere mechanical ingenuity, and that of no high grade, was sufficient to devise the improvement upon the old Stanwood cutter, which consists solely in the interposition of antifriction rollers between the lower jaw and the pipe to be cut, their bearing surfaces forming a recess in which the pipe may rest.

Nor do we find in the record sufficient to warrant any different conclusion upon the theory that the pipe cutter of the patent supplied a long-felt want, which mechanics had tried to supply unsuccessfully, nor that it has driven other competitors out of the market because its superior merits have commended it to the public. In *McClain v. Ortmayer*, 141 U. S. 428, 12 Sup. Ct. 76, it is held that "the extent to which a patented device has gone into use is an unsafe criterion, even of its actual utility;" and in *Duer v. Corbin, etc., Co.*, 149 U. S. 223, 13 Sup. Ct. 850, it is pointed out that other considerations than that of novelty enter into any question of the popularity of a patented article. The Stanwood cutter itself is still in very general use, and the three-wheel cutter of Howarth, in a modified form known as the "Barnes Cutter," is apparently a strong competitor with the one-wheel cutter of the patent in suit. There is nothing to show to what extent price, workmanship, liberal discounts to dealers, and ingenious and extensive advertising may have contributed to whatever success has attended the effort

to introduce complainants' tool, and, in the absence of any information on these points, there is not, in the circumstance that the sales of this tool have increased from 3,926 in 1885 to 10,727 in 1891, sufficient to warrant the conclusion that there was any patentable invention in devising it, in view of the state of the art as indicated supra.

The appellants' objection to the competency as proof, under the pleadings, of the letters patent to Foster, Getty, and others, is without merit. The fourth defense which may be proved under the general issue (Rev. St. U. S. § 4920) is: "Fourth. That [the patentee] was not the original and first inventor or discoverer of any material and substantial part of the thing patented." Manifestly, the last two words refer to the "thing patented" by him,—the patentee whose patent is sued upon. The third defense authorized by the same section is that "it had been patented or described in some printed publication prior to his supposed invention or discovery thereof;" and the fifth is that "it had been in public use," etc., "more than two years," etc. The section makes notice as to proof to be offered a prerequisite to the introduction of evidence in support of either of these defenses of previous invention, knowledge, or use. Such notice shall state "the names of patentees, and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had prior knowledge of, the thing patented [meaning, evidently, patented by the letters patent in suit], and where and by whom it had been used."

The notice in this case (which was contained in the answer) stated the names of the patentees and the dates of their patents, in which patents defendant contended that the material and substantial parts of the alleged improvement or supposed invention of Saunders were fully described and publicly made known. This was quite sufficient to warrant the introduction of those patents, provided they did in fact describe or disclose the alleged invention or discovery, whether they claimed it or not. Every invention disclosed in a patent, and not claimed, is dedicated to the public, and no one may thereafter appropriate it. It becomes thenceforth as much a part of the art as does the invention disclosed in the same patent, and also claimed therein. The question whether an individual is, or is not, an original and first inventor or discoverer, can only be determined by comparing what he did or discovered with that body of information upon the subject with which he and all the world are chargeable, and which is called the "state of the art." Usually, the clearest conception of what that art is will be derived from a study of prior patents, which are open to the public (sections 892, 486, 490, 491), and assumed to be within the knowledge of all from the date of their issuance and recording in the patent office, irrespective of the fact whether the plaintiff or his assignor ever saw them, and without proof of the precise date when they were printed.

The decree of the circuit court is affirmed, with costs.

**NEWARK WATCH-CASE MATERIAL CO. v. WILMOT & HOBBS
MANUF'G CO.**

(Circuit Court, D. Connecticut. March 27, 1894.)

No. 725.

PATENTS—INVENTION—WATCH PROTECTORS.

Patent No. 413,644, to Benfield, Aufhauser, and Milne, for a protector of watches against magnetism, which is composed of highly magnetic metal in two sections, joined by a coiled spring, the inner surfaces being covered with plush, and the outer with japan, paint, or like substances, is void for want of invention in view of the prior state of the art.

This is a bill by the Newark Watch-Case Material Company against the Wilmot & Hobbs Manufacturing Company for infringement of a patent for protectors of watches against magnetic influence.

Geo. Cook, and A. L. Shipman, for complainant.
A. M. Wooster, for defendant.

TOWNSEND, District Judge. This is a bill in equity for infringement of letters patent No. 413,644, granted October 29, 1889, to T. Benfield, S. Aufhauser, and A. Milne, for a watch protector. The patentees originally filed in the patent office six claims covering the elements of the alleged invention, but upon citation of anticipations restricted the specification by disclaimer, and substituted a single claim for a combination, which was allowed, and is as follows:

"As a new article of manufacture, a watch protector, adapted to hold or contain a watch, and constructed of highly magnetic metal, and in two sections, the latter being joined by means of a coiled spring, the inner surface of said sections being covered with plush or other soft nonmagnetic material, and their outer surfaces with japan, paint, or other like substances, substantially as set forth."

The object of the alleged invention, as stated in the specification, is to provide an economical device which would prevent watch movements from becoming magnetized by electric currents, and protect the watch from injury. This protector was of such size and shape as to allow the watch to fit snugly in it, and could be easily removed whenever the wearer had no occasion to use it. The defenses are noninfringement, that the claim merely covers an aggregation of old elements, and that the patent is invalid in view of the state of the art.

Infringement is proved. The contention of defendant on this point, that the patent is limited to a construction of iron, is negated by the language of the specification, which describes the receptacle as constructed "of sheet iron or other highly magnetic metal," or of "a piece of sheet metal, highly magnetic, and preferably sheet iron." This limited construction, if supported, would be immaterial, inasmuch as the evidence shows that the defendant's watch protector is not only an exact copy of complainant's in external appearance, but that the metal used is, in character and operation, the same as that of the patent in suit, and is, for all

practical purposes, iron. Every essential element of the alleged combination is old, as complainant's expert admits that, in view of the state of the art, to line such a protector with plush, or to cover it with japan, did not involve invention, and that the form of spring used was old. It is also admitted that devices for protecting watches from physical injury, and their movements from magnetic influence, were old. Patent No. 56,014, granted July 3, 1866, to W. W. Covell, Jr., describes a watch protector of such size and shape that a watch may fit snugly within it, made of brass or other metal, to protect the watch from external injury, and lined with soft material so as to prevent the case from getting scratched or worn, provided with a hinged spring, easily removed when not wanted, and capable of a construction which would permit the watch to be consulted without removing it from the protector. The only essential differences between it and the protector of the patent in suit were that, being designed for protection against pick-pockets, and not against magnetism, it was provided with eyes and a pin, whereby it could be secured to the pocket of the wearer, and it was not limited in construction to highly magnetic metal. The differences in finish and in details of construction of spring hinge and covering are, for reasons already stated, immaterial. Patent No. 93,246, granted to W. O. Sumner, August 3, 1869, for a watch protector, shows a somewhat similar contrivance, the patent office model of which is of iron.

Complainant, in his specification, disclaims the devices formerly used for protecting watch movements from magnetism, and which were originally cited as anticipations. It was well known in the art, long prior to complainant's alleged invention, that sheet iron, in the form of cases or rings surrounding an object, would prevent it from being affected by magnetism. Devices of this character, to protect compasses, are shown in Kline patent, No. 16,845, and Pender patent, No. 44,451. But patents Nos. 289,642, granted December 4, 1883; 312,458, granted February 17, 1885; and 365,985 and 365,990, granted July 5, 1887, to C. K. Giles; and patent No. 403,211, granted May 14, 1889, to H. P. Pratt,—show the practical application of this knowledge to watch protectors. The Giles patents described various kinds of protectors, among them being one (No. 312,458) where the watch case itself was made up with a sheet of iron between the case plates of gold or silver. In patent No. 289,642, Giles describes the disastrous effect upon watches of dynamos and other electrical apparatus, and states as follows:

"It is well known that when watches are brought near to powerful magnets their utility is entirely destroyed, as the many parts of the movement become magnetized, and so the regularity of the movement is entirely destroyed. At the present time, when powerful dynamo machines are in use all over the country for various purposes, the liability to this injurious disturbance in watches is greatly increased, for the magnets of these machines are frequently so powerful that persons coming near these machines will find the watch they carry affected, as described, by the magnet. It is an object of my invention to overcome this difficulty, and completely protect the watch from the deleterious influence of magnets, so that it may be carried into the presence of dynamo machines, or into the presence of magnets elsewhere, with perfect security against injury; also to shield the watch from the mag-

netism and magnetic currents of the body. This result I accomplish by surrounding the works or the watch with a complete shield of highly magnetic metal, or an alloy or combination of metals which, in common language, may be said to absorb or turn aside the magnetic currents, thereby preventing their reaching the works of the watch movement."

Although the patentee describes such protector as a box, or case, preferably designed to go inside the regular case of the watch, he also suggests, as above shown, a case for the watch itself. He also states as follows:

"I have thus described one way in which my invention may be carried out practically, but I do not limit my improvement to this particular mode of embodiment. The shield may be of any suitable form and construction, provided only, it so nearly incloses the watch as to accomplish the object explained; and it may be made of any metal or compound which is adapted to secure the result described."

I have not overlooked the evidence that the claimed anticipations are mere paper patents, which have never been successfully used. But such objection is insufficient where the modifications merely consist in matters of detail which could have been made by any mechanic, or do not require invention. *Pickering v. McCullough*, 104 U. S. 310. The most that can be claimed for this patent is that it is for a more economical device, with higher finish, or greater beauty of surface, than had been heretofore made, and that it has been extensively adopted and used by the public. But it is well settled that these circumstances are not, in themselves, sufficient to constitute invention. *Ansonia, etc., Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601. In *Duer v. Lock Co.*, 37 Fed. 342, where large and increasing sales were relied upon to support the claim of patentability, the court below held that the proof of acceptance by the public was not sufficient to demonstrate the inventive novelty of what appeared to be the product of ordinary mechanical skill. And the supreme court, affirming this decision, held that such a criterion was an unsafe one, as, among other considerations, the popularity might be due, as it apparently is in this case, to the more attractive appearance, or the more perfect finish, of the article. Such evidence is not conclusive of novelty, and still less of patentable novelty. *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850; *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76.

In order to constitute invention, there must be some contribution of creative thought. The fact of contrivance in the creation proves the fact of invention in its creator. But here no field was left for invention. The protectors against pickpockets of 30 years ago serve as the protectors against the dynamo of to-day by merely striking off the fastening device. The iron protector of Giles, inclosing a watch case or its movements, describes everything in the patent in suit, except old details of construction, or higher finish. The protector specifically described by him as designed to hold the movements of one watch would be practically the protector of the patent in suit for another watch smaller in size, and could be adapted to such use by any skilled mechanic. It is entirely clear that, the covering of the movements of a watch to protect against

magnetism being once conceded to be old, there is no novelty in the particular shape in which these coverings are made; it is a mere matter of mechanical taste or skill. Mr. Justice Brown, in *Pope Manuf'g Co. v. Gormully, etc., Manuf'g Co.*, 144 U. S., at page 247, 12 Sup. Ct. 637. This case seems to fall within the principle applied where, by reason of the development of an art, new exigencies arise which demand new appliances, or the application of old appliances to new uses, analogous to those already known. An illustration especially in point is *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, where a form of revenue stamp was shown to possess novelty and increased utility, and, having been found to furnish a valuable means for the prevention of fraud, had been adopted for general use by the internal revenue bureau. But the court held that, the character of these frauds rendered possible by the stamp system of taxation, having called the matter to the attention of those persons competent to deal with the subject, suggested the necessary modification of previous devices so as to accomplish the desired object, and that such modified device was only the result of the application of the common knowledge and experience of such persons, and was in no sense the creative work of the inventive faculty. So, in *Aron v. Railroad Co.*, 132 U. S. 84, 10 Sup. Ct. 24, where a patentee claimed a new form of railway car gates, especially adapted for use on the elevated railroads, the supreme court, affirming the decision of Judge Wallace, dismissing the bill, quotes from his opinion as follows:

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

Here the development of the electrical art required merely such a developed article as the skilled artisan was competent to produce. These considerations seem to establish that, prior to the alleged invention, the public had acquired the right to use substantially the same devices, for the same and other uses; that, even if the use to which it was applied by the patentee were a different use, it was an analogous one, with no change in the nature of the result or one which did not involve invention in view of the state of the art. It further appears that the modifications introduced into the patented device were a mere carrying forward of the original thought, by changes in form, proportions, or degree. That these circumstances do not constitute invention, is conclusively established by the foregoing and other decisions. *Smith v. Nichols*, 21 Wall. 115; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220; *Blake v. City and County of San*

Francisco, 113 U. S. 680, 5 Sup. Ct. 692. See the cases collected on this point in *Manufacturing Co. v. Cary*, 147 U. S., at page 637, 13 Sup. Ct. 472.

It seems to me further that there is no such inter-correspondence of relations in said article as to constitute a combination. It is merely the principle of the pickpocket protector of Covell or Sumner added to the magnetic protectors of Giles and Pratt. The two elements thus physically included in a single device may make a better protector than anything heretofore produced, but there is no co-operation between them which produces a new result. In *Hailes v. Van Wormer*, 20 Wall, 353, it appeared that Hailes made a better stove than any that had preceded it. The pencil and eraser of Faber, in *Reckendorfer v. Faber*, 92 U. S. 347, were convenient, popular, and found a ready sale. But the alleged combinations were, in each case, held to be mere aggregations, because no one of the elements added to the combination anything more than its own separate independent effect. "The aggregate result may be the production of a better structure, as an aggregate, than was ever before produced, and yet, for the lack of novelty, of device, or new result, produced by the aggregation, and due thereto, it may have no patentable quality." *Reckendorfer v. Faber*, 12 Blatchf. 68, Fed. Cas. No. 11,625. Such unions are not the creation of new means, and do not involve the exercise of the inventive faculties. *Rob. Pat. 154*; *Deere & Co. v. J. I. Case Plow Works*, 6 C. C. A. 157, 56 Fed. 841, 65 O. G. 441; *Pickering v. McCullough*, 104 U. S. 310. In *Watson v. Railway Co.*, 132 U. S. 161, 10 Sup. Ct. 45, where the patentee claimed a combination of an inside and outside grain door, the court held that there was a mere aggregation of an outside door and an inner door described in a previous patent, with certain of its attachments taken off by design or accident, and that such change was not invention. Let a decree be entered dismissing the bill.

JOHNSON et al. v. JOHNSTON.

(Circuit Court, W. D. Pennsylvania. February 15, 1894.)

No. 14.

1. PATENTABLE DEVICE—GENERAL INDEX.

Letters patent No. 461,787, granted October 20, 1891, to Montgomery H. Watson, for an improvement in general indexes to be used in connection with books, in which are recorded the names of individuals and facts or transactions connected therewith, are for a patentable subject-matter; the device covered being within the term "manufacture," as used in the patent laws.

2. INVENTION—CAMPBELL AND WATSON INDEXES.

Letters patent No. 461,787 were granted to Montgomery H. Watson on October 20, 1891, for an improvement in general indexes to be used in connection with books, in which were recorded the names of individuals and facts or transactions related thereto. The Campbell index, in general use before this patent, consisted of a blank book or books having as many divisions as there are letters of the alphabet, each devoted to surnames having the corresponding initial letter, while on a fly leaf, at the front or back of the book, are the letters of the alphabet, in a

horizontal line, representing the initials of Christian names, under which are placed figures referring to the pages on which those names are found. In the Watson patent, this table showing the initials of Christian names, and the pages on which they are to be found, is placed at the top of each page of the index, whose arrangement as to surnames is substantially the same as that of Campbell's index. The effect of this improvement is to make each page, practically, a complete index, and to avoid the wear and tear and the loss of time involved in turning constantly to the fly leaf, as it is necessary to do both in making and in searching the Campbell index. *Held*, that the Watson improvement involves invention, and the patent is valid.

In Equity. On final hearing. Bill by Johnson & Watson against William G. Johnston for infringement of a patent. Decree for complainants.

H. A. Toulmin, for complainants.

W. Bakewell & Sons, for defendant.

ACHESON, Circuit Judge. The plaintiffs sue for the infringement of letters patent No. 461,787, dated October 20, 1891, granted to Montgomery H. Watson, for an improvement in general indexes. The patented index is designed for use in connection with books in which are recorded the names of individuals, and facts and transactions; for example, entries in the order book or appearance docket of a court, or the record of deeds or mortgages in the books of a recorder. The specification states that, in making up a complete set of index books for sale and use, each index volume is designated by a letter of the alphabet, all surnames commencing with that particular letter being written in that volume. Each page is headed with such designations as relate to the particular uses of the index, and is ruled to agree with such uses. Across each page of the index volume—preferably, near the top—is a table composed of the letters of the alphabet, progressively arranged, which stand for the initials of the Christian names of all persons whose names are written in the columns of that volume, and a figure or figures, associated with each of said initial letters, referring to the numbers on the page or pages of the volume. By the use of the index of Christian-name initials and associated numbers, the name of any particular person can be found in the index volume, and opposite this name will be found the volume and page of the record book containing the matter sought for. No matter at what page of the index volume the searcher may open it, he will there find a ready and accurate reference to the particular page on which will be found the name for which he is searching. Indeed, every page is a complete index. The claims of the patent are:

"(1) As a new article of manufacture, an index book or volume consisting of numbered pages suitably ruled, headed, and numbered, and of a table composed of the letters of the alphabet appearing on said pages, such letters representing the initials of Christian names, and a figure or figures associated with each of said initial letters, and corresponding with a page or pages in said book, the book being designated by a letter of the alphabet. (2) As a new article of manufacture, the herein described index book or volume, the same being designated by a letter of the alphabet, and consisting of a suitable number of pages consecutively numbered, one or more pages of such

book being devoted to Christian names commencing with a certain letter of the alphabet, and each page being suitably headed and ruled, and a table on each page, consisting of the letters of the alphabet progressively arranged, and a figure or figures corresponding with a page or pages of said book."

Infringement is clearly shown. In truth, the index books which the defendant made for and sold to the county of Allegheny, Pa., for use in the prothonotary's office, (the act of infringement here complained of,) are identical with the index of the patent. Two defenses have been urged: First, that the patent in suit is not for a patentable subject-matter; second, that the patent lacks invention, especially in view of the prior state of the art.

1. The term "manufacture," as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design. *Curt. Pat. § 27; 1 Rob. Pat. § 183.* In *Waring v. Johnson*, 6 Fed. 500, letters patent for an improvement in pocket check books were sustained by Judge Blatchford; and in *Norrington v. Bank*, 25 Fed. 199, Judge Colt sustained a patent whose subject-matter was of a like nature. In *Dugan v. Gregg*, 48 Fed. 227, a combined book and index, so connected as to facilitate the more ready and convenient handling thereof, was held to be a patentable improvement by Judge Coxe, who, also, in *Carter & Co. v. Wollschlaeger*, 53 Fed. 573, upheld a patent for an improvement in duplicate memorandum sales slips, following a decision of Judge Colt in *Carter & Co. v. Houghton*, 53 Fed. 577, sustaining the same patent. In *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250, the United States circuit court of appeals for the eighth circuit sustained a patent for a bank account book, the improvement consisting in a suitable number of full leaves and alternate series of short leaves, each of the latter being creased or perforated for folding in such a manner as to transfer the column of balances on the right-hand page to the succeeding left-hand page. I have no difficulty in holding that the subject-matter of the patent in suit is patentable.

2. Does the improvement in general indexes devised by Watson involve invention? Here, I think, is the pinch of the case. As anticipating Watson's improvement, or, at least, as depriving it of the quality of invention, the defendant particularly relies upon the Campbell index, which, it is shown, has been used for many years in Allegheny county. It consists of a blank book with as many divisions as there are letters in the alphabet, devoted, respectively, to surnames having corresponding initial letters, while on a fly leaf in the front or at the back of the book are the letters of the alphabet, in a horizontal line, representing the initials of the Christian names, under which are placed figures referring to the pages of the book where the names are to be found. Now, at first view, this earlier index might seem to be decisive against the plaintiffs. It is, however, shown that, in actual practice, the Campbell index was found to be subject to serious objections; so much so that, whereas the commissioners of Allegheny county paid \$4,000 for the right to use the Campbell index, yet, in furnishing indexes for

a recently organized additional court of common pleas, they procured from the defendant indexes made in accordance with the patent in suit. The reasons for this change, disclosed by the evidence, are suggestive. As the index table in the Campbell system is at the front or back of the book, it is necessary for the clerk who writes the names in the volume to turn back and forth from the body of the book to the index table, and for the searcher using the volume to manipulate it in like manner; thus involving much loss of time, constant and great wear and tear of the book, and also liability to mistakes on the part of both clerk and searcher. The evidence is convincing that these evils were experienced. John Bradley, the prothonotary of Allegheny county, speaking of the Campbell index, testifies: "The constant turning to the index in the book defaced and mutilated the book, by finger marks, and sometimes tearing the index itself." Referring to the Watson index, he states: "We have a system now that is a great saving of time; in that respect, much better than the Campbell. * * * The system now in use is a great saver of time, and, in a county like this, that is very desirable. I mean, as compared with the system known as the 'Campbell.'" In answer to the question whether the wear and tear incident to the Campbell index occurred in the use of the Watson index, he says: "They do not, because, anywhere you open the book, you find the full index before you." This feature is the peculiar characteristic and crowning excellency of the index of the patent. The conception was novel and felicitous. Each page is itself a complete index, at once presenting to the eye a full and unerring reference to every other page of the book. All the objections to the Campbell index are thereby obviated. The proofs of general acquiescence in the claims of the patent, and of public approbation of the system of indexing it has introduced, are unusually strong. In many places the Watson index, altogether upon its intrinsic merits, has superseded the Campbell index. It has been adopted by public authorities after competitive examination, and in some instances upon the recommendation of committees of the bar appointed by the courts to consider the subject of the most approved method of keeping indexes to the public records. These facts greatly strengthen the presumption of patentable novelty arising from the grant of the patent. The reasons assigned by the judges in the several above-cited cases for sustaining the patents there involved as evincing invention, for the most part, apply to the case in hand. The views of the circuit court of appeals in *Thomson v. Bank*, *supra*, are especially pertinent. Here, as there, the evils which the patent in suit remedied had been apparent for years, yet no keeper of public records, experienced clerk employed to make entries therein, or user of the indexes thereto, had suggested what Watson has accomplished. The improvement was by no means an obvious one. Hence the decision in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, is not here applicable. Indeed, Watson has supplied a great desideratum. He has provided for the public an index which is almost, if not altogether, perfect. His work is a distinct and substantial ad-

vance upon everything which preceded it. Why, then, should the faculty of invention be denied to him? The decisions of the supreme court in *Loom Co. v. Higgins*, 105 U. S. 580, 591; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; and *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719,—furnish the amplest warrant for upholding the patent in suit. Let a decree be drawn in favor of the plaintiffs.

JAROS HYGIENIC UNDERWEAR CO. v. FLEECE HYGIENIC UNDERWEAR CO.

(Circuit Court, E. D. Pennsylvania. January 30, 1894.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—BILL—MULTIFARIOUS.

A bill which alleges, and seeks to restrain, the infringement of trade-mark rights and of certain rights secured by letters patent, is not multifarious, where both allegations relate to the same subject-matter.

2. SAME—OWNERSHIP—PARTIAL ASSIGNMENT—PLEADING.

A bill to restrain the infringement of certain letters patent for an improvement in the method of making seams alleged that the said patent, "so far as the same relates to, and is based upon, underwear and similar articles, was, by mesne assignments in writing, duly assigned" to complainant. *Held*, that this was not such an allegation of exclusive ownership as would entitle the assignee to maintain the bill; and it is not aided by an allegation that, "by reason of the premises, complainant is the sole owner" of the said patent right.

3. SAME—AIDER—STATEMENTS OF BRIEF.

A statement in the brief of complainant's counsel that "the papers of title, when produced, will show that the patentee parted absolutely and unconditionally with the entire title to the patent, without any reservation whatever," cannot be considered in aid of such allegations of the bill.

In Equity. Bill by the Jaros Hygienic Underwear Company against the Fleece Hygienic Underwear Company for the infringement of a patent. On demurrer.

W. P. Preble, Jr., for complainant.

Joseph C. Fraley, for defendant.

DALLAS, Circuit Judge. The demurrer to this bill could not be sustained upon the ground first assigned for its support. The fact that the bill alleged infringement of trade-mark rights, and also of certain rights secured by letters patent, does not render it multifarious. Courts of equity are averse to the multiplication of suits; and no definite rule, of general applicability, has been, or can be, laid down as a test of multifariousness. The question, in each instance where it is presented, is largely addressed to the regulated discretion of the judge, and is to be determined with reference to the peculiarities of the particular case, upon considerations which are practical, rather than theoretical, in their nature. In the present suit, both the allegations, the union of which is objected to, relate to the same subject-matter; and, although two distinct rights are averred to have been violated, I perceive no reason for supposing that they may not be litigated in a single proceeding,

without any injustice being done to the defendants, or any hardship being imposed upon them. The intimation reported to have been made by Vice Chancellor Shadwell in *Boyd v. Moyle*, 2 Colly. 316, is not without pertinency here. The multifariousness complained of in that case was that the discovery and injunction sought by the bill related to two several and distinct actions; but it was said "that, as both actions sought to be restrained related to the same goods, * * * it was not multifarious." In *Adee v. Peck*, 39 Fed. 209, the same point precisely as is here presented seems to have been raised, but the court did not find it necessary to pass upon it. The learned judge, however, in his opinion, did say:

"His [the plaintiff's] theory is that the defendant, by the sale of its valve under this name, has by one act infringed two rights of the complainant,—his patent right, and his right to the undisturbed use, during the life of the patent, of the trade-mark which he has adopted. If this theory was true, his bill, perhaps, would not be open to the charge of misjoinder upon the ground that, if two good causes of complaint grow out of one transaction for which the same character of relief is sought, and in regard to which all the defendants have the same claim of right, such causes may be included in one bill."

The second objection to the bill which is set up in the demurrer is well taken. It appears from the bill that the letters patent which the defendants are alleged to have infringed were granted to Samuel Jaros. The allegations with respect to the plaintiff's title are contained in two paragraphs of the bill, as follows:

"(13) That said letters patent, so far as the same relates to, and is based upon, the underwear and similar articles, was, by mesne assignments in writing, duly assigned to your orator, as by said original assignments, or duly certified copies thereof, here in court to be produced, will fully appear.

"(14) That, by reason of the premises, your orator became, and now is, the sole owner of the hereinbefore recited trade-mark, pictures, system of numbering, method of making seams, and other peculiar, distinguishing features of its said underwear, and that the same are of great value to your orator."

The learned counsel for the complainant suggested during the argument that this language might be taken to mean that the entire patent had been assigned to the complainant, but, upon its being then proposed to him to amend so as to make that meaning perfectly clear, he declined to do so. To me these paragraphs seem to be capable of but one construction, or rather to require no construction at all, for their effect is perfectly plain. It was, of course, incumbent upon the plaintiff to set out its title. It cannot be assumed to have any other or better one than that which it has asserted, and all it has alleged is that the patent, "so far as the same relates to, and is used upon, underwear and similar articles," was assigned to it. It is impossible to suppose that these limiting words would have been inserted if, in fact, the plaintiff had become the owner of the whole patent. Nor is the effect of this limitation modified by the general averment of the following (the fourteenth) paragraph, that, "by reason of the premises," the complainant is the sole owner of the before-recited method of making seams, etc. This is too evident to call for elaboration or argument. The law of this subject is not doubtful, and it constrains me to hold that the title set up

by the complainant will not support the bill which it has filed in its own name. "Such exclusive right of action exists, in favor of a sole assignee, only in two cases, namely, where he acquires by assignment the whole interest in the patent, or a grant or conveyance of the whole interest within some particular district or territory." *Suydam v. Day*, 1 Fish. Pat. R. 88, Fed. Cas. No. 13,654; *Pope Manuf'g Co. v. Gormully & Jeffery Manuf'g Co.*, 144 U. S. 248, 12 Sup. Ct. 641. In the brief submitted on behalf of the complainant, it is alleged that "the papers of title, when produced, will show that Samuel Jaros parted absolutely and unconditionally with the entire title to the patent without any reservation whatever, and has not the slightest interest whatever in any degree in this suit or in the patent." A sufficient answer to this is that nothing of this kind is contained in the bill. It states that the patent was issued to Jaros, and does not state that he assigned it. Therefore, for the present purpose, it is to be assumed that he still owns it, inasmuch as the demurrant need not, and the court cannot, look beyond the bill. Moreover, if the bill alleged that Jaros parted with the entire patent, it should also allege that the complainant is now the owner of it; and this it not only does not do, but, as has been shown, sets up a mere license to him with respect to certain articles of manufacture. Whether the owner of the patent (whoever he may be, if not this complainant) could properly be made a party to the present bill without striking from it all that relates to trade-mark is a question upon which I will not express an opinion at this time; but, in order that the complainant may have opportunity to move for leave to amend, or as he may be advised, no decree will be immediately entered.

THE MAJESTIC.

POTTER et al. v. THE MAJESTIC.

(Circuit Court of Appeals, Second Circuit. March 12, 1894.)

No. 65.

1. SHIPPING—CONSTRUCTION OF CONTRACT OF CARRIAGE—WHAT LAW GOVERNS.
A written agreement, executed and delivered in England, whereby an English corporation agrees to transport a citizen of the United States from England to this country, is to be construed according to the English law.
2. CARRIERS OF PASSENGERS—LIMITATION OF LIABILITY—PERILS OF THE SEA.
A steamship passenger ticket contained an agreement to carry a passenger and a certain quantity of luggage, and included several notices and directions, but did not refer to any other conditions. At the bottom were the words "See back," and on the back of the ticket was a statement that the ticket was subject to several conditions, among which was one attempting to relieve the carrier from liability for perils of the sea. *Held*, that this condition was not binding, since it was an attempt to limit the carrier's common-law liability by a mere notice, not incorporated into the contract of carriage.
3. SAME—LIABILITY FOR PASSENGER'S BAGGAGE.
A condition on the back of such ticket limiting the carrier's liability for baggage to £10, unless extra payment is made, is binding on the passenger, where he receives the ticket in time to examine it thoroughly

before embarking, since the extent of a carrier's liability for baggage, being not definitely fixed by the common law, is subject to reasonable regulation by the carrier.

Libel by Grace Howard Potter and others against the steamship Majestic for breach of a contract of carriage. Libelants obtained a decree. The claimant, the Oceanic Steam Navigation Company, appeals. Modified.

Appeal by the Oceanic Steam Navigation Company, claimant of the steamship Majestic, from a decree of the district court for the southern district of New York in favor of the libelants. 56 Fed. 244. The libel was filed to recover for an injury to the contents of certain trunks on a voyage from Liverpool to New York.

Everett T. Wheeler, for appellant.

Willard Parker Butler, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The two ladies and their maid who are the three libelants took passage on January 20, 1892, at Liverpool for New York, on board the steamer Majestic. The vessel arrived in New York on January 28th. The contents of their trunks were found to have been saturated with salt water, and to have been damaged to the amount of \$2,828.50. The baggage was stowed in compartment No. 3 of the orlop deck, where the mails were also stowed. This compartment is about 25 feet in length, has watertight bulkheads at each end, and is ordinarily a safe and convenient place for the baggage of passengers. On the morning of January 25, 1892, there was a pretty rough sea, and from 7 to 8 o'clock a. m. the vessel passed through a quantity of wreckage, apparently broken planks, and about 8 o'clock a. m. it was found that the after port in No. 3 had been broken, and that a large quantity of water had entered and damaged the mails and luggage. There were three port holes on each side of the compartment, which were closed in the usual way, with thick glass, and an iron cover or "dummy," screwed up tightly. The glass was broken in many fragments, and the iron dummy was forced from its hinges, and turned back,—an accident which could not have been caused by the sea alone. The ports are examined at the commencement of the voyage in Liverpool. The chief officer of the ship was at this compartment the day after the vessel left Queenstown. It was the custom to inspect the baggage rooms after heavy weather, and accordingly the chief officer opened the door on the morning of January 25th, and discovered, by the wash of water, that an accident and injury had taken place. The facts that the glass was splintered into many fragments, and that the iron dummy was forced from the hinges, and thrown backward, show that the accident must have been caused by a violent blow coming from the ocean. It is reasonable to infer that it was caused by an apparent and adequate cause, rather than by one which rests entirely upon surmise, and we are therefore led to conclude that a blow from one of the floating planks inflicted the injury. The district judge was of opinion, assuming that the acci-

dent was caused by wreckage, that the ship must be deemed guilty of negligence in not checking her speed when passing through material capable of inflicting such damage. If such an injury could have been anticipated, the speed should have been slackened, but it is apparent that the injury was of an extraordinary character, and that the propriety of taking precautions to avoid it would not naturally have occurred to the mind. It was an unanticipated peril of the sea.

The questions in the case which are of general importance arise upon alleged limitations of the carrier's liability, which are expressed in the notice printed upon the back of the libellant's ticket. One ticket was purchased in England, and was issued to the three libellants. It was a maritime contract, for the performance of which the ship became liable, entered into by a common carrier by sea, the terms of which were expressed in writing. The portion relating to the contract was headed "Cabin Passenger's Contract Ticket." Then follow the words: "These directions and the notices to passengers below form part of, and must appear on, each contract ticket." Five "directions" which are required by the British merchant shipping act are then inserted. The undertaking or agreement of the steamship company is next printed. The part of this agreement which is important to this case is as follows:

"In consideration of the sum of £124 10, I hereby agree with the person named in the margin hereof that such person shall be provided with first-class cabin passage in the abovenamed British steamship, to sail from the port of Liverpool for the port of New York, in North America, with not less than twenty cubical feet for luggage for each person; * * * and I further engage to land the person aforesaid with their luggage at the last-mentioned port, free of charge beyond the passage money aforesaid. For and on behalf of the Oceanic Steam Navigation Company, Limited, of Great Britain.

Thomas Henry Ismay,
"Per R. Martekellell."

The last name was written. Then follow two notices to cabin passengers, and a caution in regard to the care of their baggage and valuables. At the bottom of the face of the ticket are the words, in conspicuous, black-faced type, "See back." Upon the back of the ticket are the words: "Notice to Passengers. This contract is made subject to the following conditions." Seven important conditions are then stated. The third, fourth, and seventh are as follows:

"(3) Neither the shipowner nor the passage broker or agent is responsible for loss of or injury to the passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the steamer, her machinery, gear, or fittings, or from act of God, queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and peoples, barratry or negligence in navigation, of the steamer or of any other vessel. (4) Neither the shipowner nor the passage broker or agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which one per cent. will be charged) is paid." "(7) All questions arising on this ticket shall be decided according to English law, with reference to which this contract is made."

The signature of Thomas Bruce Ismay, for the steam company, is printed. The father of the two young ladies who were passengers bought the ticket. Neither he nor either of the three passengers read it, or knew its contents. The father and daughters had abundant opportunity to do so. The steamship company claims that, under the third condition, it is not liable for injury to any passenger's baggage which arises from perils of the sea or from negligence in navigation of the steamer or any other vessel, and that, under the fourth condition, the amount of liability to a passenger for injury to his baggage is limited to £10, unless the value of the same in excess of that sum was declared when or before the ticket was issued and freight was paid. No declaration was made in their case. The seventh condition specifies that the contract is an English one, and has particular reference to the limitation in regard to liability for negligence.

The contract was made in London or in Liverpool, where the shipowner had a place of business, between a British corporation, which was the shipowner, and a citizen of the United States. The contract was for the transportation, upon the high seas, of passengers and their baggage, from the city of Liverpool to the city of New York; and, if the statement that it was made with reference to English law had been omitted, nothing in the contract would have indicated an intent that it was to be controlled by the law of the United States. Under such circumstances, it was an English contract, and governed by the law of England. "The general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, requires a contract of affreightment, made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665.

It is well known, and in the *Liverpool & G. W. Steam Co.* Case the supreme court has declared, that, by the law of England, common carriers, by land or sea, except so far as they are controlled by the provisions of the railway and canal traffic act of 1854, are permitted to exempt themselves, by express contract, from responsibility for losses occasioned by the negligence of their servants. A like exemption from other portions of their common-law responsibility can also be made by special contract. As negligence has been found not to have existed, it will not be necessary to dwell longer upon the part of the third condition which purports to relieve the carrier from responsibility occasioned by its servant's negligence.

In the absence of a special contract, the common carrier of merchandise was only exempted from liability for those losses which were occasioned by the act of God or the public enemy. *York Co. v. Railroad Co.*, 3 Wall. 107. The third condition extends these two exemptions to those occasioned by divers other causes, one of them

being "the perils of the sea." While it has been thought that the term "perils of the sea" had the same and no larger meaning than losses or injuries "by the act of God," it is now generally considered that it has a broader signification, and includes calamities which were not caused by a violence or convulsion of nature, such as lightning, flood, or tempest. In *Parsons on Shipping*, (volume 1, p. 255), the learned author states what he conceives to be the proper definition, and the reason for it, as follows:

"The 'act of God' is limited to causes in which no man has any agency whatever, because it was never intended to raise in the case of the common carrier the dangerous and difficult question whether he had any agency in causing the loss, for, if this were possible, he should be held."

In this case the district court thought that the injury was one from which the steamship could have turned aside. It certainly was not a peril of the same class as lightning or hurricane, from which there is no escape, and to call it an "act of God" would be a strained use of language. When, therefore, the third condition excludes from the carrier's liability losses from those perils of the sea which are not included in those occasioned by the act of God, it excluded what was included upon the face of the contract.

The next question is whether this limitation is one which was entered into by express contract, or is a mere notice by the carrier of a desired limitation. The reported English cases do not contain a construction of this ticket, or of a ticket of the same character. There are cases which construe the effect of conditions which the passenger has admitted by his signature (*Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore, P. C. [N. S.] 272), and also the legal meaning of a railroad pasteboard ticket or check, one side of which contains merely the names of the towns where the passenger's journey begins and ends, and the other side containing limitations upon the carrier's responsibility (*Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470). Other cases construe the meaning of checks or vouchers for the return of parcels deposited in a railway office for temporary safe-keeping (*Parker v. Railway Co.*, 2 C. P. Div. 416; *Harris v. Railway Co.*, 1 Q. B. Div. 515), and others construe the meaning of conditions contained upon the face of a railway ticket, or in a book of railway coupon tickets (*Zugz v. Railway Co.*, 4 Q. B. 539; *Burke v. Railway Co.*, 5 C. P. Div. 1); but no case declares the legal construction which the English courts place upon important conditions attached to a contract which expresses, in legal phrase, the undertaking of a carrier by sea to transport a passenger and his baggage from one point to another, the conditions not being referred to in the body of the contract, but referred to upon the bottom of the face of the paper by the words "See back," and indorsed upon the back of the ticket, the signature or assent of the passenger not appearing upon the paper. The general principle which controlled the various cases, and which is plainly stated in the discussions of the judge in *Henderson v. Stevenson*, *supra*, is that courts should insist upon the importance of a distinct declaration or reference by the carrier in that part of the ticket which contains his contract with respect to limitations in derogation of his common-law liability; so that it may

manifestly appear that such limitations could not have been misunderstood and were accepted by the passenger. These exemptions must be directly stated, or the assent of the passenger will not be inferred. Attempts, "by indirection," to obtain an assent to exemptions, will not, unless the attempt is positively sanctioned by the passenger, receive the favor of courts. The principle is the one which is the foundation of the important decision in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318. But there is a distinction between regulations for the conduct of business and limitations upon common-law obligations, and this rule is not intended to be so stringent as to prevent the carrier from prescribing reasonable regulations for the conduct of his business, not in derogation of his responsibility at common law, for the purpose of preventing imposition upon him, and of establishing proper charges adequate to the extent of the risks to be undertaken, provided such regulations are brought to the knowledge of the person who intrusts merchandise to the carrier. *York Co. v. Railroad Co.*, 3 Wall. 107.

Turning now to the ticket which was issued to the libelants, we find that certain directions are expressed in the body of the ticket, which, with two notices to passengers, are expressly said to form part of the contract, and no other condition is referred to in the body of the agreement. At the foot of the page, by the words "See back," the purchaser is referred, under the heading "Notice to Passengers," to important modifications of the carrier's liability as expressed in the face of the contract. If these conditions are to be construed as a part of the express contract, they make a clumsily and inartificially drawn document. They are of such a vital character that they should have been embodied in the contract, or unmistakably made a part of it. There is no reason why agreements of this nature should not be so distinctly and definitely stated or referred to in the body of the contract as to remove all uncertainty on the part of courts, or cause of complaint on the part of the passenger. The modifications in the third condition of the agreement entered into upon the face of the ticket, and which did not allude to these proposed modifications, are so great that they cannot be considered to have been made by special contract, in the absence of evidence of positive assent upon the part of the purchaser of the ticket or of the passenger.

The regulation in regard to a limitation of liability for the value of baggage of which the carrier is not informed, and the amount of a risk for which he is not paid, rests upon a different principle. The common-law liability of common carriers for the safety of baggage of travelers is not exactly defined, but it is not unlimited. The carrier is not to be called upon to take an unusual quantity of trunks, as the baggage of a single traveler, nor is he under obligations to pay large sums for the value of articles which are in excess of a traveler's ordinary wants. The rule which the common law laid down upon this subject is well understood. "The contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending, of

course, upon the station of the party, the object and length of his journey, and many other considerations." *Railroad Co. v. Swift*, 12 Wall. 272. And therefore, as this obligation on the part of the carrier is not unlimited, but is at common law not exactly defined, the carrier has a right, "by reasonable regulations, of which the passenger has knowledge," to define and make certain to both parties the extent of an implied undertaking to carry baggage (*Railroad Co. v. Fraloff*, 100 U. S. 29), and of an express undertaking, where the contract includes baggage by name; for an express contract which simply mentions baggage would not be construed to mean baggage unlimited in quantity or in value. By the contract in question the amount of space which the baggage could occupy was expressly provided for. The power of the carrier to define by regulations, communicated to the traveler, the amount of his pecuniary liability for baggage, has been well understood in the law of England and in this country. "It is undoubtedly competent for carriers of passengers by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duty to the public, to protect themselves against liability, as insurers, for baggage not exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." *Railroad Co. v. Fraloff*, *supra*. The regulations or the notices upon the tickets or contracts which bring this class of limitations home to the knowledge of the passenger are of a very different character from the notices of which we have been speaking, and which limit or attempt to annihilate the common-law responsibility of a carrier. This class of regulations is intended to make certain what is uncertain, to define what is otherwise indefinite, to prevent mistakes, complaint, and litigation, and to promote fairness of dealing. The ticket was purchased by the father of the young lady passengers, a gentleman of large business experience, who had frequently used similar tickets. He kept the ticket for a while in his office in London, but did not read it, and had never read the tickets which he had purchased for his own use. He had abundant opportunity to read it, and to make himself familiar with the reasonable and ordinarily well-understood regulations of carriers by land or sea in regard to baggage. The regulation was distinctly brought to the knowledge of Mr. Potter by his reception of the ticket (which was far more than the ordinary railroad check, indicating the two points between which the passenger is to be carried), in ample time to make himself acquainted with its regulations. He was not hurried on board with no opportunity to know the rules of the company, and it cannot be safely asserted that with adequate means of knowledge placed in his hands, and with ample opportunity to possess himself of the information which the carrier gave him, knowledge of the regulations was not brought home to him. The decree of the district court is modified, with costs of this court, and the cause is remanded to the district court, with instructions to enter a decree in favor of each libellant for the sum of \$43.67, and interest from January 25, 1892, and their costs in the district court.

THOMPSON v. GEO. W. BUSH & SONS CO.

(District Court, D. Maryland. March 17, 1894.)

CHARTER PARTY—EMPLOYMENT OF OBJECTIONABLE STEVEDORE.

Under a charter party requiring the charterer to furnish a full cargo of lumber to be loaded by the vessel, the shipper has no right, in the absence of express stipulation or established usage, to refuse to furnish the cargo because of the employment by the master of a stevedore who, although competent and experienced, is personally objectionable to the shipper.

In Admiralty. Libel by Abraham P. Thompson, master of the schooner William Neely, against the George W. Bush & Sons Company, for breach of a charter party.

Robert H. Smith, for complainant.

Gans & Haman, for respondent.

MORRIS, District Judge. The controversy in this suit arises from a dispute in regard to the employment of a stevedore to load a cargo of lumber in the port of Savannah. By a charter party made in the city of New York 26th of March, 1892, the George W. Bush & Sons Company, of Wilmington, Del., chartered the schooner William Neely for a voyage from Savannah to New York, and engaged to furnish to the vessel at Savannah a full and complete cargo of re-sawed yellow pine lumber, under and on deck, to be carried to New York at a certain rate of freight per 1,000 feet for all delivered; the cargo to be received and delivered alongside, within reach of the vessel's tackles, at the ports of loading and discharging; at least 40,000 feet per day (Sundays excepted) to be allowed for loading, and dispatch in discharging, and for every day's detention of the vessel by default of the charterer or its agent demurrage to be paid at the rate of \$85 per day. The master of the vessel was directed by the charterer to report his arrival at Savannah to the Georgia Lumber Company, who would furnish him with cargo. On May 2, 1892, the schooner being in Savannah, and ready for cargo, the master reported to the lumber company, and was shown the wharf at which he was to load, and the lumber he was to take on board, the greater part of the cargo being then ready upon the wharf. He mentioned to the wharf manager of the lumber company that he had engaged a stevedore named Daniels, and was told that the lumber company objected to Daniels, as they had had trouble with him. The master replied that he was entitled to select his own stevedore, and that he had already contracted with Daniels, that he had also employed him when loading in Savannah three or four weeks before, and preferred him, and meant to have him. Daniels and his gang of stevedores went to work, and made the vessel ready, and had put on board 16 pieces of timber, when, by orders from the lumber company, the delivery of the lumber was forbidden, and the stevedores ordered off the lumber company's wharf. All efforts to come to any agreement proved fruitless. Day after day, the master notified the lumber company that his vessel was ready for the cargo, and that

his gang of stevedores were waiting to stow it. Day by day, the lumber company replied that if the master would employ any stevedore, except Daniels, he could have the lumber, but that he could not have it if Daniels was to have anything to do with loading it; and the lumber company offered to pay any difference in any other stevedore's charges. Upon the master making an effort to proceed with the loading, Daniels was arrested, and fined for trespassing on the wharf; and the master having got into a wordy altercation with some other lumber merchants, who were supporting the officers and the lumber company in their contention, he was also arrested, tried, and fined. Finally, upon request of the lumber company, the harbor master removed the schooner away from the lumber company's wharf, and on May 24th the master rechartered at a less rate of freight.

Stowage of the cargo is primarily the duty of the shipowner and the master. The shipper places the lumber within reach of the ship's tackles. At that point the shipper's duty ends. The ship pays the cost of loading, and is responsible for damage to the cargo by reason of negligent or unskillful handling or stowage. *Richardson v. Winsor*, 3 Cliff. 395, Fed. Cas. No. 11,795; *The Keystone*, 31 Fed. 412; *The Alex. Gibson*, 44 Fed. 371; *Sandeman v. Scurr*, L. R. 2 Q. B. 86; *Scrutton, Charter Parties*, art. 50, p. 94; *Sack v. Ford*, 13 C. B. (N. S.) 90. The requisites for the stowage of a cargo of sawn lumber are of the simplest character. The lumber cannot be injured unless by the roughest and most unskillful handling, or by wantonly cutting it. The shipowner is interested that the largest possible quantity shall be put into the vessel, so as to earn the greatest possible amount of freight, and also that it shall be stowed so as not to shift and list the vessel. The quantity which the vessel will contain depends a good deal on the skill and fidelity of the stevedore. The charter party in this case is silent as to who shall nominate the stevedore. As between the ship and the charterers, so far as it depends upon the charter party, there can be no question that it was the master's duty to pay the stevedore, that he was answerable for the stevedore's performance of the work, and that it was his right to select him.

It is urged in behalf of the respondents that, by the usage of the lumber trade in the port of Savannah, it is the shipper of the lumber who has the right to select the stevedore. This usage is not proven. It is shown that during the last four years the largest shippers of lumber in that port have strongly desired and striven to establish that usage, and to compel shipmasters to acquiesce in their claim of right to select the stevedore, but the proof falls far short of proving general acquiescence of shipmasters in such a practice. It appears from the proof that, four or five years before the occurrence in this case, there was in the port of Savannah a strike of stevedores, which injured the lumber business, and caused the lumber shippers great anxiety, and that since that occurrence they have, as far as they have been able, taken the loading of lumber vessels into their own hands, by establishing firms in that business, in which they have an interest and can

control, and also by blacklisting those stevedores who were prominent in the strike, and preventing their getting employment. When the shippers of lumber have also an ownership in the vessel, they compel the master to take the stevedores selected by them; and, when they have not such ownership, they endeavor by other means to prevail upon the masters to accept a stevedore upon their nomination. It is proven, however, that the masters still contend that, as they employ and pay the stevedores, they are entitled to select them; and in a great many instances, particularly with the smaller shippers, they still insist upon doing so.

It has been urged on behalf of the respondent that Daniels was not a competent and trustworthy stevedore, but the proof fails to support this contention. It is shown that for a great many years he has been known as among the best lumber stevedores of the port, and was duly licensed; and numbers of masters of vessels carrying lumber from that port have testified in this case that they prefer him, and employ him constantly, and have never had any reason to complain of him. He had stowed a lumber cargo on the William Neely on her previous voyage from Savannah, a few weeks before the one in question, and the master had then arranged with him to load his vessel on her next trip. It is true that he was objectionable to the shippers of this cargo, the Georgia Lumber Company, and the president of that company had declared that Daniels never should load a cargo which they furnished. This was principally because they suspected him of having been in the strike four years before, although Daniels denied it, and because he had once stopped off in the loading of a vessel consigned to them, complaining that he had been unwarrantedly interfered with, and once had left a car of their lumber on a wharf in order to take advantage of a tide to get the vessel to another wharf, and once had been accused by them of improperly cutting some sticks in order to stow them. These were all of them small matters of irritation, susceptible of explanation, and which no doubt would have been overlooked but for the fact that the officers of the Georgia Lumber Company, together with other lumber merchants of Savannah, determined to get the stevedoring of lumber cargoes into hands where they could control it, so as to prevent strikes, and had determined to force all other stevedores out of the business.

The testimony leaves no doubt that Daniels was a competent and experienced stevedore, of established reputation, and the one preferred above all others by many of the shipmasters loading lumber at Savannah. The matter resolves itself, then, into the question whether, under such a charter party, in the absence of express stipulation,—in the absence of established usage,—the shipper of the cargo has a right to say he will not furnish the cargo if the master employs a stevedore who, although competent and experienced, is personally objectionable to the shipper. I can find no warrant for a refusal to furnish cargo based upon this ground. The shipper does not employ the stevedore, nor pay him. He is not responsible for his want of skill, nor his mistakes. The shipper's duty is performed when he puts the sticks of timber

within reach of the vessel's tackles, and after that the responsibility rests with the ship.

It is urged that, if the lumber is found to be broken or split when delivered from the vessel to the purchaser, the purchaser generally makes reclamation on the shipper, and that it is difficult to prove that the defect is the result of careless stowage, and the shipper generally has to suffer the loss. This may be a good reason why the shippers should endeavor to control the nomination of the stevedore; and, if it is sufficiently important, they can accomplish it by insisting that the purchaser of the lumber shall stipulate in the charter party that the vessel shall employ the shipper's stevedore, or any one satisfactory to him. This is a very usual stipulation, and is found in nearly all foreign charter parties. The charterers having failed to have inserted in the charter party a stipulation that the stevedore should be satisfactory to the charterers or the shippers, they cannot now have the same benefit as if the provision had been inserted. *Culliford v. Gomila*, 128 U. S. 135-158, 9 Sup. Ct. 50. The case comes to this: The respondent, who chartered the schooner, contracted to furnish her at Savannah with a full and complete cargo of lumber. The lumber was tendered, but with a condition annexed which was not warranted by the charter party, nor by any usage of the port. It was, in fact, refused, unless the master would submit to a requirement which was not in the charter party, or sanctioned by usage. The master having already, in good faith, contracted with a competent stevedore selected by himself, he could not be compelled to dismiss that stevedore, as a condition of the cargo being furnished to him. There was therefore a refusal to furnish the cargo in compliance with the stipulation of the charter party, and the master was not obliged to accept it with the condition annexed to the offer. *Hudson v. Hill*, 43 L. J. C. P. 273. In my judgment, the libelants are entitled to recover from the respondent the loss of freight upon the recharter at a less rate, and damages for the delay caused by the failure to furnish cargo.

KNOTT v. ONE HUNDRED BALES OF RAGS.

(District Court, D. New Jersey. March 3, 1894.)

1. SHIPPING—BILL OF LADING—LIGHTERAGE CHARGES.

A bill of lading of certain rags provided for delivery from the ship's deck to consignees, who were to be ready to receive the same "simultaneously with the ship's being ready to unload" them. In default thereof, the master was authorized to "land, warehouse, or place them in lighter, without notice." The consignees, though notified, did not appear, to receive the rags; and, as the health regulations of the port forbade landing them on the dock, the master placed them in lighters, from which they were transferred, after some delay, to a warehouse. *Held*, that the master's action was justified by the bill of lading, and the goods were thenceforth at the risk and care of the consignees.

2. SAME—DUTY OF CONSIGNEES.

When, several days later, the consignees appeared and claimed the rags, they objected to paying the lighterage expenses; and finally the ship's agent sent the rags to a warehouse, where the charges were much

less than on the lighter. The consignees afterwards objected to the lighterage expenses, as excessive; claiming that the goods should have been sent to the warehouse immediately, so as to reduce the expense to a minimum. It appeared, however, that it was necessary to obtain permits from officials for the removal and storage, which required some time. *Held*, that as it was the duty of the consignees to attend to these details, and having chosen to leave them to others, they could not complain of the delay.

This is a libel in rem filed by James Knott against 100 bales of rags under a bill of lading, to recover lighterage and other charges.

Convers & Kirlin, for libelant.

Leavitt, Wood & Keith, and Albert H. Atterbury, for claimant.

GREEN, District Judge. In March, 1893, the steamship Spanish Prince arrived at the port of New York from Leghorn with a general cargo, consisting, among other things, of 100 bales of rags consigned to I. B. Moore & Co., or to their assigns, under a bill of lading which provided for a delivery in good order to the consignees or their assigns "from the ship's deck, where the ship's responsibility shall cease." The bill of lading also contained these clauses:

"Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of said goods is hereby bound to be ready to receive them from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein; and in default thereof the master or agent of the ship, and the collector of above port, are hereby authorized to enter the said goods at the customhouse, and land, warehouse, or place them in lighter, without notice to, and at the risk and expense of, the said consignee of the goods after they leave the deck of the ship." "The captain or owner has a lien on the goods for unpaid freights, through freights, average claims, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods."

The steamship arrived at the port of New York on the 14th of March, and was docked at the South Atlantic dock, Erie basin, Brooklyn. She commenced discharging her cargo immediately. Notice of the ship's arrival and discharge was given, in the customary manner; and the consignees of the bales of rags (residing, as it appeared, in Boston) were duly notified by telegraph. All of the ship's cargo, except these rags, was discharged on the 17th of March. Neither the consignees, nor any one acting for them, claimed or called for the rags; and, as the space in the hold of the ship where they were stowed was needed for the stowage of the outbound cargo, the master discharged them into lighters, which had been especially hired for that purpose, the health regulations of Brooklyn forbidding their discharge upon the dock or quay where the rest of the cargo had been discharged. The steamship sailed from the port on her return voyage March 19th. When the consignees claimed the rags, which was not for several days, objection was made by them to the payment of lighterage expenses; and finally the rags were sent by the agent of the steamship to warehouses at Hoboken, N. J. This libel is filed to recover the expenses which were incurred by the master and agent of the steamship in discharging and removing the rags from the ship first into the lighters, and then to Hoboken. The claimant's insistent is that the charges were largely in-

curred improperly, and are exorbitant, and ought not to be allowed, except to a very limited amount.

The material facts in the case are practically admitted. The sole question is the proper construction of the clauses of the bill of lading which have been quoted. The acts of the ship's master or agent in discharging the bales of rags as was done must find justification there; for it is a duty incumbent upon carriers by water to deliver to the consignee, and a substituted delivery can only be regarded as a compliance with that duty when made in strict accordance with the terms of the bill of lading, which expresses the contract between the carrier, the shipper, and the consignee. Now, with these clauses of the bill of lading in question, there cannot be any perplexing difficulty. They are plain and explicit. On the one hand, the carrier is to make a proper delivery, after due notice, if possible, to the consignee. On the other, the consignee is to be ready to receive the goods consigned to him, at the place where they are to be discharged. If the consignee, however, is not ready to receive the goods, then the express authority is given the master or agent of the ship to "land, warehouse, or place them in lighter, without notice." In the present instance the health regulations of Brooklyn forbade the unloading of the rags upon the dock where the rest of the cargo had been discharged. The only alternative left the master or agent was to discharge them into the lighter. In so discharging them, the master was acting clearly within the terms of the bill of lading; and such discharge, therefore, constituted a perfectly legitimate delivery. And, from the moment the rags were thus delivered from the ship's deck, the ship's liability ceased, and the consignee's liability began.

But it is urged that the "discharge into lighter" was only a preliminary step to "warehousing," and a means to that end, and the rags should have been immediately forwarded to a "warehouse," so that expenses would have been reduced to a minimum. It appears from the evidence that the lighterage charges were largely in excess of warehouse charges, and that the rags were left upon the lighter for several days before they were forwarded to the warehouse in which they were finally stored. But the contention of claimant's proctor, while it is acute, is hardly accurate. The landing of the goods, the storing of them in warehouses, the discharge into lighters, are alternatives, either of which may be taken by the master or agent of ship in default of the consignee's readiness to receive the goods. The only implied condition which can be annexed to either is that the goods so treated, in any case, shall not, by reason of such treatment, come to harm. Barring that, the master is to be judge of what is best. But in this case, as has been said, but one of the alternative courses was open to the master. Health regulations of the port forbade the choice of any other. The discharge into lighters being, therefore, a good substitute delivery, for such expenses as thereafter accrued the consignee became liable; and if such expenses were paid by the ship, under the terms of the bill of lading, a resulting lien was had in her favor upon the goods.

But if this construction of the bill of lading be too broad,—and

it is readily admitted that exemptive provisions, as these are, should be strictly construed,—the only remaining question would have regard to the diligence of the master in discharging into lighter, and sending the rags to the warehouse, after he had notice that the consignee had failed or had refused to receive them from alongside the ship; for the insistment of the claimants in this regard must necessarily be based upon the admission that the rags were rightly lightered in the first instance, and afterwards properly stored in the warehouse in which the claimants desired them to be placed. The evidence discloses that certain preliminary action had to be taken so as to obtain the permits from the proper officials which were necessary to effect the removal and storage of the rags. That some time was consumed in doing this appears. But it cannot be equitable to charge that expense of time to the libelant. Clearly, it was the duty of the consignees to attend to these details. If they failed to do so, and chose to leave the matter to others, they cannot now complain of the apparent slowness of the ship's agent in accomplishing what they might possibly have done in less time.

Upon the whole case, as presented, I am of the opinion that the libel be sustained. If parties cannot agree upon the amount due, let there be the usual reference.

THE OBDAM.

NETHERLANDS AM. STEAM NAV. CO. v. NEGRE et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1894.)

No. 71.

COLLISION—SAILING VESSEL AT ANCHOR—FOG SIGNALS.

A fishing bark anchored in a fog was about to change her position, when she was run into and cut in two by a steamer going at an excessive speed. At the time the bark's crew were engaged at the windlass, but there was a conflict of evidence whether the anchor had yet left the ground. The bark, at any rate, had not yet gathered headway. Her bell had been kept ringing until collision, and the fog horn had not yet been sounded, though it was in readiness for use. *Held* that, even if the anchor had left the ground, the failure to change the fog signal from bell to fog horn was not a fault contributing to the collision.

Appeal from a decree of the District Court, Eastern District of New York, in favor of the owners of the French fishing bark *Christophe Colomb*, for the recovery of \$27,794.50, collision damages, against the steamship *Obdam*.

The material facts are stated in the opinion of this court, *infra*. The conclusions of the district court were announced in the following opinion by Judge BENEDICT:

My conclusion in this case is that the collision in question must be held to have been caused by the fault of the steamer in maintaining a rate of speed which was unlawful under the circumstances, and was not caused by fault on the part of the bark. Let a decree be entered in favor of the libelants, with an order of reference to ascertain the amount of the damages.

Harrington Putnam, for appellant.
Wm. W. Goodrich, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. About 1:15 p. m. on July 27, 1890, the steamship Obdam came into collision with the bark upon the Grand Banks of Newfoundland. The weather was foggy, and the steamer was proceeding, as her officers admit, at a speed of from six to seven knots an hour. Other testimony in the case would make her speed much higher, but further discussion of that branch of the case is unnecessary. The district judge held her in fault for maintaining a rate of speed which was unlawful under the circumstances, and upon this appeal the claimant does not question the soundness of that finding. The district judge further found that the collision was not caused by fault on the part of the bark. His opinion does not refer in detail to the several faults charged against her upon conflicting testimony, but his conclusion indicates that he found none of them to be established by the proof. The principal—practically the only—fault charged against the bark is a failure to give proper fog signals. Both vessels sighted each other when about one length of the steamer apart, at which time the whistle of the steamer was first heard by the Colomb. Up to the time of sighting, no signal had been heard from the Colomb by those on the Obdam. Thereafter several short blasts of her fog horn were heard.

On the part of the bark, which had anchored there the afternoon before, it is contended that her bell was sounded, while the fog lasted,—certainly since noon, and down to the moment of collision,—at intervals of one and a half to two minutes. The testimony from the bark in support of this statement is overwhelming. Every survivor of her officers and crew, 21 in all, testify positively and unhesitatingly that the bell was so rung by one Tauvel, who had no other duty assigned to him at the time, who continued attending to the bell when all the rest of the crew were busy with the anchor or the sails, and who was killed at his post. In opposition, there is only the negative evidence of those on the Obdam, who did not hear the bell,—a circumstance which might be accounted for in part by the fog, in part by synchronism between the bell and her own whistle, coupled with a high rate of speed. There is evidence tending to show that she was going much faster than six knots. She cut the bark in two pieces, and ran through her from eight to ten fathoms. The appellant lays great stress on a statement as to the ringing of the bell, which is contained in the Rapport de Mer, executed by the master, mate, boatswain, and several of the crew before the French consul at New York, to which port the survivors were brought by the Obdam. The Rapport was prepared by the master, and left with the consul to be transcribed. No mention of fog signals appeared in it. Calling the next day, with the mate and crew, to hear it read and execute it, the master suggested an addition as to fog signals, which was added in the following language: "After having read the above report, said Capt. Rubatto

adds that he had the bell of his ship sounded at intervals of ten minutes." Thus amended, the Rapport was signed.

The explanation offered by the bark is simple and plausible, viz. that the use of the word "ten" was an error of the consul's secretary, who mistook "deux" for "dix." Capt. Rubatto so testifies, and further swears that on his return to Fécamp, the home port of the bark, he made the declaration required by French law before the commissioner of marine, on which occasion he for the first time learned that the New York protest stated the intervals at 10 minutes. Thereupon he at once insisted that the "consul must have misunderstood him, as he said that he had it rung at two minute intervals." That Capt. Rubatto knew what was the proper interval is not disputed, and there is an inherent improbability in the suggestion that he volunteered the statement that his fog signals were sounded at such long intervals as clearly to indicate fault. In view of the overwhelming, positive, and detailed evidence from the bark as to the actual ringing of the bell, we are not inclined to give any weight to the clause added by the consul's secretary to the original Rapport, although it is signed by master and crew.

It is, however, contended by the appellant, that, even if the bell were rung, as testified to by the witnesses from the bark, that vessel was none the less in fault for failure to give proper fog signals, because the law designates the bell as fog signal for an anchored vessel only, and the Colomb was, as claimant contends, under way on the starboard tack, and should have given single blasts of her fog horn to indicate that fact. It is conceded that the fog horn was not sounded until after the steamer was sighted, and then not so much as a fog signal, but rather to make as much noise as possible. The bark had come to anchor the day before in 37 fathoms of water, with 100 fathoms of chain. About 12 o'clock or a quarter past, being desirous to change the anchorage, the captain gave orders to weigh anchor. This operation requires all hands, and except Tauvel, who remained at the bell, the cabin boy, and two apprentices, all went to the windlass. The wheel was lashed amidships. A small sail aft (the mizzen staysail) had been set to keep her head to the wind. The captain was aft. Near to him on the after part of a skylight lay the fog horn, convenient to be used by him as soon as the vessel got under way. On the Colomb it was customary, when shifting anchorage, to raise the anchor clear up to the hawse pipes,—an operation which, with 100 fathoms of chain out, would take considerably over an hour. After the windlass had been worked for some time, variously estimated at from a half to three-quarters of an hour, orders were given to hoist the jibs. This was done, the work of heaving in the anchor chain being meanwhile suspended. Up to this time there is no substantial dispute in the testimony, which all tends to show that the anchor was still on the bottom. When the jibs were hoisted, the men who had been engaged in that work returned to the windlass, and some of them testify that work thereat was resumed. The weight of evidence, however, is to the contrary, and satisfies us that substantially no further progress was made in raising the anchor, the steamer's

whistle being heard just as the work of heaving began, whereupon all fled aft.

The captain in his *Rapport de Mer* stated that he "had had the jib and flying jib hoisted, for at last the anchor was breaking ground," and that "there were still about 40 meters of chain under water," which would bring the anchor about 90 feet above the bottom; and on the trial he adhered to this statement, adding; "I think my anchor had left the bottom, but of this I am not certain." Where he was stationed, however, it was impossible for him to know whether or not the anchor had broken ground, in the absence of a report by some one, or some movement of the bark itself which would indicate that she was no longer held by it. No such report was made to him; he had neither sounded the fog horn, nor ordered *Tauvel* to cease ringing the bell, nor taken the becket off the wheel, when the steamer's whistle was heard. The captain's belief as to the length of chain still out is, in our opinion, of little weight, in comparison with the evidence of those who were at the capstan. The chain was in lengths of 25 fathoms, each length marked with wire. Some of the crew testify that length No. 2 was just coming on the windlass when the *Obdam's* whistle was heard. This, allowing for the distance to the hawse pipe and the surface of the water, would give about 40 fathoms under water, and the testimony of nearly all the others at the windlass is to the same effect. Undoubtedly, the most satisfactory proof upon this branch of the case is such as shows the depth of water and the length of chain out. There is evidence tending to show that, subsequent to the setting of the jibs, the bark had dropped off somewhat from the wind; but we fail to find satisfactory proof that she had done so sufficiently to put her under headway, or to warrant our discrediting the testimony as to length of chain still out. The yards were braced up on the starboard tack, apparently had been so prior to the attempt to shift anchorage, and the foresail and both topsails were loose and hanging in the gear,—circumstances which probably account for the testimony given by those on board the *Obdam* to the effect that the sails appeared to be set, and the bark under way on the starboard tack. But the clear preponderance of testimony is to the contrary; and, even if it be conceded that the anchor had ceased holding a few seconds before the *Obdam's* whistle sounded (an assumption which would account for any change of heading by the bark), it does not follow that the brief delay in changing her fog signal from bell to horn was a fault contributing to the collision. The catastrophe was caused by the conceded fault of the steamer in running at such high speed through a fog as to be unable to stop in time to avoid a vessel advertising her presence by signals at proper intervals. Had she been going at such a rate of speed as would have permitted her to stop or avoid the bark when such signal was heard, there need have been no collision. Nor did the signals given by the bark mislead the steamer, for she did not hear them at all until after she sighted the bark. There is no force in the claim that the bark was in fault for not having a stationed lookout.

Decree of district court affirmed, with interest and costs.

UNITED STATES v. YUKERS.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 187.

1. APPEAL—BY UNITED STATES—JURISDICTION.

The United States have a right to appeal from any judgment of any amount rendered against them under Act March 3, 1887, authorizing suits to be brought against the United States. *U. S. v. Davis*, 9 Sup. Ct. 657, 131 U. S. 36, followed.

2. TRIAL—SUFFICIENCY OF FINDINGS.

In an action against the United States for a pile driver, boat, engine, and tools lost while hired by the government, a finding for the plaintiff for "a pile driver, its tackle, apparel, and furniture" is sufficiently specific on appeal, where the record does not show any request for a more specific finding, and the evidence is not preserved in the record.

3. BAILEMENT—NEGLIGENCE OF BAILEE—LIABILITY.

Where a hired chattel is lost while in the possession of the hirer, and on account of his negligence, he is liable for its value to the owner.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

Action by John M. Yukers against the United States. Plaintiff obtained judgment. Defendant appeals.

J. N. Miller, for the United States.

R. T. Ervin, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. The appellee, John M. Yukers, brought suit against the United States under the provisions of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505), to recover the value of a certain pile driver, boat, engine, and tools, alleged to have been lost and destroyed while chartered and hired to the United States. The facts of the case, as found by the circuit court, are as follows:

"The facts, as shown by the proof, are that one Thompson, who was in the employment of the defendants, was authorized by Major Quinn, Corps U. S. Engineers, to hire for the defendants a pile driver for use in some public work to be done in Mobile bay by Thompson; that Thompson hired the pile driver from the plaintiff at the price of seven dollars a day, with the agreement to return it when the work was done, and which was to be within ten days; that he took charge of the pile driver, hired men to work it, had it towed to the beacon in Mobile bay, where the work was to be done, and towed back to the city every night during the progress of the work, except two, when it was left moored at the place where the work was being done. On these two nights one Whitaker, who was one of Thompson's employes, was left aboard of the pile driver as watchman. There was no specific order for Whitaker to stay aboard, but Thompson said some one of the men must stay aboard as watchman, and Whitaker replied that he would stay, and did so. The plaintiff engaged the men to work on the pile driver, but did so for Thompson, and at his request. Plaintiff himself was an employe of Thompson's, having been hired by him as a carpenter at the rate of \$75 per month. One Caldwell was hired as engineer, but by common consent—impliedly at least—plaintiff operated the engine in Caldwell's place. Thompson knew this, and assented to it. He testifies that he hired the pile driver, and at the same time hired the plaintiff as a carpenter; that he did not hire the

use of pile driver with plaintiff to operate it, and that he did not tell plaintiff that he was expected to manage and control it, and to be responsible for it. Thompson directed the work, the anchoring and mooring of the pile driver while in the bay, and the towing of it to and from the city. The pile driver was fit for use and was serviceable for the purpose for which it was hired, and did actually perform the work, which had been completed on the day of the night the pile driver was lost. The pile driver sunk, and in a few days became a total wreck; the loss occurred by the fault or neglect of Thompson or of his servants. Thompson says it was caused by the neglect of Whitaker, who was the watchman left in charge of the pile driver. Other evidence tends to show that it was caused by improper mooring. There was some conflict in the evidence as to the value of the property, and as to what was the necessary equipment of the pile driver. The amount claimed was \$1,959.45."

A preliminary motion is made to dismiss this appeal on the ground that the case cannot be brought to this court for review by appeal, a writ of error alone being the proper process. The question of the right of the United States to appeal from the judgments rendered under the above-mentioned act of 1887 was considered by the supreme court of the United States in *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657. There the provisions of the act in relation to the right of appeal, in connection with sections 707 and 708 of the Revised Statutes, were fully considered, and the court held that an appeal would lie from a judgment against the United States under said act, without regard to the amount of the judgment. The motion to dismiss the appeal must be denied.

The first assignment of error is that the court erred in finding that the United States was liable on the contract made by Thompson with the plaintiff for the use of his (plaintiff's) pile driver. According to the evidence in the record and the finding of the circuit court, the loss of the pile driver occurred by the fault or neglect of the agents of the United States. This being the case, and the hiring being admitted, it seems clear that the United States was liable on the premises. It is elementary that every hirer of a chattel is bound to use the thing let in a proper and reasonable manner; to take the same care of it that a prudent and cautious man ordinarily takes of his own property; and, if a loss occurs through the fault or neglect of the hirer, or the hirer's servant, acting within the scope of his employment, the hirer is liable.

The second assignment of error is based upon evidence and is abandoned.

The third assignment of error is that the court erred in failing to find severally and separately the value of each piece of property sued on for which judgment was rendered against the United States; and the fourth is that the court erred in finding an aggregate value for all the several pieces of property sued on in the case. On these matters the trial judge found as follows:

"I find that under the circumstances of this case the defendants are liable for the loss, but that they can only be made liable for the pile driver and its essential equipments for the specific service. Carpenters' tools and other implements that were on board of the pile driver, and that were not included in the hiring of the pile driver as a part of its necessary equipment, cannot be considered as a part of the damages. It is only such tools as pertain essentially to the pile driver, and which were included in the hiring, that can be re-

garded in assessing the damages. I have found much trouble in making a just assessment of the damages. But under the proof I have concluded that \$1,578.95 would be fair and reasonable."

The record does not show that any request was made to the trial judge to be more specific in his findings. To the extent which he went in the case, we think he has complied with the seventh section of the statute of 1887, in relation to findings of the court. As we regard his finding, it was one for "a pile driver, its tackle, apparel, and furniture," as one certain thing. As it is admitted that all the evidence is not brought up in the record, we cannot say that the judge erred in not being more specific.

The fifth assignment of error is that the court erred in failing to find that, as the plaintiff was in charge of his own pile driver when it was lost, the defendants are not liable in damages for the loss of the pile driver and its equipments. We do not find in the record any evidence to show that the plaintiff was in charge of his own pile driver when it was lost; in fact, the contrary appears. The motion to dismiss the appeal herein is denied, and the judgment appealed from is affirmed.

DOE v. WATERLOO MIN. CO.

(Circuit Court, S. D. California. March 22, 1894.)

No. 183.

FEDERAL COURTS—MISTAKE IN DECREES—CORRECTION AFTER TERM.

Mistake of counsel, whereby a decree is entered which does not conform to the opinion of the circuit court, cannot be corrected by that court after the lapse of the term.

Bill by John S. Doe against the Waterloo Mining Company. On motion to amend the decree.

Daniel Titus, for complainant.

A. H. Ricketts, for defendant.

ROSS, District Judge. By mistake of counsel, the decree entered in this case did not, in some important respects, conform to the opinion and decision of the court theretofore rendered and entered of record; but the fact was not brought to the attention of the court until long after the lapse of the term at which the decree was entered, when a motion was made on behalf of the defendant in the suit to so amend the decree as to make it conform to the decision of the court. The moving party, I think, will have to look for the correction sought to the appellate court, where the case is now pending; for it is the established law that in the federal courts the power does not exist, after the lapse of the term at which a judgment or decree is entered, to so change or modify it as to substantially vary or affect it in any material thing. *Bronson v. Schulten*, 104 U. S. 410; *Sibbald v. U. S.*, 12 Pet. 491. Motion denied.

ALBRIGHT et al. v. OYSTER et al.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1894.)

No. 355.

APPEAL—RIGHT TO APPEAL—ESTOPPEL.

Parties who, pursuant to the provisions of a decree, demand and receive a conveyance of lands from a trustee, are thereby estopped from appealing from the decree; for they cannot accept its benefits, and at the same time have a review in respect to its burdens.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Edward P. Johnson, for appellants.

David P. Dyer and F. S. Schofield, for appellees.

Before CALDWELL and SANBORN, Circuit Judges.

PER CURIAM. This is an application for a rehearing of a motion to dismiss the appeal in this case. That motion was granted early in this term. The decree from which this appeal was taken, which was rendered April 15, 1893, provided, among other things, that one Lloyd D. Mitchell, a trustee, that had been appointed in the place of George Oyster, deceased, should convey to the appellants a large quantity of lands, the title to which was originally involved in this suit. May 22, 1893, on the demand of the appellants, this trustee conveyed these lands to them, pursuant to the decree, and the appellants accepted the deed, and afterwards placed it on record. The next day after they obtained this deed under the decree, they took their appeal from that decree to this court. No rule is better settled than that a litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court. It is said that the right of the appellants to the conveyance of the lands they obtained was no longer in controversy, but that the title to them had been finally decreed to the appellants. But this does not relieve the appellants from the estoppel. It was by the direction of this decree from which they now appeal that the deed to these lands was made by the trustee and received by them. They could not take the title to these lands from the trustee by virtue of the decree, even if that title was no longer in dispute, and then appeal from the decree, and contest the provisions of it that were onerous to them. We are of the opinion that the acceptance of this deed under the decree estopped the appellants from exercising any right of appeal they otherwise might have exercised. It was the receipt of a substantial benefit that they could not have obtained without the decree, and they ought not to be permitted to review the provisions of it with which they are not satisfied, after taking the benefit of those they approve. The motion for a rehearing is denied.

MABURY v. LOUISVILLE & J. FERRY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 6, 1894.)

No. 25.

1. FERRY—REAL PROPERTY.

A ferry franchise is real property.

2. ESTOPPEL IN PAIS—RECITALS IN AGREEMENT.

The owners of a ferry signed articles of association which recited the interests of the different owners. In these articles, W. was stated as owning one-twelfth. At the date of the articles he owned no interest, but at the time the articles were adopted he had acquired the interest of his mother, who owned one-twelfth for life, and claimed to own it in fee. The reversionary estate in this one-twelfth was really owned by M., who signed the articles as owner of another share. At that time, and afterwards, M. always claimed to own this reversionary twelfth. *Held*, that the recital in the articles did not estop M. from asserting title to the twelfth interest after the death of the life tenant.

3. SAME—PLEADING.

An estoppel by recitals in a contract, being a species of estoppel in pais, cannot be availed of, when not specially pleaded.

4. CORPORATIONS—ISSUE OF STOCK—DEED.

The owner of a life estate in certain property, who claimed also to own the fee, quitclaimed the property to a corporation for an expressed consideration of certain shares of the corporate stock. The title to the reversionary estate being understood to be in dispute, the corporation issued no certificate for such stock, but paid the dividends thereon to the life tenant, and allowed her to vote it during the continuance of the life estate. *Held* that, on termination of the life estate, the corporation was not bound by its deed to deliver a certificate of the shares to the life tenant, it being proved that she did not own the reversion.

Appeal from the Circuit Court of the United States for the District of Indiana.

Action by Nora Adams against the Louisville & Jeffersonville Ferry Company to compel it to issue to her a certificate for 166 $\frac{2}{3}$ shares of its capital stock, which she claimed to own. The defendant the ferry company instituted a second action in the circuit court of the United States for the district of Indiana against Mrs. Adams and Hiram Mabury, in the nature of a bill of interpleader, calling upon them to assert their respective claims to the stock which was the subject-matter of the first action. The defendants to the second action, by cross bills against the ferry company and against each other, set up their respective claims to the stock; and by stipulation the two actions were consolidated, and a joint decree entered in favor of Mrs. Adams, from which Hiram Mabury has appealed.

This suit arises out of a controversy between Nora Adams, one of the appellees, and Hiram Mabury, the appellant, regarding a one-twelfth interest in the Louisville & Jeffersonville Ferry Company, and the right to the issuance of 166 $\frac{2}{3}$ shares of stock in said company, of the par value of \$16,666.66%, representing that interest. The company stands ready to issue this stock either to Nora Adams or to Hiram Mabury, as that right may be determined in this suit. It may be said, however, that Nora Adams claims the right to the stock independently of any claim or interest which Mabury may have in the ferry property. The first suit was brought by Nora Adams in 1888 against the company, in the circuit court of Clark county, Ind., to compel the company to issue the said shares of capital stock to her. That suit was removed by the company to the circuit court of the United States for

the district of Indiana. After that suit was removed, the ferry company began another suit in the same court against Hiram Mabury and Nora Adams, in the nature of a bill of interpleader, to determine the respective rights of the parties to the issuance of such stock. In that suit the defendants, by cross bills against the ferry company and against each other, set up their respective claims to the stock, and by stipulation the two suits were consolidated, and heard as one, and a decree entered in favor of Nora Adams, which determined that she was the owner of the disputed one-twelfth interest in the ferry company, and entitled to have the stock representing that interest issued to her; that Mabury had no right, title, or interest in or to said one-twelfth share; and that he be perpetually enjoined from asserting the same, by suit or otherwise, and adjudged to pay the costs of suit. The evidence is mainly documentary, and the facts undisputed. Those necessary to present the points at issue are substantially these:

In 1802 William Henry Harrison, then the governor of the Indiana territory, granted a ferry franchise to one Marston G. Clark. In 1815 Clark sold the franchise, and in 1822 it came into the hands of George White. At this time, White was in possession and operating another ferry, under an act of the Indiana legislature passed December, 1820, which recited that he was the assignee of the franchise theretofore granted to Samuel Merriweather. White, thus having the two ferries, in 1826, sold one undivided one-half to Charles Steade, who conveyed the same to Athanasius Wathen, and the other undivided half to Ephraim Gilmore, who conveyed the same to Charles Strader, John Shallcross, and James Thompson; so that at that time, and until 1833, the two ferries belonged, equally, one-half to Athanasius Wathen, and one-half to Shallcross, Strader, and Thompson. In 1807 Gov. Harrison had granted another ferry franchise to one Joseph Bowman, who ran the ferry down to 1837, leaving two brothers and two sisters as heirs. One of these sisters and one of the brothers sold their shares to A. Wathen. Another brother died, leaving nine children, each entitled to one thirty-sixth of the ferry franchise. Eight of the children sold their interest to A. Wathen, who married the other sister, Elizabeth Bowman Wathen (referred to in the case, generally, as Mrs. Elizabeth Wathen). The other brother sold his share to Shallcross, Strader, and Thompson. From 1837 the ferry was conducted by A. Wathen, as the owner of one half, and by Shallcross, Strader, and Thompson, as the owners of the other half. This A. Wathen, thereafter known as A. Wathen, Sr., died in 1851, leaving a widow, Elizabeth, and four children, James, Athanasius, George W., and A. J. Wathen. If the ferry franchise was real estate, it stood, upon the death of Athanasius Wathen, Sr., as follows: Shallcross, Strader, and Thompson, 12-24; Mrs. Elizabeth Wathen, dower for life, 4-24; James Wathen, 2-24; Athanasius Wathen, Jr., 2-24; George Wathen, 2-24; A. J. Wathen, 2-24. And there would be a reversionary interest of 1-24 in each of the four sons of Athanasius Wathen, Sr., to take effect upon the death of Mrs. Elizabeth Wathen, the widow. In 1857 George Wathen conveyed to Hiram Mabury all his interest in the ferry. This gave Mabury 2-24 in possession, in fee, and 1-24 in reversion, upon the death of Elizabeth Wathen. The deed is broad in its terms, and professes to grant, bargain, sell, and convey to Mabury, and to his heirs and assigns forever, all his right, title, interest, and claim in and to the ferry right, ferry landing, and steam ferryboats, together with all the appurtenances thereunto belonging. In 1859 A. J. Wathen also conveyed to Mabury all his interest in the ferry. These two deeds gave Mabury 4-24 in fee, and 2-24 in reversion. In 1858, by a sheriff's deed, all James Wathen's interest in the ferry was conveyed to Reed, Lewis & Howard, who conveyed the same to Thomas J. Howard. October 31, 1863, Howard conveyed the same interest to Mrs. Elizabeth Wathen, who thereupon, by virtue of this conveyance and her former interest, became entitled to the following interests in the ferry: For life, 3-24; in fee, 3-24. At this time the Wathens' half interest in the ferry stood as follows: Elizabeth Wathen: For life, 3-24; in fee, 3-24. Athanasius Wathen, Jr.: In fee, 2-24; in reversion, 1-24. H. Mabury: In fee, 4-24; in reversion, 2-24. In 1865 (March 11th) there was a conveyance of ferry interests to Pinkney Varble and others, in which Shallcross, Moses Brown, H. Mabury, Eliza-

beth Wathen, George Wathen, and James Wathen joined. In that deed is the following provision: "And it is also understood between the parties hereto that the four twenty-fourths of said premises hereby conveyed by the grantor Elizabeth Wathen, two twenty-fourths are the same which she acquired by purchase, heretofore held and owned by her son James Wathen, and the other two twenty-fourths conveyed by her is the one-half of an interest in which a question may arise as to the right of reversion or inheritance after her death. Now therefore, I, James Wathen, for the consideration of one dollar cash to me in hand paid, join in this conveyance, and sell and convey to said grantees herein all my right, title, and interest, in possession, remainder, or reversion, in or to the said four twenty-fourths of said ferry property, conveyed herein by my mother, said Elizabeth Wathen; and I, George Wathen, for the like consideration to me paid, do convey and quitclaim to said grantees said four twenty-fourths conveyed by my mother, Elizabeth Wathen. And said H. Mabury, party hereto, agrees and covenants to look to the two twenty-fourths not conveyed herein for his reversionary interest, as grantee of Andrew Wathen and George Wathen, and that in no event will he, by virtue of his purchase of the interest of said George and Andrew Wathen, claim any interest in the four twenty-fourths of said ferry property herein conveyed by said Elizabeth Wathen." The son Athanasius Wathen was non compos, and it appears by this deed that his mother undertook to convey his reversionary interest, and Mabury undertook to risk the claim of Athanasius Wathen to one of the two twenty-fourths still held by Elizabeth Wathen. This deed left Mrs. Wathen two twenty-fourths, being what remained of her life interest as widow; and Mabury undertook to look to those two shares so retained by Mrs. Wathen, for his reversionary interest as grantee of Andrew and George Wathen, by their previous conveyances to him. These, as will be seen hereafter, are the identical two twenty-fourths in controversy in this suit. On September 23, 1865, following, the claim of Athanasius Wathen, Jr., was conveyed to Sherley & Co. by William D. Beach, guardian of A. Wathen; and on October 17, 1865, Mrs. Wathen conveyed to her son, James Wathen, her remaining two twenty-fourths, in which she held a life interest.

Under date of March 29, 1865, a voluntary association was formed by the owners of the ferry, and an agreement signed by them. These articles of association were signed by John Shallcross, Moses Brown, Hiram Mabury, James Wathen, W. D. Beach (guardian of A. Wathen), J. A. Wathen, Sherley, Woodfolk & Co., John B. Smith, W. C. Hite, E. S. Hoffman, Pinkney Varble, Daniel G. Parr, and Howard Johnson. A provision of these articles which figures largely in this suit is as follows: "Article I. All the boats, appurtenances, and franchises having become the common property of said company, in proportion as herein set forth of their interest: John Shallcross, one-eighth (1-8th); Moses Brown, one-eighth (1-8th); Hiram Mabury, one-eighth (1-8th); James Wathen, one-twelfth (1-12th); A. Wathen, by Wm. D. Beach, guardian, one-twelfth (1-12th); Sherley, Woodfolk & Co., one-eighth (1-8th); J. B. Smith, one twenty-fourth, (1-24th); W. C. Hite, one-twenty-fourth (1-24th); E. S. Hoffman, one-twenty-fourth (1-24th); P. Varble, one-eighth (1-8th); Dan'l Parr, one twenty-fourth (1-24th); Howard Johnson, one twenty-fourth (1-24th)." In other words, the Wathen interest, by that agreement, stood as follows: Hiram Mabury, 3-24; James Wathen, 2-24; Athanasius Wathen, by his guardian, 2-24; making 7-24. As Mrs. Wathen had previously conveyed 4-24, and Hiram Mabury 1-24, the 7-24 named in the deed covered what remained of the original Wathen interest of 12-24. It will be seen that the articles do not name Elizabeth Wathen as the owner of any interest in the ferry at that date, though, according to the record, she had never parted with her life interest in the 2-24 of which Mabury held the reversionary interest after her death. And it is claimed by counsel for Mabury that the inference from this fact is that, when the association was formed, James Wathen had in some way arranged to acquire and represent this interest standing in his mother's name, and which she did in fact afterwards convey to him. On the other hand, it is claimed by Nora Adams' counsel that, as against Mabury, he is absolutely bound by the agreement, and es-

topped from showing that the interests stood at that time any otherwise than as set down in the articles. It is alleged in Mabury's cross bill, and admitted in Nora Adams' answer, that the so-called "articles of association," while dated 29th of March, 1865, were not in fact adopted until October 7, 1865, which is the date of the deed from Elizabeth Wathen to James Wathen. In 1867 James Wathen died, bequeathing all his estate to his widow, Nora Wathen. In 1869 the present corporation, the Louisville & Jeffersonville Ferry Company, was chartered by the legislature of Kentucky. Among other provisions of this charter were the following: "(7) Said corporation may purchase from any existing ferry companies or associations any ferry, boats, wharfs, and ferry franchises for any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities. (8) Said corporation may accept such boats and franchises and wharfs and other property in payment of stock subscribed, and at such prices as may be agreed upon." The corporators met on the 24th of April, 1869, and after accepting this charter, and resolving to organize under it, passed the following resolution: "Resolved, that the president be, and is hereby, authorized and empowered to make and complete the purchases authorized by sections seven and eight of the charter of this company, by purchasing the franchises and boats, and all other property and rights, of the association known as the 'Jeffersonville Ferry Company,' at the price of two hundred thousand dollars, payable in the stock of this company at par." A meeting of the board of directors was held on the 11th of September, 1869, at which was passed the following resolution: "Resolved, that as fast as the title of each owner of an interest in the old ferry company is duly conveyed to this corporation, free of incumbrance, the stock to which such owner may be entitled in payment for such interest shall be issued to him. No fractional shares shall be issued, but certificates therefor shall be given; and, whenever a number of those certificates equaling or exceeding one full share shall be presented, stock shall be issued therefor to the amount of the share or shares embraced by one value of the certificates, and for any fraction over a new certificate shall issue." By deed dated the 6th of July, 1869, there was conveyed to this corporation various interests in this ferry franchise by divers parties; said deed, among other clauses, containing the following: "And Nora Wathen, in consideration of one hundred and sixty-six and two-thirds shares of the stock of Louisville and Jeffersonville Ferry Company to the said Nora Wathen assigned and transferred, does hereby grant, bargain, sell and convey to the said Louisville and Jeffersonville Ferry Company one equal and undivided twelfth part of all the franchises and other assets, real and personal, of the firm or association known as the 'Jeffersonville Ferry Company,' except the wreck of the steamer Wathen, and reclamations arising from the loss of said boat; to have and to hold to the said Louisville and Jeffersonville Ferry Company, in fee simple, forever." This deed was recorded in Jefferson county on the 15th of April, 1870, and in Clark county, Ind., some months subsequent thereto. By deed dated the 24th of September, 1869, Hiram Mabury conveyed his three twenty-fourths interest. This deed was recorded in Jefferson county on the 15th of April, 1870, and some months thereafter in Clark county. The following recital is contained in this deed of Hiram Mabury: "To have and to hold to said party of the second part, with covenant of general warranty, in fee simple, forever; but it is expressly understood and agreed that this conveyance in no wise affects the claim of said party of the first part to the reversion, after the death of Elizabeth Wathen, of two twenty-fourths of said ferry now held by Nora Wathen as assignee of said Elizabeth Wathen, and no part of the same is conveyed herein." There was another deed, dated September 15, 1869, from Jonas Howard, guardian of Athanasius Wathen, to the Louisville & Jeffersonville Ferry Company, and which was recorded on the 15th of April, 1870, in Jefferson county, and subsequently in Clark county, Ind., and which it is important to observe in this connection. The recital in that deed is as follows: "Whereas, the owners of a majority of the interest of the ferry franchises and real estate and other assets, real, personal, or mixed, which belong or appertain to the association or firm known as the 'Jeffersonville Ferry Company,' and now and for many years

engaged in running and operating a ferry between the cities of Louisville, Kentucky, and Jeffersonville, Indiana, having organized a company, under the recent act of the general assembly of the commonwealth of Kentucky known as the Louisville and Jeffersonville Ferry Company, for the purpose of enabling the several owners of the interests in said ferry franchises, etc., to transfer their several interests therein to said ferry company, and to receive back in lieu thereof an amount of stock of said company equal in value to the interest so conveyed by such owner; and whereas, Athanasius Wathen, a person of unsound mind, is the owner in fee of the undivided one-twelfth part of said ferry franchises, boats, tackle, docks, etc., of the estimated value of sixteen thousand six hundred and sixty-six and 66-100 dollars." It then goes on to transfer to the ferry company the undivided one-twelfth of the ferry franchises and real estate, and provides that the deed is not meant to include any right said Athanasius Wathen may have in reversion to the interest which descended to his mother, Elizabeth Wathen, for life, from one A. Wathen, deceased, in and to said ferry franchises, etc. On the 9th of October, 1869, the following proceedings were had at a meeting of the directors of the Louisville & Jeffersonville Ferry Company:

"Louisville, Ky., October 9, 1869.

"The board met, upon the call of the president, at the residence of Capt. Z. M. Sherley. Present: Z. M. Sherley, W. C. Hite, F. Leib, D. G. Parr, Howard Johnson. Capt. W. C. Hite offered the following resolution, which was adopted: 'Resolved, that the stock now in the name of Mrs. Nora Wathen shall not be issued to any one, but remain in the possession of the company until the matter of title is definitely settled.' On motion, the board adjourned.
H. H. Reynolds, Secretary."

It appears in evidence that in October, 1869, all of the stock of the Louisville & Jeffersonville Ferry Company, which, as above shown, consisted of 2,000 shares, of \$100 each, was issued either in the form of share certificates, or in the form of scrip for fractions of shares, excepting 166 $\frac{2}{3}$ shares. It further appears that these shares, which were reserved on account of the claim of Mrs. Nora Adams (then Mrs. Nora Wathen), had not been issued; and, although this occurred in 1869, the shares had not been issued until the decree in this cause. In the mean time, Mrs. Adams received the dividends upon this stock, and was allowed to vote; but no certificates, as we have above stated, were issued to her. In 1888 Athanasius Wathen, the unfortunate son of Mrs. Elizabeth Wathen, died, leaving no heir at law except his mother, and subsequently she died. After Mrs. Wathen's death, Mr. Mabury claimed that the stock should be issued to him, representing this one-twelfth interest, and Mrs. Adams claimed that it should be issued to her. The dividends, after that, were not paid to anybody, nor had the stock been issued to anybody; and this controversy is to determine to whom that stock belongs.

John Maynard Harlan, for appellant.

Humphrey & Davie, for Louisville & Jeffersonville Ferry Co.

M. Z. Stannard, for Nora Adams.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

BUNN, District Judge, after stating the case as above, delivered the opinion of the court.

It appears from the above undisputed statement of facts that Mrs. Nora Adams (formerly Mrs. James Wathen) claims under the will of her former husband, who, in turn, derived such title as he had from his mother, Mrs. Elizabeth Wathen, the wife and widow of Athanasius Wathen, Sr.; that Elizabeth Wathen, as widow, was entitled to a dower interest, which was at that time, under the laws of Indiana, where these parties lived, a life interest

for 1-3 in her husband's real estate; that dower interest was a life interest in 4-24 of the ferry; that she afterwards purchased from her son James Wathen 2-24 more in fee, and a remainder interest in 1-24, giving to her, in all, 3-24 in fee, and a life estate in 3-24. This is all on the assumption that the ferry property was real estate, as no doubt it was. Indeed, there has been but little contest on that question on the hearing, though from all that appears in the record it is more than probable that the uncertainty in regard to the title to this disputed 2-24 interest, suggested upon the death of Elizabeth Wathen, arose from doubt as to the character of the ferry property,—whether personal or real estate. When the controversy commenced, though this doubt concerning the character of the property became more and more settled, so that now it is admitted to be real estate, the parties naturally sought for other means to maintain their respective claims to this disputed interest. Mrs. Elizabeth Wathen, then being entitled to 3-24 in fee, and another 3-24 for life, undertook to convey in fee 4-24, which was one more than she possessed. This was by deed dated March 11, 1865, but not recorded until October 30, 1865. Why she undertook in that deed to convey in fee 1-24 more than she so held is not certain; probably because she relied upon procuring the reversionary interest in 1-24 from her non compos son, Athanasius. But, whatever the motive, the fact is patent on the record. Afterwards, she undertook to convey to James Wathen 2-24 in fee. But it is apparent that, at the time of this conveyance, she held a life interest, only, in those 2-24 which are the 2-24 in dispute here, and which Nora Adams (then Nora Wathen) received from her husband, James Wathen. So that we must conclude, from the record, that Nora Adams held only a life interest in this 2-24 which terminated upon the death of Elizabeth Wathen. It is likewise just as apparent from the record that Hiram Mabury purchased the reversionary interest in these same 2-24 from George and James Wathen, and thereby, upon the death of Elizabeth Wathen, became the owner in fee, and is entitled to assert his right and title thereto in this suit, unless estopped from so doing by some act or contract or transaction of his appearing in the record of the case. That he is so estopped or barred is one of the contentions put forth by Mrs. Adams, and which was supported by the finding and decree of the circuit court. We think the contention is not made good by the evidence, and that the finding and decree, in this respect, are erroneous. No estoppel was pleaded in the case, which doubtless should have been done if the appellee wished to avail herself of such a defense. But beyond this, upon careful consideration of all the conveyances and proofs, we are satisfied that no estoppel or bar to Mabury's claim has been shown.

Mabury has asserted his claim on almost every occasion, and the contest in regard to the title, upon Elizabeth Wathen's death, to this disputed 1-12 interest in the ferry, has been foreshadowed for a quarter of a century, and must have been well understood by Nora Adams, and all of the parties interested in the ferry property. In the deed of March 11, 1865, Mabury and Elizabeth Wathen are both party grantors. By this deed she conveyed 4-24, of which, it

was recited, 2-24 was the interest of James Wathen, which he had acquired by purchase, and the other 2-24 constituted "one-half of an interest in which a question might arise as to the right of inheritance or reversion after her death." In the deed of September 24, 1869, Mabury conveyed to the ferry company the 3-34 interest which he held in fee. This deed was recorded in Jefferson and Clark counties, Ind. It contains the following recital:

"To have and to hold to said party of the second part, with covenant of general warranty, in fee simple, forever; but it is expressly understood and agreed that this conveyance in no wise affects the claim of said party of the first part to the reversion, after the death of Elizabeth Wathen, of the two twenty-fourths of said ferry now held by Nora Wathen as assignee of said Elizabeth Wathen, and no part of the same is conveyed herein."

After the new incorporated company was organized, the board of directors met at Louisville, October 9, 1869, and passed this resolution:

"Resolved, that the stock now in the name of Mrs. Nora Wathen shall not be issued to any one, but remain in the possession of the company until the matter of title is definitely settled."

Nora Wathen (now Nora Adams) was then representing that stock, and receiving the dividends thereon, which state of things continued until the present controversy was precipitated by the death of Elizabeth Wathen, in the spring of 1888. During all this time, from 1869 when this resolution was passed, until the death of Elizabeth Wathen,—a period of 19 years,—Nora Wathen, while voting as a holder of stock, and receiving her dividends, made no demand on the company for the issuance of stock to her, nor did Mabury. Both waited until the death of Mrs. Elizabeth Wathen, and then both demanded the stock from the company.

It is evident from the testimony that the question of title to this one-twelfth interest, was well understood to be pending from 1865, four years before the present company was organized, down to the death of Elizabeth Wathen and the commencement of this suit. Mabury was claiming it, and Mrs. Adams was claiming it. The company, while allowing Mrs. Adams all the benefits of a stockholder during all this time, expressly resolved not to issue the stock to her, or to any one, until the question should be definitely settled. Mrs. Adams, as a member of the company, was bound to take notice of its proceedings, and must be considered as having acquiesced in this resolution and attitude of the company, by voting her stock, and receiving the dividends, for 19 years, without asking that the stock be issued to her. All the parties resided in the same town in Indiana, and all must have known of the resolution of the board of directors. This presumption is strong—almost conclusive—upon the members of the company, and, in Nora Adams' case, is strengthened by the fact that she has not denied under oath her knowledge of it, or her acquiescence in the action of the board. Indeed, she has not testified as a witness in her own behalf in the case. Her right during the life of Elizabeth Wathen was undoubted. The question was whether it continued after her death. There is no evidence that any claim was made, prior to the bringing of the suit

by Nora Adams, that Mabury had parted with his reversionary interest, or had done anything, in the previous conveyances and contracts, to estop him from claiming that interest, in case he ever held it by law.

The claim of estoppel arises out of the proper effect to be given to certain provisions in the conveyances and the articles of association to which Mabury was a party in 1865 and 1869: (1) The deed of March 11, 1865, in which he conveyed 1-24 of the ferry to Pinkney Varble and others. Elizabeth Wathen joined in this deed, and conveyed 4-24, of which it was recited that 2-24 was the interest of James Wathen, which she had acquired by purchase, and the other 2-24 constituted 1-2 of an interest in which a question might arise as to the right of inheritance or reversion, after her death. This left in her 2-24, to which Mabury covenanted to look for his reversionary interest as grantee of Andrew and George Wathen. (2) The articles of association, dated March 29, 1865, in which James Wathen is described as an owner in the ferry property, and as having contributed a 1-12 interest. (3) The deed of September 28, 1869, in which Mabury conveys to the new company his remaining 3-24 interest. This 3-24 interest he conveyed to the company in fee, in consideration of the issuing to him by the company of 250 shares of the capital stock. But in this deed he makes the express reservation that the conveyance is in no wise to affect his claim to the reversion, after the death of Elizabeth Wathen, of 2-24 of the ferry, then held by Nora Wathen as assignee of said Elizabeth Wathen, and that no part of the same was conveyed by that deed. It is claimed by counsel, and was held, as we understand, by the circuit court, that by the above-named deed of March 11, 1865, Mabury, in joining in the deed with Elizabeth Wathen, relinquished the reversionary interest which he had, if any, and that by the articles of association of March 29, 1865, he estopped himself from denying that James Wathen was the owner of 1-12 of the ferry. Did Mabury, in the deed of March 11, 1865, relinquish his reversionary interest? Upon careful inspection of all the provisions of that deed, we are satisfied that Mabury not only did not relinquish such reversionary interest, but, on the contrary, that these provisions negative any such intention, by showing that he was then endeavoring to protect his interest, and assert his title to this disputed share. It is nevertheless true that Elizabeth Wathen, by that deed, undertook to convey in fee 1-24 more than she then owned, but the reason for this seems apparent, from the deed itself, to be, that she was undertaking to convey the reversionary 1-24 interest of her non compos son, Athanasius Wathen. This seems apparent from the recital in the deed as follows:

"And said grantees have paid and are to pay to said grantors, for said property conveyed, as follows, wit: They have paid one-third of said purchase money, to wit, twenty-four thousand four hundred and forty-four $44\frac{1}{2}$ -100 dollars (\$24,444.44 $\frac{1}{2}$), cash in hand paid to said grantors, the receipt whereof is hereby acknowledged, and have executed to said grantors their promissory notes for the like sum of \$24,444.44 $\frac{1}{2}$, due and payable on the first day of May next, and also their promissory notes for the like sum of \$24,444.44 $\frac{1}{2}$, due and payable on the first day of August next, and all bearing interest from

the first day of February last, which notes are executed separately to said grantors according to the interest they severally convey and warrant by these presents, and the receipts of which notes is acknowledged by the said grantors in full, except only that, as to the part sold by Elizabeth Wathen, the price for one twenty-fourth share is \$6,666.66%, is to be withheld, and no note executed therefore or payment made thereon, until she perfects title as to one share, in so far as her son Athanasius Wathen may have any reversionary interest therein; and when said reversionary interest, or whatever other interest of said Athanasius, in said interest conveyed and warranted by said Elizabeth Wathen, of the 4th part, shall be fully and lawfully conveyed to said grantees, then they are to pay said sum of \$6,666.66%, or execute their note or notes therefor, according to the terms of payment above indicated, with interest thereon from the 1st day of February last."

This deed appears to be a carefully prepared instrument, its meaning tolerably plain, and little room left for construction. The provision above cited shows, with reasonable certainty, why it was that Elizabeth Wathen undertook to convey in fee one more share than she held in fee, and what that particular 1-24 was; and that she was not undertaking to convey the 2-24 share which is in dispute in this suit, in which she then held a life interest, and to which Mabury was claiming the right of reversion by conveyance from George and Andrew Wathen. Instead of waiving anything, Mabury was standing by, and protecting himself against the conveyance of his reversionary interest by protesting that it was not his intention to convey it. Mrs. Wathen conveyed the 2-24 in fee which she had acquired from James Wathen, and Mabury joined with her in conveying his reversionary interest of another 1-24. Adding to these the 1-24 interest of Athanasius Wathen, Jr., and we have the 4-24 which Mrs. Wathen undertook to convey, leaving still in her a life interest in the 2-24, in which Mabury was claiming the reversionary interest. We are unable to perceive anything in this deed, which is evidently drawn with care and precision, showing that Mabury relinquished his claim to the reversionary interest in this 1-12 of the ferry and franchises. It appears, on the contrary, that, so far from relinquishing, he asserted, his claim, with all proper assiduity. The covenant of Mabury to look to the remaining 2-24 held by Elizabeth Wathen to make good his reversionary interest was made with the grantees in that deed, and was for their benefit, and not that of the Wathens. If he had relinquished that reversionary interest, it would have inured to the benefit of his grantees. The deed, however, shows plainly that it was not intended to convey that interest, or to approve a conveyance of it by Mrs. Wathen, but that Mrs. Wathen meant to exclude from that conveyance the reversionary interests then held by Mabury under deeds from George and Andrew Wathen. The only other conveyance by Mabury was that of September 28, 1869, executed by himself and wife to the ferry company; and in that he expressly reserves the reversionary interest which he had all along claimed, and which the record shows he was entitled to claim, and properly describes it as being the interest then held by Nora Wathen, as assignee of Elizabeth Wathen. By that deed he conveyed to the ferry company, in fee, "three equal undivided twenty-fourth parts of the entire franchises, boats, tenements, hereditaments, and other assets," with this reservation:

"But it is expressly understood and agreed that this conveyance in no wise affects the claim of said party of the first part to the reversion, on the death of said Elizabeth Wathen, of two twenty-fourths of said ferry, now held by Nora Wathen as assignee of said Elizabeth Wathen, and no part of the same is conveyed herein."

But it is claimed by counsel, and was so held by the court below, that Mabury, in signing the articles of association, of March 29, 1865, which describes James Wathen as the owner of one-twelfth of the ferry, estopped himself from denying that James Wathen was in fact the owner in fee of said one-twelfth. We cannot concur in that conclusion, and, indeed, see but little ground for such a contention. Such supposed estoppel, to be successful, should rest upon good and solid foundation; but, when the circumstances are fully considered, there seems but slight ground on which to base an estoppel, in this case, which will cut off Mabury's right to assert a claim to which he was clearly entitled, and which he had, all along, constantly and persistently made. There is no such claim made in the pleadings, and there is little ground for it. If Mrs. Adams relied upon it, she should have set it up. In these articles, dated 29th March, 1865, in the recital of the different interests which go to make up the ferry rights, Mabury is described as holding one-eighth, and James Wathen one-twelfth. But the articles in such recital did, no doubt, and might properly have described these shares according to their quantity or size, rather than according to their quality; that is to say, whether in fee, or for life only. Mabury held at this time the fee in one-eighth. He had a present right to represent that share. The other two twenty-fourths which he had all along claimed was a reversionary interest, merely, depending upon the life of Elizabeth Wathen, and gave him no then present right to represent it. Elizabeth Wathen, on the contrary, at that time, held the life interest in these shares, which gave her the right to be a member of the company, and to join in the articles of association. She, however, did not join in the articles, but her son did, and she afterwards conveyed to him her life interest in these shares; and it was, no doubt, in contemplation of this that James Wathen was named as a party, instead of his mother. It will be remembered that the deed of March 11, 1865, had already been executed, and was acknowledged by the grantors on March 13, 1865, and that Elizabeth Wathen then held the title to two twenty-fourths for life, while James Wathen had no interest at all. Why, then, should it be recited that he was the owner of a one-twelfth interest, and his mother not be mentioned at all in the articles, unless it was then understood that she was to convey to him that interest, which she did, in fact, the following October? Viewed in this light, the recital contained in the articles is entirely consistent with all the facts, as they now appear from the record. The association formed so soon afterwards was, no doubt, in contemplation at the time the deed was executed. In fact, the deed was not fully acknowledged and recorded until October 30, 1865,—after the date and acknowledgment of the deed from Elizabeth Wathen to James Wathen, conveying her life interest. The association did not go into effect until after James Wathen re-

ceived the conveyance from his mother, and it is a fair inference from all the circumstances that when the articles were signed, in March, 1865, it was understood that James Wathen was to have and represent the two twenty-fourths interest then standing in the name of Elizabeth Wathen. Considering the object to be accomplished, the situation of the parties, and the dates, times of acknowledgment, and recording of the different papers, it is quite evident that the deed of March 11, 1865, the articles of association of March 29, 1865, and the deed of Elizabeth to James Wathen, of October 17, 1865, are really contemporaneous documents, to be read and construed together; and, if this is done, it is quite evident there is nothing in the recital of the different interests contained in the articles of association that amounts to an estoppel against Mabury's claim. When the association was actually formed and went into effect, in the fall of 1865, James Wathen had acquired the two twenty-fourths interest recited as belonging to him, in the articles, from Elizabeth Wathen, which sufficiently explains why he was, and she was not, mentioned in the articles of association as a shareholder. It may be that, at the time the articles of association were executed, James Wathen understood that a conveyance to him by Elizabeth Wathen of her two twenty-fourths share, would give him that interest in fee; and from the conduct of Mabury, all the way through, he, no doubt, entertained a contrary opinion. But there is clearly no inconsistency in describing Wathen as the owner upon either theory; for whether he was to hold a life interest, or an interest in fee, he would still be an owner, and entitled to a share in the management of the association, and in the division of profits. In short, he would be a member and stockholder for all purposes, and might so continue during the life of the company. Besides, there is nothing to show that there was any guaranty on the part of any of the signers of the articles that they were the owners of the shares respectively credited to them in the recital, or in the conveyances which they severally made. They were probably named as owners in the articles because they had severally made conveyances of certain shares to the association, but they did not undertake each to warrant for the others. *Sunderlin v. Struthers*, 47 Pa. St. 411. Moreover, the articles were executed for the government of the ferry, and were not a conveyance, and do not profess to be a conveyance, at all. They were properly signed by those persons who were then presumably entitled to possession. They did not purport to settle any controversy as to title, though the signers well knew that there was one pending, or that might arise, in regard to this reversionary interest. At every step through all the transactions, Mabury asserted his right to the reversionary interest; and all parties, including the Wathens, had full notice of that claim. It would be a hardship, in these circumstances, to hold him estopped, if there is any other reasonable interpretation to be given to the document. No fraud is imputed to Mabury, and it does not appear that any person has been led to change his position, or have his rights or interests prejudiced, by any act of his. The disputed interest stands to-day as it did when the articles of association were formed, and when the deeds of

March 11, 1865, and September, 1869, were executed. Mabury is making the same claim now that he made then. He should be allowed to rely upon the simple truth and the justice of his claim, if not guilty of any fraud, and no one has been misled, to his prejudice, by Mabury's act. Certainly, the ferry company is in no position to claim an estoppel, as against Mabury, as it does not. It was not a party to the articles of association, which were executed four years before the company had any existence. The company is not holding through these articles, but under deeds direct from the owners in interest. It is not claimed that the company has been induced to accept the deed from Nora Wathen on account of these articles, or that it has in any way changed its position, or been misled, to its prejudice, on account thereof. If the ferry interest was real estate, as seems now to be conceded, Nora Adams' interest terminated upon the death of Elizabeth Wathen. Up to that time, for 19 years, she represented this interest, and received the dividends. She was a member of the company, enjoying all the privileges of a stockholder, though no certificate of stock was ever issued to her. Why has she not, then, already received all it was understood she was to receive, and all she was by law entitled to receive?

We have considered the question of estoppel upon the merits as though it had been regularly pleaded. We are satisfied that the appellee's contention is not sustained by the evidence. But Nora Adams has not invoked or claimed any estoppel, as against Mabury. This is something the court below has given her the benefit of without her asking. Neither in her original bill of complaint filed in the state court, nor in her cross bill in the suit brought in the United States court, does she claim any estoppel. She does not even refer to the articles of association of March 29, 1865, by virtue of which the estoppel is held by the court below to have arisen. An estoppel by contract, which this is said to be, is a species of estoppel in pais, and must be specially pleaded, or it cannot be relied upon. *Bigelow*, Estop. (5th Ed.) 455; *Wood v. Ostram*, 29 Ind. 179; *Robbins v. Magee*, 76 Ind. 390; *Cole v. La Fontaine*, 84 Ind. 448; *Stewart v. Beck*, 90 Ind. 458.

But Nora Adams does not make her claim against Mabury alone, but against the ferry company; and she insists, and the court below held, that she is entitled to the stock claimed by her, independently of any claim Mabury may have, and by virtue of her conveyance to the company, with others, of July 6, 1869. This claim is made by virtue of the following language contained in that deed:

"And Nora Wathen, in consideration of one hundred and sixty-six and two-thirds shares of the stock of Louisville and Jeffersonville Ferry Company to the said Nora Wathen assigned and transferred, does hereby grant, bargain, sell, and convey to the said Louisville and Jeffersonville Ferry Company one equal and undivided twelfth part of all the franchises and other assets, real and personal, of the firm or association known as the 'Jeffersonville Ferry Company,' except the wreck of the steamer Wathen, and reclamations arising from the loss of said boat; to have and to hold to the said Louisville and Jeffersonville Ferry Company, in fee simple, forever."

It is evident from what has already been seen that Nora Wathen, by this deed (conceding that the ferry property was real estate),

while really owning but a life interest derived from her husband, who in turn derived it from his mother, Elizabeth Wathen, undertook to convey to the company an estate in fee; and it is contended, and was so held, that the recital of the consideration received, being the transfer of 166 $\frac{2}{3}$ shares of the stock, cannot be contradicted or explained, but that the company, though refusing to issue a certificate for the stock to her until the controversy in regard to the reversionary interest after Elizabeth Wathen's death should be determined, is bound now to issue the same to her, although that controversy should be determined against her, and in favor of Mabury. The result of such a contention, if made good, would be that, though Mabury is held to be entitled to hold that interest after Elizabeth Wathen's death, the company is still bound to issue the stock to Mrs. Adams, thus making a double liability on the part of the company for the same interest. It is evident the company cannot issue the stock to both, as that would be a gross fraud upon the other shareholders, and a double liability, in any other form, for the same interest, would result in the same sharp injustice; and the question is whether, the court, finding, as it must, that Mabury is entitled to claim the two twenty-fourths interest in the ferry property upon Mrs. Elizabeth Wathen's death, in 1888, must also find that the company is bound, by the recitals in the deed from Nora Wathen, to issue the stock to her. We are of opinion that such a conclusion is not only unnecessary, but would result in gross injustice. The company has shown itself ready and willing to convey the stock either to Mabury or to Mrs. Adams, as the court should decree, and that is all it can properly be made liable for. To hold the company for a still greater measure of liability, would be to contravene or ignore the understanding of the parties, and the facts and evidence in the case. We are of opinion that there is nothing in the deed from Nora Wathen inconsistent with the facts, as we know them from the record to be. Nora Wathen owned a life interest in these disputed shares. She might be held to own the fee. She wished to convey all the interest she had. She accordingly made a quitclaim deed of these shares, which was entirely sufficient to transfer whatever interest she had, or might be held to have, whether in fee, or only for life. If she should be adjudged to hold the fee, then the deed conveyed that interest, without the necessity of any further conveyance. If she held only a life interest, then the deed conveyed that. She had the then present right to represent that interest. How long it would last was uncertain. It did continue for 19 years, until the death of Elizabeth Wathen, in 1858. During all this time, she was as much a member of the company, and entitled to share in its proceedings and profits, as any other stockholder, and she did. She is presumed to know, and did know, of the action of the company in withholding the certificate of stock until the right to the reversionary interest should be settled; and she acquiesced in that action, and never demanded that the stock be issued to her. These things are quite consistent with the recital of the consideration in the deed, and there can be

no doubt of the propriety of showing just what that consideration was, and what the interest was which she must be held actually to have conveyed. There was no guarantee on the part of the company that she held title in perpetuity, as well as for life, to these shares. Though no certificate of stock was issued, she was recognized as the present owner by being allowed to draw her dividends. She might continue the owner as long as the company had an existence, but upon the death of Elizabeth Wathen, if the court should decide that her deed conveyed but a life interest, the stock might then go to the person entitled to it. The deed is a conveyance by Nora Adams, reciting a consideration already received. It does not profess to be an agreement on the part of the company to issue the shares of stock to her, but it recites that the deed is made in consideration of the said shares assigned and transferred to her. It is not an agreement to transfer and assign, but a recital of a transfer already made. But we know from the record just how they were assigned and transferred,—not absolutely, and for all time, but absolutely for the life of Elizabeth Wathen, and for her life, only, unless the pending controversy in regard to the reversionary interest to Mabury should be determined in Nora Adams' favor, and in that case she was to receive a final certificate, giving full title; and this is consistent with a proper and reasonable interpretation of the recital, and harmonizes with all the facts and circumstances attending the early history of this controversy. Certainly, the entire conduct of Nora Wathen, through so many years, in reference to the subject-matter, accords with, and is best explained by, this interpretation, and is inconsistent with the interpretation now asserted by her counsel. This is consistent with the general rule that the consideration of a deed may be inquired into, and shown to be different from the recital in the deed. You shall not defeat the deed by showing a want of consideration, but you may show what the consideration actually was. *Welz v. Rhodius*, 87 Ind. 5; *Goodspeed v. Fuller*, 46 Me. 141; *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247; *Bowen v. Bell*, 20 Johns. 338; *Hall v. Hall*, 8 N. H. 129; *Meeker v. Meeker*, 16 Conn. 387; *Hayden v. Mentzer*, 10 Serg. & R. 329. The court, in *Goodspeed v. Fuller*, *supra*, says: "The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation in every direction." Mrs. Nora Wathen, as well as her husband, from whom she derived title, knew all about the controversy over the reversionary interest in these shares. James Wathen, her husband, was a party to the deed with Mabury and Elizabeth Wathen, which contains the recital and reservation of this controversy. The record and circumstances show conclusively that all the parties knew about it, and of the action of the company in withholding the stock; and the recital of the consideration in Nora Wathen's deed to the company should be viewed in the light of all these facts, and, when so viewed, it is clear what is meant, and how it should be construed. It is clear to the court that these several deeds made by different owners at different times, but for a

common purpose, and all recorded at the same time, form part and parcel of one transaction, and should be read together. They all have the common purpose of organizing the new company with a capital stock of \$200,000, to be taken at par by the owners of the different undivided interests in the ferry. It was never intended by any one that more than the \$200,000 of stock should be issued. The controversy in regard to the final ownership in fee of the shares in question was purposely and studiously left in abeyance by the parties for the time being, and until it became of practical moment by the death of Elizabeth Wathen. Upon her death, in 1888, this controversy was precipitated. It became important then to know whether Mrs. Adams or Mabury held that interest. It made no difference with the company which party should make its title good to these shares. It stood ready, and is still ready, and willing, to issue the certificate to the rightful owner, as the court shall determine that right. But it would be grossly unjust, and contrary to the facts and the understanding of all the parties, to require the company to issue the stock to both; supposing that could be done, and an overissue decreed by the court. It would lessen the value of the stock of every member of the company.

There is but one other point in the case that we care to notice, and that only because some importance was given to it in the opinion of the court below. In the endeavor to show that Nora Adams had some interest in fee in the ferry property when she made the deed of July 8, 1869, aside from her life interest derived through her husband from Elizabeth Wathen, it is suggested that she also held an interest derived from her husband, James Wathen, which he held from his mother, Elizabeth Wathen, in what was known as the "Bowman Ferry,"—one of the three old ferries which were consolidated in the new one. It is perhaps sufficient to say in regard to this claim that it is not set up, nor relied upon, in the pleadings. Mrs. Adams evidently had no thought of advancing any such claim, or relying upon it in any way, nor did her counsel, when the pleadings were drawn. It seems to be an afterthought in support of the conveyance of an interest in fee, in case it should be held that the real interest in dispute was owned by Mabury, instead of Mrs. Adams, at the time of the execution of the deed. The pleadings admit that at the time of the death of Athanasius Wathen, Sr., one undivided half of the consolidated ferries belonged to Shallcross, Strader, and Thompson, and the other half to Athanasius Wathen, Sr.; and, if this be true, it must follow that before that date the small interest (whatever it was) inherited by Mrs. Elizabeth Wathen in the Bowman ferry was in some way conveyed to some of the other owners. The disposition of this fractional interest is not disclosed by the pleadings or the evidence, but, as no reliance is placed upon it in the pleadings, it forms a precarious foundation upon which to found a claim against the ferry company, after the real claim relied upon by the appellee to the disputed interest has failed.

Our conclusion is that Hiram Mabury is the owner in fee of the undivided one-twelfth interest in the ferry in dispute in the case, and

that Mrs. Nora Adams is entitled to take nothing in the premises; and, as the ferry company expresses a willingness to convey the 166 $\frac{2}{3}$ shares of stock to the party who shall be declared to be the owner of such interest, the decree of the circuit court will be reversed, and the case remanded, with instructions to enter a decree in favor of Hiram Mabury,—that he be adjudged and decreed to be the owner in fee of the undivided two twenty-fourths interest in the ferry property and franchises in dispute in this case, and entitled to the possession, profits, and enjoyment thereof from the time of the death of Elizabeth Wathen; that upon his executing to the ferry company a good and sufficient warranty deed, in fee simple, of such two twenty-fourths interest in the ferry franchises and property, the ferry company convey to him the said 166 $\frac{2}{3}$ shares of stock, representing that interest; that the said Nora Adams be adjudged and decreed to have no right, title, or interest in or to said two twenty-fourths of said ferry franchise and property, or to such stock, or to the funds in court, and that she be perpetually enjoined and restrained from asserting any claim thereto, by suit or otherwise, either against Hiram Mabury, his heirs, or assigns, or against the said ferry company; that the title of said Mabury and the ferry company be adjudged and decreed to be absolute, and free from any claim or demand, of any character whatsoever, of the said Nora Adams; that there be paid out of the fund deposited in the court below, being the dividends declared upon the said shares of stock decreed to the said Mabury, the costs of the said Louisville & Jeffersonville Ferry Company herein incurred, as well as the costs of removal of the case of Nora Adams against the Louisville & Jeffersonville Ferry Company from the Clark county circuit court of the state of Indiana, and that the residue of said fund be paid over to the said Hiram Mabury; and that the said Hiram Mabury recover from the said Nora Adams his costs herein expended, and also the costs of the Louisville & Jeffersonville Ferry Company so ordered to be paid out of the fund in court.

NEW ENGLAND MORTGAGE SECURITY CO. et al. v. TARVER et al.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1894.)

No. 197.

1. CONSENT DECREE—VALIDITY—FRAUDULENT REPRESENTATIONS.

A woman who is fully informed of all the terms and stipulations of a consent decree, and who is advised by able lawyers, and by the chancellor himself, cannot, after receiving pursuant thereto a large sum in cash, which she does not offer to return, avoid the execution of the decree by claiming that she was misled, and by setting up alleged promises and representations contemporaneous with or subsequent to the original decree.

2. PAROL EVIDENCE—DEED ABSOLUTE AS MORTGAGE—RESCISSION.

A father, by a deed absolute, conveyed lands to his son, who mortgaged the same for a large sum. Thereafter, with the consent of his father, he sold and assigned in writing the equity of redemption. *Held*, that under the Georgia statutes (Code §§ 1950, 3800) the father could not show

by parol a subsequent rescission of this transfer, and that the original deed from himself to his son was intended only as a mortgage, and thereby to establish a right in himself to redeem the land.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The original bill in this case was filed by the New England Mortgage Security Company against Annie P. Tarver to foreclose a mortgage. An agreement was reached between the parties, which resulted in the entry of a consent decree containing various provisions and stipulations. Subsequently the Union Real-Estate Trust Company and J. F. F. Brewster presented a petition in the nature of an ancillary and supplemental bill, for the purpose of enforcing the decree above mentioned. To this, answers and a crossbill were filed, and the hearing below was upon the matter thus presented. The court below entered an interlocutory decree restraining the complainant and petitioners from taking out a writ of assistance, and the present appeal is taken therefrom.

The following opinion was delivered in the court below by SPEER, Circuit Judge:

The record of this cause presents a large number of questions. It was argued upon demurrer some time ago, but, on account of the intricacy of the matters presented, and the unusual and exacting demands made upon the time of the presiding judge by other very pressing and weighty causes pending in the court, it has not been practicable until now to obtain a satisfactory conclusion. On the 11th of June, 1891, the Union Real-Estate Trust Company, of Atlanta, and J. F. F. Brewster, a citizen of Massachusetts, presented to the court their petition in the nature of an ancillary bill and supplemental bill to the original litigation which had been for some time pending in this court between Annie P. Tarver as complainant and the New England Mortgage Security Company and others. From the averments of this proceeding, which for brevity will be called the "supplemental bill," it appears that on the 10th day of January, 1891, a final decree was rendered by the court in the original litigation. This litigation involved a large and remarkably fine body of lands in this district, estimated by some of the witnesses to be worth several hundred thousand dollars. They had been pledged to secure loans made by the New England Mortgage Security Company, and a decree had been obtained foreclosing the mortgages executed thereon. Mrs. Annie P. Tarver, when an attempt was made to enforce the decree, filed her bill, in the nature of a bill of review, setting out, among many grounds of apparent importance, that she had not been served, and had not had her day in court. The bill containing proper averments and prayers, a receiver of the court was appointed to take charge of the properties, to prevent waste, collect rents, etc. While the litigation was in this situation, propositions for settlement were mutually entertained by the parties. The agreement finally had was as follows:

"State of Georgia, Bibb County—ss.: This agreement, made and entered into this, the 31st day of December, A. D. 1890, between Thomas P. Stovall, for the Union Real-Estate Trust Company, and J. F. F. Brewster and the New England Mortgage Security Company, parties of the first part, and Mrs. Annie P. Tarver, party of the second part, and William B. Tarver, party of the third part. Whereas, there is now pending in the circuit court of the United States for the western division of the southern district of Georgia a bill in equity filed by Mrs. Annie P. Tarver against the New England Mortgage Security Company et al., the intervention of the Union Real-Estate Trust Company in said proceedings, the cross bill of the New England Mortgage Security Company against said Annie P. Tarver, which said bill and dependent and auxiliary litigations involve the title, ownership, and possession of sixteen thousand three hundred and sixty-four acres of land, more or

less, known as the 'Tarver Place,' in Twiggs county, Georgia, and more particularly described in said bill and proceedings: Now, therefore, and in consideration of the sum of eight thousand seven hundred and fifty dollars in hand paid to the said Annie P. Tarver by the said party of the first part at or before the signing and delivery of these presents, the receipt whereof is hereby acknowledged, and for and in consideration of the sum of one dollar in hand paid to the said William B. Tarver by the said party of the first part at or before the signing, sealing, and delivering of these presents, the receipt whereof is hereby acknowledged, and for and in consideration of the mutual concessions and undertaking of the said parties hereto, as hereafter more fully set forth, made for the more speedy settlement and compromise of matters in litigation as hereinbefore mentioned, and disputes between them, the said Annie P. Tarver and the said William B. Tarver, each for themselves, have relinquished, and by these presents do relinquish, all claim, right, title, interest, and possession of, in, and to any and all of the said lands in controversy in said litigation, as well as the twenty-one hundred acres, more or less, known as the 'J. R. Wimberly Place,' except as to six hundred and fifty (650) acres of the said J. R. Wimberly place known as the 'Old Homestead,' or 'Hunter Place,' said relinquishment being in favor of J. F. F. Brewster, of Suffolk county, Massachusetts, subject to whatever agreements may exist between said Brewster and the said Union Real-Estate Trust Company in reference to said lands. And it is further agreed between all the parties hereto that this agreement shall be made a part of the decree of the said circuit court in said pending litigations, which it is agreed shall be forthwith entered by consent of all the parties upon the presentation of this agreement to the court, and according to the terms hereof, and without any further preliminary proceedings; and that the court shall decree in said final decree that the said Annie P. Tarver, and those claiming under her or through her, are forever estopped from denying the validity or effectiveness of the service of process upon her in the foreclosure suit against her filed in the United States circuit court on April 30th, 1887, by the said New England Mortgage Security Company for the foreclosure of the mortgage upon said lands given by said Annie P. Tarver to the said the New England Mortgage Security Company, and that the decree of foreclosure entered in said suit on July 7, 1887, as well as the execution issued upon the same, and the levy and sale of said lands thereunder, and the marshal's deed of September 6, 1887, conveying said lands to Charles L. Flint, the purchaser at said sale, shall be decreed to be good and valid and binding from the respective dates thereof upon the said Annie P. Tarver and the said W. B. Tarver, and all persons holding under or through them; and that it shall be further decreed that the said W. B. Tarver shall surrender up to said J. F. F. Brewster the bond for title to what are known as the 'McRae Lands,' in said county of Twiggs; and that the said Annie P. and W. B. Tarver shall transfer and assign in proper form to said Brewster the bond for title made to said J. R. Wimberly by Charles L. Flint on the 21st day of June in the year 1882, wherein and whereby said Flint obligated himself and his assigns to reconvey 2,100 acres, more or less, which are fully described in said bond to said Wimberly, upon the payment by him of a certain note of that date for the principal sum of \$5,000, with interest, and which said note has been sued to judgment in the superior court of Fulton county, Georgia. And it shall be further decreed that the said J. F. F. Brewster is entitled to the immediate possession of all of said lands, except the 650 acres known as the 'Old Homestead,' or 'Hunter Place,' before mentioned, subject to the contracts and agreements heretofore entered into in relation thereto between said Brewster, Stovall, and the Union Real-Estate Trust Company; and that process may forthwith issue to put said Brewster in possession of same; and that the said Annie P. Tarver and William B. Tarver shall forthwith vacate the house and premises now occupied by them by leave of the court heretofore granted, and shall surrender all possession, title, interest, and claim of, in, or to any and all of said lands, except said 650 acres of said Wimberly place; but that said J. F. F. Brewster and said Union Real-Estate Trust Company shall execute a deed relinquishing to said Annie P. Tarver, or to whomsoever she may designate in writing, all their right, title, and claim in or to the said six hundred and

fifty acres known as the 'Old Homestead,' or 'Hunter Place,' the same to be surveyed and platted so as to include the piece of woodland next to Tarversville, and run off in one body, in such shape as Mrs. Tarver may direct. And that it shall be further decreed that all parties to said proceedings in said court shall pay the fees of their own respective solicitors, and that no costs shall be taxed therefor. That the costs in said proceedings shall be taxed as follows: The New England Mortgage Security Company shall pay the court costs of the bill filed by said Annie P. Tarver, as aforesaid, and of the answer thereto by it, and also the cross bill filed by it. The Union Real-Estate Trust Company shall pay all the costs made by the filing of its intervention, the costs of the receivership, and all compensations decreed the receiver by the court; and the said Annie P. Tarver shall be relieved of all court costs. This settlement is intended to settle all demands of the said the New England Mortgage Security Company, J. F. F. Brewster, the Union Real-Estate Trust Company, and Thomas P. Stovall, or either of them, on the one side, and of the said Annie P. Tarver and W. B. Tarver, or either of them, on the other side.

"In witness whereof the parties have hereto set their hands and seals, this December 31, 1890.

"Annie P. Tarver. [L. S.]

"William B. Tarver. [L. S.]

"Union Real-Estate Trust Company, by

"Thos. P. Stovall. [L. S.]

"The New England Mortgage Security Co., by its attorney,

"W. E. Simmons. [L. S.]

"J. F. F. Brewster, by his attorney at law,

"W. E. Simmons. [L. S.]"

It having been alleged in the pleadings heretofore filed that Mrs. Tarver had been conveying away her property under the dominating influence of her husband, the chancellor thought proper to caution her, and advise her as to the character of this agreement. This was done, and the agreement, having been signed by the counsel for all the parties, was made the decree of the court on the 10th day of January, 1891. As will be seen in the agreement, and as alleged in the supplemental bill to enforce this decree now before the court, it was provided that J. F. F. Brewster and the Union Real-Estate Trust Company should execute a deed relinquishing to Mrs. Tarver, or whomsoever she might designate in writing, all their right, title, or interest in or to 650 acres of land known as the "Old Homestead," or "Hunter Place," the same to be surveyed and platted so as to include the piece of woodland next to Tarversville, to run off in one body, in such shape as Mrs. Tarver may direct. The supplemental bill alleges that the complainants have earnestly endeavored since the decree to induce Mrs. Tarver to "run off" from said Hunter place and have platted 650 acres of land, provided for by the decree, but that she has refused to take any steps in that behalf, and has refused to make any agreement upon the subject. Complainants aver that they were anxious to make the deed as provided for by the decree, but that Mrs. Tarver refused to aid them in any respect, and was using their failure to make the deed as an excuse for remaining in possession of certain lands passed to the complainants by that decree; the supplemental bill describing it as the "Hunter Place," and setting forth the boundaries, which it stated will more fully appear by reference to the abstract of title made by John Wimberly, March 10, 1882, and furnished by him to Charles L. Flint, and the deed to the same made by said John R. Wimberly to Charles L. Flint, July 1, 1882, now to the court shown. It otherwise appeared that Charles L. Flint was the president of the New England Mortgage Security Company, and the supplemental bill stated that the complainants had acquired the title to the said Hunter place through said Charles L. Flint; that said Hunter place contained 1,313 $\frac{3}{4}$ acres, and "that out of the same Mrs. Tarver is entitled to have six hundred and fifty acres, to be surveyed and platted so as to include the piece of woodland next to Tarversville, to run off in one body, in such shape as she may direct." The supplemental bill then prays that, in order to carry this decree into effect, the court will appoint a competent surveyor to survey

and plat said lands and run off said 650 acres out of said Hunter place in one body, in such shape as Mrs. Annie P. Tarver may direct, and so as to include the piece of woodland next to Tarversville. On the 17th day of June, 1893, Mrs. Tarver filed her answer to this proceeding. She denied that she had delayed the steps to carry out the agreement. She averred that at the time the contract was signed she had discussed with the complainants the best mode of carrying out the agreement in good faith; that complainants had stated to her that it would be impossible to make a deed and give possession of the 650 acres of the Hunter place until said Hunter place could be sold by the sheriff of Twiggs county under a fi. fa. issued from Fulton superior court against John R. Wimberly. It otherwise appears in the record that this fi. fa. was issued on the suit of the New England Mortgage Security Company against John R. Wimberly, and under the contract between these parties, construed by the law of Georgia, the judgment constituted a lien of the highest dignity on these lands, to wit, the Hunter place, which had been conveyed to secure the loan. She states further in her answer that complainants promised that they would immediately commence to advertise the said Hunter place for the sheriff's sale in March, 1891, and that, as soon as the sale could be made, the entire tract, containing 2,172 acres, would be bought in by the complainants, and the 650 acres should be surveyed, and a deed and possession of the same should be given to her. She states that she agreed to do this, induced to do so because complainants assured her that under no circumstances would she be disturbed in her present abode until said arrangement of sale and survey could be perfected and possession given. She states further that complainants did not advertise said lands for sale by the sheriff of Twiggs county under the fi. fa. from Fulton superior court. The advertisement was in the month of February, 1891, in pursuance of her agreement with the complainants. In her answer she further avers that two weeks before the time fixed for the sale, T. P. Stovall, who, it appears, was acting for the Union Real-Estate Trust Company, in the entire transaction, came to respondent, and requested her to assign or transfer to said complainants bond for titles to the Hunter place, described in said decree. Respondent says that at first she refused to do so until the said sale should be made and the deed and possession given to said 650 acres, but that, upon assurances of said Stovall that the sale should certainly take place at the time advertised, and that complainants would buy said land, would survey the same, and that a deed would be made in good faith in a few days thereafter, defendant reluctantly yielded, and signed said bond for titles as Stovall requested; her objection being on the ground that her contract did not provide for any assignment whatever. Defendant did provide for the delivery of said bond after said survey was made and deed and possession given to said 650 acres of land. The answer further states that, after the bond for titles had been assigned, complainants immediately withdrew the land from sale. Although repeatedly and urgently requested so to do, they have failed and refused to take any steps to put themselves in a position that would enable defendant to carry out in good faith the terms of such agreement undertaken by them. She charges that she has been the victim of systematic fraud and misrepresentation on the part of complainants, not only in the framing of said decree, but in carrying out its provisions after it was adopted. She charges that she signed the agreement on the undertaking then and there of complainants to make to her good and sufficient titles to said 650 acres of the Hunter place, and put her in possession thereof; and that by artful evasions said decree was so worded that respondent was only to receive a quitclaim title from them to her of said 650 acres. She claims further by her answer that she was entitled to have 650 acres run off out of the 2,172 acres, which she insists comprises the Hunter place, and not from the 1,313 $\frac{3}{4}$ acres, as complainants propose, which last tract was known as the "Coombs Place," and was included in said 2,172 acres. She denies that complainants had any title to the said land, and insists that Henry R. Wimberly has now, and has had for years, possession of the land; that the deed that John R. Wimberly has filed and recorded in terms of the law was merely made to secure the loan, and did not pass the title; that by the sheriff's advertisement which the complainants

had inserted they admit possession and title in John R. Wimberly. And she insists further that the court had no jurisdiction to appoint a receiver, and direct a survey of the lands held by persons not parties to the litigation. In her answer she asks affirmative relief from the court, to wit, that the complainant should be required to do equity, and carry out in good faith the terms of the agreement. She refers to the supplemental agreement of the date of January 9th, which was omitted from the decree by the fraudulent conduct of complainants, which omission was to defraud respondent of her just and legal rights under said agreement, respondent insisting that such supplemental agreement and the entire contract that was in fact made should be executed in the utmost good faith. The substance of her prayer is that the complainants should be compelled to renew the advertisement of the sale of the Wimberly lands, known as the "Hunter Place," sell the same, acquire title, execute good and sufficient titles to respondent, and have the survey as aforesaid of said 650 acres hereinbefore described, as they undertook to do.

Pending the questions raised by this supplemental bill and her answer, it was agreed between the parties that the following questions arising on the above petition and answer shall be submitted on the proofs to be made by affidavits and documentary evidence and arguments of counsel to his honor, Judge Speer: First. From what lots and parts of lots of land the 650 acres of land referred to in the final decree of January 10, 1891, shall be carved. Second. That when the judge shall have determined the lots or land out of which the 650 acres shall be run off as Mrs. Tarver may direct, in the manner designated in such decree of January 10, 1891, the judge shall then appoint a surveyor to run off said land, and plat said 650 acres in manner and under the terms of said petition for said survey, out of the lands such judge may designate above. Third. That until said survey is complete, and plat approved by the court, the status of the parties in other respects is to remain as now, and no new steps to be taken by either party that would tend to oust the jurisdiction of the court in this proceeding. The intent of it is that the movants will not dismiss the bill after the survey, and at the same time get the advantage of the survey. Movants reserved the right to make, after said survey is complete, any legal objection to the relief prayed for in the answer of Mrs. Tarver, by demurrer or otherwise. The defendant reserved the right to make such amendment and alteration of her pleadings as may be proper and necessary. This agreement was signed by the counsel. Pursuant to this agreement, the court rendered its decision on the 16th of November, 1891. It held that it could grant no affirmative relief to the respondent upon an answer in the nature of a cross bill, but that, under the equity practice, it would be necessary to present the matters of grievance and the affirmative relief sought by a cross bill proper. As to the survey, the contention of the complainants was fully sustained as to the locality and boundaries of the Hunter place, and it was ordered that Calvin W. Hendricks, a surveyor, be appointed to run off and plat the said 650 acres mentioned in the decree of January 10, 1891, out of the Hunter place as defined and described in the order, said survey to be in such shape as Mrs. Annie P. Tarver may direct, and so as to include the piece of woodland in the southeast corner of lot 181, next to Tarversville. The order further provided that after the survey shall have been completed, and plat filed with the court, unless exceptions shall be filed by either party to this proceeding after said plat is filed, the same shall be fully and finally confirmed. This survey was made by the surveyor, and filed in the clerk's office on December 14, 1891, and, so far as the court is informed, no exceptions have been filed to the decree itself.

On the 23d day of December, 1891, the Union Real-Estate Trust Company filed its quitclaim deed to Mrs. Annie P. Tarver to the 650 acres marked off by the survey. On the same day J. F. F. Brewster and the New England Mortgage Security Company filed with the clerk a similar deed. On January 7, 1892, it being represented to the court by the counsel for Mrs. Tarver that the marshal was proceeding with a writ of assistance to eject this lady from the home which she had occupied, that she was in delicate health, and about to be confined, and the court having been apprised by its

knowledge of the record that there was a dispute pending between her and the complainants, which she purposed to bring to the attention of the court, the following order was passed: "Upon motion of counsel for Mrs. Annie P. Tarver, it is ordered by the court that the Union Real-Estate Trust Company do not sue out a writ of assistance to enforce said final decree of January 10, 1891, without first having made formal application to the court for leave to sue out said writ of assistance, and shall serve Mrs. Annie P. Tarver with notice of such application." This order was made to apply also to J. F. F. Brewster. In the mean time, to wit, on November 16, 1891, Henry S. Wimberly was made party by intervention pro interesse suo. From this intervention it appeared that Mrs. Tarver had no title whatever to the Hunter place; that H. S. Wimberly was the father of John R. Wimberly; that H. S. Wimberly conveyed by deed this land to his son in order to enable him to borrow money from the New England Mortgage Security Company by pledging the land therefor. It is alleged in the intervention that the deed to John R. Wimberly was made for no other purpose, and, while John R. Wimberly conveyed this land to the New England Mortgage Security Company for the purpose of securing a loan of \$5,000, H. S. Wimberly insists that he is, as between himself and the New England Mortgage Security Company, entitled to pay off the debt, and retake his lands. The New England Mortgage Security Company, holding a deed to the property to secure the debt under the law of Georgia, after suing its note to judgment, may file its deed with the clerk of the superior court, and levy on the land, and sell it, and, taking the sheriff's deed, may be put in possession by the sheriff; or it may, if it chooses to do so, bring an action of ejectment on the deed made to secure the debt, and acquire possession of the land by that method. This action, however, may be defeated by the payment of the debt with all proper charges. The New England Mortgage Security Company began its procedure under the option first stated. It brought suit, as we have seen, in the superior court of Fulton county, and the Union Real-Estate Trust Company, having acquired all the rights of the New England Mortgage Security Company in this debt, as we have further seen, causes *fi. fa.* to be levied, and the land to be advertised for sale thereunder, after the consent decree with Mrs. Tarver was taken. H. S. Wimberly attaches to his intervention a copy of the bond for titles to reconvey the land on payment of the debt, made by Charles L. Flint, president of the New England Mortgage Security Company, to John R. Wimberly. Mrs. Tarver's connection with this land is explained by the intervention as follows: Several gentlemen undertook to make a ranch on all of the Tarver lands, amounting to some 16,000 acres. This particular tract, known as the "Hunter place," from its situation, was necessary to their scheme, and H. S. Wimberly was induced to convey this land to Annie P. Tarver for them. They were relatives of hers, and all of these lands had been placed in her name. She gave to Wimberly her note for \$5,000 in consideration of the Hunter place. The note was not paid. Wimberly sued in the superior court of Twiggs county. The suit was afterwards dismissed by consent. By agreement the debt was canceled, and Mrs. Tarver relinquished all right and interest in the Hunter place to Wimberly. As Wimberly had made no conveyance to her, she made none to him, and the color of title which she had to the Hunter place at the time of the consent decree of January 10th between herself and the New England Mortgage Security Company and Union Real-Estate Trust Company was the bare custody of the bond for titles executed by Charles L. Flint to John R. Wimberly to reconvey to the latter the Hunter place when Wimberly's debt to the New England Mortgage Security Company should be paid. H. S. Wimberly, by his intervention, calls the attention of the court to the fact that the Hunter place was in no sense comprehended in the suit between Annie P. Tarver and the New England Mortgage Security Company to enforce the debt of the latter against her lands, which was not mentioned in the pleadings. The Hunter place was not in her possession, and he declares that the consent decree of January 10, 1891, was wrong and unjust and illegal as to him for the reason that the court had no authority to take his land, or utilize it in any way as a part of the consideration of the settlement between parties in which he was in no sense concerned. He charges a

fraudulent scheme on part of the complainants to obtain a transfer by Mrs. Tarver of the bond for titles which was made by Charles L. Flint to John R. Wimberly, the object of this being to relieve complainants of the necessity of reconveying the land if the debt should be paid. This he now offers to do. He charges full notice upon all the parties as to his interests in the matter and the equities which belong to him. He states that the loan itself was usurious; that John R. Wimberly gave the note for \$5,000, and in point of fact received \$4,000; but he declines to avail himself of this plea. He does object to giving Mrs. Tarver 650 acres of his land, which he prays may be sold at public outcry to the highest bidder, the New England Mortgage Security Company having elected to proceed by judgment, execution, and advertisement; and proposed to pay off the debt with interest, and take the land; or he proposed to make his land bring at the sale the amount of the debt with interest and costs, and claims that he may be paid the excess of the bid, above that amount.

Another complication is presented by the intervention of W. B. Sparks. This was filed the 20th of July, 1891. It recites that John R. Wimberly owned the Hunter place. That he made to the New England Security Company a deed thereto to secure the payment of \$5,000 loaned him. The deed was made, as we have seen, to Charles L. Flint, who, as we have seen, was president of the company, as grantee. Flint executed to John R. Wimberly his bond for titles to reconvey the land on the payment of the debt. After this occurrence John R. Wimberly transferred and assigned said bond for titles, together with all his title, right, and interest in said lands and under said bond, to Annie P. Tarver; and that Annie P. Tarver did afterwards on the 29th day of January, 1886, make and execute to intervenor Sparks a mortgage upon certain lands. It may be observed at this point, however, that John R. Wimberly transferred and assigned this bond for titles to Mrs. Tarver on the 14th of February, 1886, and that the mortgage made to Sparks is dated the 29th day of January of that year, which was some days before Mrs. Tarver had received the bond for titles. A mortgage to Sparks was made to pay certain notes and drafts due by Mrs. Annie P. Tarver. He attacks the mortgage or deed of the New England Mortgage Security Company for usury, charging that 20 per cent. per annum was exacted, whereas the notes only specify 8 per cent. as the rate of per cent. charged, and that this was done by means of a scheme and pretended commissions to evade the laws of Georgia relative to usury. He charges further that the whole contract is void, and not collectible under the law of New York on account of the usurious charge, and that it was made in New York, and that for this reason the title never passed out of Wimberly to secure said debt. He states that the transfer of John R. Wimberly to Mrs. Tarver therefore conveyed the title which gives to intervenor a first lien upon the property. He charges notice of these facts upon the Union Real-Estate Trust Company, its agents and attorneys. He charges a conspiracy between Annie P. Tarver, J. F. F. Brewster, the New England Mortgage Security Company, and the said Union Real-Estate Trust Company, by means of which Mrs. Tarver sought to divest herself of the title which she received from Wimberly by conveying the bond for titles from Flint to Union Real-Estate Trust Company. That this was done to relieve the lands of intervenor's mortgage, and then to cause a conveyance of the land to some person other than Annie P. Tarver, and place it beyond the reach of intervenor's right, and defeat the collection of this debt. That this agreement was made the judgment of this court on the 1st day of January, and is a part of the record in this cause. Intervenor charges that Annie P. Tarver did assign and deliver up the bond for titles from Flint to Wimberly in pursuance of said agreement, and calls on all of the parties to produce the said bond for titles at the trial. He charges that the land is worth far more than a sufficient amount to pay off and discharge both the debt of John R. Wimberly and the New England Mortgage Security Company, and also to Annie P. Tarver, and that it will bring at public sale more than a sufficient amount of money to pay both debts. Mrs. Tarver has but little property, and, if said parties are allowed to pursue their purpose and intention to convey to others said land, it will reach the hands of an innocent third party, who will be protected against intervenor's mortgage. He stated

that the amount was within the jurisdiction of the court, and, all the parties being in court asserting their several claims, he prays that he may be allowed to come in and assert his rights in the premises, and, waiving discovery, prays—First, for substituted service upon the solicitor of the nonresident parties; second, that all other parties, their agents and attorneys, be immediately enjoined and restrained from further proceeding to survey said lands, and from executing and delivering or receiving any conveyances of or to said lands until the final order of the court; third, that he have judgment and decree of foreclosure of his mortgage against said Annie P. Tarver for principal, interest, and attorney's fees; fourth, that his mortgage be decreed to be the first lien upon said lands, and entitled to payment out of the same in preference to the claim of any of said parties defendant; fifth, and for general relief it was agreed further that the application for a survey should proceed without prejudice to the rights of H. S. Wimberly.

Cross Bill of Mrs. Annie P. Tarver.

On July 6, 1892, Mrs. Annie P. Tarver filed her cross bill. She states that when the terms of the consent decree had been fully discussed and agreed upon, the decree was drafted by the attorneys for the New England Mortgage Security Company and the Union Real-Estate Trust Company, and that neither she nor her attorneys read said decree. She states that she, her husband, W. B. Tarver, and Minter Wimberly, one of her counsel, were present when the decree was read to them by William E. Simmons, attorney for the New England Mortgage Security Company, and that the word "quitclaim," or other word of similar import, was never used in reading said decree, but that "good" title or "warranty deed" was substituted therefor, by which she was induced to accept the terms of the agreement, because that, in discussing the terms of said agreement in the presence of her husband and W. A. Davis, also D. C. Hughs,—friends of the oratrix, selected by her to aid her in fixing the terms of said agreement,—and that in the presence of the counsel for the Union Real-Estate Trust Company, and also in the presence of Thomas P. Stovall, it had been invariably understood and expressly agreed that she should receive good and sufficient titles to said 650 acres of land. She states further that both Thomas P. Stovall and William E. Simmons assured her that the title would be put beyond all question by the sale of the Wimberly land; that when said sale should take place, and the title of Wimberly and the mortgage of W. B. Sparks finally divested, they could and would make to your oratrix a good and sufficient title to the same; that both herself and the other parties to the decree were fully advised of the complications surrounding the making of titles to said land; and that, if she had in good faith agreed to accept the conditions of said decree as it now stands worded, she would have done so with the full knowledge that the portion of said decree by which she was to receive a quitclaim deed to said 650 acres of the Hunter place was utterly worthless, and carried no valid consideration, and conferred upon her no greater privilege than that of paying off the Sparks mortgage, of which your oratrix had never received one dollar of benefit, and which had been made for the benefit of other persons entirely, and which she could never have been legally compelled to pay out of her own personal means. She states further that she was lulled into a feeling of security by the positive assurance that the sale of the said Wimberly land should take place as had been agreed upon, and, knowing that if said sale should be made, and said land bought in at said sale by said New England Mortgage Security Company and said Union Real-Estate Trust Company, as they had solemnly promised to do, their deed would give her a good title to the land she had selected and earnestly desired in order to shelter and rear her helpless brood of little children. She states that she was advised by disinterested friends that in accepting said decree, even as she supposed it to be, she was making a great sacrifice of her material interest. That she was moved to make this sacrifice in order to get a home, where she might rear and educate her children, unexposed by litigations and unembarrassed by the anxieties of continual lawsuits. She states that she was misled and entrapped into agreeing to the terms of said agreement by having them read in a different manner from that in which they were set down, and in finally accepting said decree under the belief that the subse-

quent stipulations as to sale and possession of the said 650 acres had been inserted therein as agreed upon. She states that, relying upon the good faith of said William E. Simmons and Thomas P. Stovall, she would have immediately given up possession of her home, and placed herself absolutely in their power, if the latter had not then and there tendered to her notes for \$2,500, payable in New York, at 8 per cent. interest, instead of cash, as it was understood said payment was to be in cash. That she had already signed said agreement, and then and there refused to accept said notes, which were void under the laws of New York, but, being incensed at what she believed a deliberate effort to swindle her, at once repudiated said entire agreement, and immediately left for her home; and subsequently, when urged by Thomas P. Stovall to reconsider her action, she consented to accept proper notes on New York, instead of cash, for said \$2,500, upon the solemn assurance that she was not to be molested in her home until said notes should be paid, and said Wimberly land should be sold, and oratrix put in possession of said 650 acres as above described. That she refused to reconsider her action until the said agreement should contain a stipulation, in addition to the former terms, that said sale of said Wimberly land should take place immediately, and that she should remain in undisturbed possession of the homestead until said sale and conveyance of title of said 650 acres of land should be made to her, which Thomas P. Stovall then and there agreed to be done. She states that she was assured by her husband, W. B. Tarver, that said agreement contained said additional stipulation, and that she acted under that belief when she informed the chancellor in a private interview that she was satisfied with said agreement. She states that she received no consideration for the sacrifice she made in accepting said decree, except the \$8,750, paid as aforesaid; and that, if said decree should be enforced according to its literal tenor, the portion of said consideration purporting to give her a home, which she regarded as the most valuable and indispensable part thereof, would be rendered utterly valueless and worthless to her, and, she repeats, would give her no greater advantage or privilege than to pay off and settle the mortgage of W. B. Sparks, which is a debt incurred for the benefit of other persons, and in which she did not participate. That she has been systematically misled, not only in getting her consent to accept said decree, but in the reading of the same so as to give the terms thereof an entirely different significance from those actually set down; and that said agreement to give her a title to a home on the 650 acres was so worded and so read for the express purpose of making the word of promise to the ear, only to break it to the hope.

To the various answers and cross bills and interventions which have been hereinbefore set out, the New England Mortgage Security Company and the Union Real-Estate Trust Company have interposed demurrers. They were set down for argument. After argument the questions presented were taken under consideration by the court. The questions themselves have been found difficult and perplexing. For the purpose of demurrer, of course, the averments in the answers and in the interventions and in the cross bill of Mrs. Tarver, where properly pleaded, must be taken as true. At the same time, the court must consider them in connection with the record wherein it makes plain the intention of the parties and the action of the court. After careful and anxious inquiry, we find, in the present state of the record, that the equity of the case may be stated as follows: Mrs. Tarver claimed the title to about 16,000 acres of land, which was exceedingly valuable. She was resisting an interference with her possession of these lands by means of an execution obtained by the New England Mortgage Security Company against her. Without considering the merits of her contention, it may be presumed from the facts that the Union Real-Estate Trust Company, who succeeded to the rights of the New England Mortgage Security Company, agreed to pay her the sum of \$8,500, and also to relinquish to her all the claim and right it had and which the New England Mortgage Security Company had to the Hunter place, above described, in consideration of the abandonment by her of the contest she was making; that the resistance was formidable, and perhaps threatening to the validity of the execution itself. In the agreement it appears that she did abandon this contest, and, further, that she surren-

dered her right to a very large, very fertile, and very valuable body of lands, which is otherwise shown in the record to be worth anywhere from \$75,000 to \$200,000. Now, to secure both parties the valuable results of the agreement into which they entered, it is undoubtedly true that the valuable result which the Union Real-Estate Trust Company sought to attain is this immense body of fertile and valuable land. It is perhaps not improper to state that it otherwise appears in the record that the company was organized perhaps mainly for the purpose of profitable speculation in these lands. That Mrs. Tarver's title was seriously embarrassed is unquestionably true. That the mortgage of the New England Mortgage Security Company would eventually have prevailed as against her lands is probably true. It is, however, probably true that there would have been delay caused by the fact that she was not served by process as the law requires. The valuable result which she sought to obtain was pecuniary compensation paid her and the 650 acres of land, which all through the controversy appears was desired by her as a home for herself and her children. This appears in her answer and in her cross bill. It was stated in *judicio* by her counsel when the consent decree was proposed; it was discussed by the chancellor and this lady when he felt obliged to advise her as to the far-reaching effect of the decree which conveyed away from her the title to so much and such valuable property. It follows, therefore, that if, without violating the principles of equity, the court can secure to her her home, it is our duty to do so.

Now, it is true it is insisted that upon the face of the agreement, which is made the decree of the court, there is nothing but the relinquishment of the title which the Union Real-Estate Trust Company and J. F. F. Brewster, who acted for the New England Mortgage Security Company, had in the 650 acres of the place called the "Hunter Place," and otherwise the "Wimberly Place." It might be true, if this were a court of law, it would be obliged to give a narrow construction to the terms of the instrument itself, without a consideration of the equities surrounding it, that this contention might be sustained; but we are in a court of equity, which will look through forms in order to find the substance of the agreement. Now, what is the language of this agreement upon which Mrs. Tarver is ready to rely in order to obtain a home for herself? It is agreed that Annie P. Tarver and William B. Tarver shall forthwith vacate the house and premises now occupied by them by leave of the court heretofore granted, and shall surrender all possession, title, interest, and claim of, in, or to any or all of said lands except said 650 acres of said Wimberly place, but that the said J. F. F. Brewster and said Union Real-Estate Trust Company shall execute a deed relinquishing to said Annie P. Tarver, or to whomsoever she may designate in writing, all their right, title, and claim in or to the said 650 acres known as the "Old Homestead," or "Hunter Place," the same to be surveyed and platted so as to include the piece of woodland next to Tartersville, and run off in one body, in such shape as Mrs. Tarver may direct. Is it not, then, true, when these parties agreed to relinquish to Mrs. Tarver all their right, title, claim, and interest to said 650 acres, they agreed to give her all the elements and means of making an effective title in her to that land which they possessed? We think so, clearly. And if, by directing them to do that for her, which they otherwise in the assertion of her title would and could have done, the court can make her title perfect, it is our duty to direct.

Now, what is the right and title of the Union Real-Estate Trust Company and J. F. F. Brewster or the New England Mortgage Security Company in the Hunter place? In other words, what is their equity? Whatever it is, Mrs. Tarver takes it under this agreement. If it should be a perfect title the word "relinquish" would be equivalent to the word "convey," and it would not matter, to the perfection of her title, that there was an absence of the covenant of warranty in the conveyance. The New England Mortgage Security Company held at the time of the agreement, and now holds, an equity which could be easily ripened by their action into a formal and perfect title to the Hunter place. It follows, therefore, that this power is also applicable to any portion of the Hunter place, and to the 650 acres surveyed and set off to Mrs. Tarver. H. S. Wimberly had conveyed the entire tract to the New England Mortgage Security Company to secure a debt for

\$5,000. It is true that the New England Mortgage Security Company, in compliance with the statute of the state of Georgia, had given to John R. Wimberly a bond obliging them to reconvey the title to him on the payment of the debt. And it is also true that this bond for titles was delivered to Mrs. Tarver, and that subsequently she redelivered this bond for titles to Thomas P. Stovall, in the interests of the complainants. It is also true that the New England Mortgage Security Company did not elect to proceed against this land upon their title to it, but they treated their agreement with John R. Wimberly merely as a security for the debt. They sued their note in Fulton superior court, obtained judgment, and issued execution, which, according to the averments of Mrs. Tarver's bill, they levied upon the land, and advertised it for sale for the purpose of perfecting title in her. Whether this last statement be true or not, if it also be true that H. S. Wimberly chooses to do so, he can pay off the accounts due on this execution, with all proper charges; and the New England Mortgage Security Company, and those who hold under it, will have no right to complain. But, if this be not true, the New England Mortgage Security Company and the Union Real-Estate Trust Company having relinquished all their right in this land to Mrs. Tarver for a valuable consideration, she has the right to compel them to do for her which they might have done for themselves to protect her title to the 650 acres of that tract intended for her. She therefore has plainly the right to insist that they should levy on the 650 acres of land, sell it at marshal's sale, and bid at the sale to the full extent of their judgment against John R. Wimberly, and thus buy in the land, and make their right, which they have conveyed to her, a perfect title. If, however, the entire tract should bring a larger sum than the amount due on their judgment, and if it should be bought in at the sale by other parties, Mrs. Tarver would be entitled to be paid from the proceeds a sum to be ascertained as an equitable apportionment of the value of her 650 acres as compared with the entire tract. This seems to be upon principles of equity incontestably true. The court cannot shut its eyes to the fact that it is at this moment easily within the control of the complainants in the supplemental bill to make title to themselves by a judicial sale certainly in the 650 acres, and we repeat that whatever they might do for themselves, it being their legal right, has been relinquished by them to Mrs. Tarver, and the court can compel them to do for her. It is also true, in view of the averments of his intervention, that H. S. Wimberly is entitled to have the Hunter place sold, and to bid, if he chooses, at the sale, or, if he does not bid, to claim any excess of the price for which these lands sold over and above the amount necessary to discharge the debt due to the New England Mortgage Security Company and controlled by J. F. F. Brewster and the Union Real-Estate Trust Company. For these reasons the demurrers to the intervention of H. S. Wimberly to the answers and cross bill of Mrs. Tarver will be overruled and denied.

With regard to the intervention of W. B. Sparks, the court is of the opinion that it has no jurisdiction to consider the relief which that intervener seeks. He insists that he has a mortgage, executed by Mrs. Tarver, on these lands. If he has, he may proceed in the state courts to assert the lien of his mortgage, and his equities, if they exist, need not be considered by this court. Mrs. Tarver insists that her individual property is not responsible for this debt. Whether it is or not, or whether the mortgage of W. B. Sparks will prevail against a title perfected by sale under the special lien of the mortgage to the New England Mortgage Security Company, controlled by the Union Real-Estate Trust Company, it is not necessary for this court to consider. For the reasons stated, let an order be taken striking the intervention of W. B. Sparks, and overruling the demurrers presented by the complainants.

W. E. Simmons (Marion Erwin, of counsel), for appellants.

W. D. Nottingham and Minter Wimberly, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. An earlier decision of this case has been prevented by sickness among the judges, and an elaborate opinion is prevented by the approaching recess of the court. The facts of the case are fully stated in the opinion of the trial judge on page 175 to the middle of page 187 of the transcript, except that the following, which appears to have been accidentally omitted in the statement of the case, should be appended to the agreement, to wit:

"The above agreement having been entered into at night, and after banking hours, and to-morrow being a legal holiday, on which all banks will be closed, we agree that the same shall be filed with L. M. Erwin, deputy clerk of the circuit court of the United States for the southern district of Georgia, and that no decree shall be rendered as therein agreed until the \$8,750 shall be paid, and that immediately after such payment this agreement shall be delivered to W. E. Simmons, and a decree taken.

"This December 31st, 1890.

"[Signed]

W. E. Simmons,

"Attorney at Law for the New England Mortgage Security Company and J. F. F. Brewster.

"Bacon & Rutledge,

"Minter Wimberly,

"Attorneys for A. P. Tarver."

Assuming that on a petition for a survey ordered in the decree, and for a writ of assistance to execute the final decree rendered at a former term of the court, Mrs. Tarver can attack by answer and cross bill the decree for error, fraud, or misrepresentation, and that the averments in the answer and in the cross bill were properly pleaded, and must be taken as true, we agree with the learned judge of the circuit court that at the same time the court must consider them in connection with the record wherein it makes plain the intention of the parties. It cannot be disputed that in entering into the agreement which is the basis of the final decree in the case Mrs. Tarver was fully advised of all the terms and stipulations thereof, and acted with full knowledge, and with the advice and counsel of able and eminent lawyers, and that in regard to the matter she was advised by the chancellor. It is not to be conceived that under such circumstances she was deceived or misled with regard to the terms and stipulations of the agreement she entered into. In fact, a careful reading of her cross bill shows that she does not at this time make any distinct and specific averment sufficient to show that she was misled. By the agreement she received the sum of \$8,750 in cash. In resisting the execution of the decree, and in seeking to prevent her forced compliance therewith, she makes no offer or suggestion to return the said sum; much less does she pay or tender it in court.

The answer and cross bill in the case show that the facts she deals with are in relation to agreements, promises, and representations contemporaneous with the agreement itself, and not incorporated therein, or in relation to assurances given by Thomas P. Stovall subsequent to the agreement that the sale of the Wimberly lands, as then advertised, should take place. In short, we find that the facts properly pleaded in the answer and cross bill fall far short of presenting a case sufficient to warrant a court of equity in setting

aside or modifying the final decree based upon the agreements of the parties, or from enjoining the execution of the decree until the appellants shall do and perform some matter or thing not specifically provided for in said decree. The final decree which was entered in pursuance of the agreement with Mrs. Tarver, with full knowledge and under the advice of counsel, and under which she holds at this time, without offer to return, the sum of \$8,750, provides:

"And it shall be further decreed that the said J. F. F. Brewster is entitled to the immediate possession of all of said lands, except the six hundred and fifty acres known as the 'Old Homestead,' or 'Hunter Place,' before mentioned, subject to the contract and agreements heretofore entered into in relation thereto between said Brewster, Stovall, and the Union Real-Estate Trust Company; and that process may forthwith issue to put said Brewster in possession of same; and that the said Annie P. Tarver and William B. Tarver shall forthwith vacate the house and premises now occupied by them by leave of the court heretofore granted, and shall surrender all possession, title, interest, and claim of, in, or to any and all of said lands except said six hundred and fifty acres of said Wimberly place; but that said J. F. F. Brewster and said Union Real-Estate Trust Company shall execute a deed relinquishing to said Annie P. Tarver, or to whomsoever she may designate in writing, all their right, title, and claim in or to the said six hundred and fifty acres known as the 'Old Homestead,' or 'Hunter Place,' the same to be surveyed and platted so as to include the piece of woodland next to Tarversville, and run off in one body, in such shape as Mrs. Tarver may direct. And that it shall be further decreed that all the parties to said proceedings in said court shall pay the fees of their own respective solicitors, and that no costs shall be taxed therefor."

In our opinion, Mrs. Tarver shows no legal or equitable ground against the execution of this decree, and ought not to be permitted to have an injunction restraining the execution of the decree until the appellants shall do or perform some matter not specified in the decree, and, so far as the record goes, of very doubtful agreement elsewhere.

The only proceeding pending in the court at the time of the filing of the intervention of H. S. Wimberly was the petition of the appellants for a survey of the 650 acres, as provided in the final decree, so that the appellants could make the deed in conformity with the terms of the decree. Neither the title nor possession of the land in which said Wimberly claims an equity could have been affected in any degree by the determination of the issue thus raised, nor could any decree rendered be binding on him. It is very doubtful whether he had any right to intervene in the case. The deed of March 14, 1882, from H. S. Wimberly to John R. Wimberly, was a warranty deed, absolute on its face, and the intervener relies solely upon an alleged oral understanding to reconvey, and upon his alleged continued possession. Section 1950 of the Code of Georgia is as follows:

"To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized. 1st: A promise by an executor, administrator, guardian or trustee to answer damages out of his own estate. 2d: A promise to answer for the debt, default or miscarriage of another. 3d: Any agreement made upon consideration of marriage except marriage articles as hereinbefore provided. 4th: Any contract for sale of lands, or any

interest in or concerning them. 5th: Any agreement that is not to be performed within one year from the making thereof."

Section 3800 of the Code of Georgia provides:

"That parol contemporaneous evidence is inadmissible generally to contradict or vary the terms of a valid written instrument."

It is contended, however, that under the circumstances of the case parol evidence is competent to change the character of the deed of 1882 from H. S. Wimberly to John R. Wimberly into a mortgage or deed of trust, under which H. S. Wimberly really held, as of right, the equity of redemption. If it is admitted that this was true at the time of the deed, still the subsequent transfer and assignment of 1886, in writing, by J. R. Wimberly to Mrs. Tarver, with the admitted consent, if not procurement, of Henry S. Wimberly, of the equity of redemption, and the acceptance by Henry S. Wimberly of Mrs. Tarver's note in payment therefor, would seem to have divested all right and title of H. S. Wimberly. If this be so, it is clear that the alleged rescission afterwards of this transfer of the equity of redemption cannot be set up by parol. It was an independent transaction in regard to the land, and the proposition to establish such rescission and the continued equity in H. S. Wimberly by parol is far from being a proposition to show by parol that an equitable interest was reserved to H. S. Wimberly at the time he parted with the legal title, or that the absolute deed then executed was intended to operate as a mortgage. If we go further, and admit, for the purposes of the case, that there is some equity of redemption still left in Henry S. Wimberly, still, as the validity of the debt of \$5,000 secured by the deed of J. R. Wimberly to Charles L. Flint, and now amounting to about \$9,000, and wholly unpaid, is admitted, then, under sections 1969 and 1970 of the Code of Georgia, which provide that a deed with a bond to reconvey passes the title to the vendee until his debt is paid, it is clear that without payment of the debt the said H. S. Wimberly can assert no title to the land in controversy cognizable either in a court of law or a court of equity.

The decree of July 25, 1893, appealed from, restraining J. F. F. Brewster, the New England Mortgage Security Company, and the Union Real-Estate Trust Company from taking out and having executed a writ of assistance on the decree of January 10, 1891, should be reversed, with costs, and the cause remanded to the circuit court for such further proceedings not inconsistent with the views herein expressed; and it is so ordered.

AMES et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, D. Colorado. February 8, 1894.)

No. 3,013.

RAILROAD COMPANIES—RECEIVERS—CHANGING RULES AND WAGES.

The court will not confirm the action of the receivers of an insolvent railroad system in reducing the wages and changing the regulations for the conduct of its employees which were in force when the property was

turned over to the receivers, where the employes affected were not notified of the proposed changes, and given an opportunity to point out, before the receivers, any inequalities or injustice that will be caused by them.

In Equity. Petition filed by Oliver Ames, 2d, and others, receivers, against the Union Pacific Railway Company and others.

The receivers herein appear by petition, and state that, by their general order No. 1, they have retained in their employment all of the officers, employes, agents, and servants who had been theretofore in the employment of the corporations defendant, but that such employment had ceased, and a fresh engagement began, when the defendant companies went into their hands; that because of the general decline of the earning capacity of the company's system of railways, and of the task imposed upon them of conducting the insolvent trust estate in their care in as economical manner as possible, they investigated the rules, regulations, and schedules governing their employes prior to the time the companies came into their hands, as also the wages paid, and made a comparison with the wages paid upon other railway systems similarly situated, and found that the wages they paid were in excess of the prevailing rates paid for similar classes of labor in a like region of country. The receivers pray for an order sustaining them in their revision and rearrangement of the rules, regulations, schedules, and wages of the nonsalaried employes, as promulgated, and that the employes be directed to refrain from conspiring with intent to induce a strike upon the system of railways operated by the receivers.

J. M. Thurston, for receivers.

T. Fulton Gantt, John H. Croxton, and George L. Hodges, for defendants.

Before HALLETT and RINER, District Judges.

RINER, District Judge. In the matter of the petition filed by the receivers of the Union Pacific system in relation to certain proposed schedules affecting the employment of men engaged in the service of the various railway and telegraph lines composing that system, now in the hands of the receivers, we are of opinion that it is necessary to the proper and economical management of the property now under the control of the receivers to adopt and maintain rules, regulations, and schedules governing the conduct, employment, and establishing the wages of all persons employed in the service of the receivers, in and about the management, operation, and conduct of the business in relation to these railways and properties. It appears by the pleadings in this case that, prior to the appointment of the receivers, certain rules, regulations, and schedules, the result of negotiations between the managers and employes of the various railway lines entering into and composing the Union Pacific system, touching the matter set forth in the petition, were in force, and were recognized and acted upon by the employes and managers of the railway companies composing this system.

Our own view is, if the receivers deem it advisable and necessary to the proper and economical management of the properties in their hands that rules, regulations, and schedules different from those in force at the time the property came into their hands should be adopted, that a hearing upon the question of proposed changes thought necessary by the receivers be had, in the first instance, before the receivers; that the employes affected by any proposed

change be notified, and be given time and opportunity to point out to the receivers any inequality in schedules, or any injustice which they may think will be done them by any proposed change in the rules and regulations. If, after such negotiation and consultation, the receivers and employes are unable to agree as to any proposed rule, regulation, item, or items of the wage schedules proposed, let the matters of difference be referred to the court for final determination. If this course is pursued, the result, in our judgment, will be that after a full consultation and discussion of these matters, between the receivers and employes (meeting, as they will, in a spirit of fairness upon both sides, determined to do the right thing, under existing conditions), very little will be left to the determination of the court, in relation to this matter. This course not having been pursued in this instance, we deem it advisable to deny the prayer of the petition of the receivers; and an order to that effect will be entered in this district, and in the district of Wyoming.

SHWARTZ et al. v. H. B. CLAFLIN CO.

KERN et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. December 23, 1893.)

No. 159.

1. DESCENT AND DISTRIBUTION—LIABILITY OF HEIRS—ABATEMENT.

Under Code Pr. La. art. 120, which declares that, upon death of a defendant pending suit, the suit shall not abate, but shall be continued against his heirs by notice served on them, but that judgment can only be given against each heir for his share of the inheritance, it is error to render judgment against all the heirs in solido on service of notice, but without appearance by them, or entry of default against them, or submission to a jury of any issue as to their heirship and responsibility.

2. ATTACHMENT—DISSOLUTION—INSOLVENCY—FEDERAL COURTS.

Under Rev. St. U. S. § 933, declaring that attachments in the federal courts shall be dissolved by any cause which would dissolve similar attachments in the state courts, an attachment is dissolved in Louisiana by an accepted cession of the attached property to creditors under the insolvency laws of that state.

3. SAME—PLEADING.

Such a dissolution of an attachment may be pleaded by the insolvents and by interveners who claim the attached property as purchasers prior to the cession, as well as by the syndic.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Attachment by the H. B. Claflin Company against H. Kern & Son. An intervention was filed by A. Schwartz & Sons. Plaintiff obtained a personal judgment. Defendants and interveners bring error.

Suit was brought by the H. B. Claflin Company against H. Kern & Son, in the circuit court of the United States, to recover \$21,728, due the plaintiff on certain notes. A writ of attachment issued, under which the marshal seized the stock of goods in the store formerly occupied by defendants. Schwartz & Sons were also made garnishees, as alleged debtors of Kern & Son. On the 23d of February, 1892, the day after the seizure, Schwartz & Sons filed a

petition of intervention, claiming to be owners of the goods seized, and, on the day following, obtained a release of their property upon executing a forthcoming bond in favor of the marshal in the sum of \$35,000. They also made answer to the garnishment. On the 4th of March, Kern & Son filed an exception to the suit, alleging that they had been granted a respite by the state court, and at the same time moved to dissolve the attachment. On the 5th, H. B. Claflin Co. filed a general denial to the intervention of Shwartz & Sons, coupled with a special allegation that the property seized was the property of Kern & Son, and liable to be attached for their debts. The motion of Kern & Son to dissolve the attachment, upon the issues then presented, was tried by a jury, and the attachment sustained. On December 6, 1892, Shwartz & Sons moved to dissolve the attachment on the ground that the defendant had been adjudged insolvent by the state court, and on the 10th of December supplemented this motion with another, referring to the cession of December 8, 1892. On December 6, Victor Mauberret, alleging himself to be provisional syndic, moved to set aside the attachment for the same reason. The court also on the same day gave judgment against Kern & Son for the amount of the debt. On the 8th Kern & Son moved for a new trial, which was granted on the 28th. Thereupon, all parties, by a stipulation dated January 10, 1893, waived trial by jury, and submitted the main cause, together with the intervention of Shwartz & Sons, for trial by the court. On the same day H. B. Claflin Co. discontinued the garnishment proceedings against Shwartz & Sons. On March 3, 1893, Kern & Son presented and asked leave to file a motion to dissolve the attachment, setting up their adjudication as insolvents. Leave to file was granted April 21st. The case then stood in this attitude: At issue between the Claflin Company and Kern & Son as to the debt, and upon the motion to dissolve the attachment; at issue between the Claflin Company and Shwartz & Sons on their intervention, and on their motion to set aside the attachment. Upon these issues the cause was tried before the court, and submitted March 3, 1893. On March 10th following, the counsel for plaintiff, in writing, suggested to the court that since the trial and submission of the cause Emile Kern, a member of the firm of H. Kern & Son, and one of the defendants, had departed this life, as appeared by affidavit presented, and on further suggesting to the court that said Emile Kern died intestate, that he was unmarried, and that his sole heirs were Henry Kern, his father, and Mrs. Henry Kern, his mother, and that they, being the heirs of said deceased, should be made parties to the cause, it was ordered "that Henry Kern and Mrs. Henry Kern be made parties hereto; that a duly-certified copy hereof be served upon them, and that whatever judgment be rendered in this cause be rendered for or against said heirs representing said Emile Kern;" and on the same day a copy of the said motion was served upon both Mr. Henry Kern and Mrs. Henry Kern, but neither thereafter appeared in said cause as heirs or representatives of Emile Kern, nor was any default entered against them, nor any issues as to their said heirship and responsibility in the case submitted to a jury. The court, upon consideration, April 21, 1893, filed the following document, headed "Opinion of Court, Finding of Fact, and Conclusions of Law":

"Circuit Court of the United States, Eastern District of Louisiana.

"H. B. Claflin Co. v. H. Kern & Son (A. Shwartz & Sons, Interveners).

No. 12,059.

"Billings, Judge. On February 20, 1892, the following contract was entered into between the defendants and interveners:

"Agreement.

"This agreement, entered into this 20th day of Feb., 1892, between H. Kern & Son, of the first part, and A. Shwartz & Sons, of the second part, witnesseth: The said H. Kern & Son agree to sell to said A. Shwartz & Sons, who bind themselves to purchase, the entire stock in trade, merchandise, fixtures, and all the appurtenances of the dry-goods store, corner of Canal and Dauphine Sts., with no other exception than one iron safe, one desk, and one stove. This sale is to be made on the following basis, viz.: First. All piece goods

having over ten yards and all other merchandise upon which the cost price shall be marked to be taken at said cost, less ten per cent. upon the aggregate amount. Second. All remnants or piece goods measuring less than ten yards shall be taken at the selling price, less fifty per cent. upon the aggregate amount. Third. All piece goods measuring more than ten yards and other merchandise upon which the cost price is not marked shall be taken at the selling price, less twenty-five per cent. upon the aggregate sum. Fourth. The invoices for all goods in transit, purchased by said H. Kern & Son, shall be turned over to the purchasers, who, upon delivery of said goods, shall assume the amount of said invoices, and be responsible therefor. Fifth. All the furniture, tools, and fixtures (save those above mentioned) shall be accepted for the price of one thousand dollars. Sixth. In order to expedite the ascertainment of the price of the within sale, the said parties of the first and second parts shall put at once as many clerks as they may deem necessary (satisfactory to both parties) to measure all unmeasured piece goods and count all other merchandise; thereupon persons representing both parties shall call off the said merchandise to others likewise representing both parties (in such manner as complete fairness shall exist), who shall enter the merchandise in books numbered alike, a copy of which to belong to either party. As soon as the entire stock shall have been thus entered, the parties of the first and second part shall proceed, without unnecessary loss of time, to the ascertainment of the value of said stock of merchandise on the basis above established, which value shall be thereupon paid in cash by said A. Schwartz & Sons to said H. Kern & Son. Seventh. The book accounts are not included in this sale, but shall remain the property of said H. Kern & Son, and, for the purpose of facilitating the settlements of said firm and the collections, they shall be allowed the use of space within the building for a reasonable time, free of rent. Eighth. The said A. Schwartz & Sons shall enter into immediate possession of the said stock of merchandise, and be permitted to dispose of the same as they may deem best, after the said goods shall have been duly entered as stipulated in paragraph sixth; nor shall any delay in the ascertainment of the total of the amount of the present sale delay the delivery of said goods to said A. Schwartz & Sons. Ninth. The lease to the building shall be transferred to said A. Schwartz & Sons by said H. Kern & Son, who shall obtain the consent of the owner thereto. Tenth. In order to bind the present sale and agreement, the said A. Schwartz & Sons have presently paid to the said H. Kern & Son, who acknowledge the receipt thereof, the sum of forty thousand dollars. It being well understood that in the event the stock, etc., hereby sold should be found, under the present agreement, to be worth less than that sum, the said H. Kern & Son shall make good the difference; likewise, should the said stock, etc., be found to exceed the amount herein paid, the said A. Schwartz & Sons shall pay said difference to H. Kern & Son, as soon as ascertained. [Thirty-three words erased, null and void.] At the moment of signing it was agreed that in case of disagreement, in the carrying out of the present agreement, between the parties of the first and second parts, the matter in difference shall be submitted to arbitration; Henry Beer to act on the part of H. Kern & Son, and Gus. Lehman, Sr., to act on the part of A. Schwartz & Sons, these two to appoint an umpire, the parties to abide by the award of the majority of the arbitrators.

"Signed in presence of

"F. J. Dreyfous.

"G. Lehman.

H. Kern & Son.

Emile Kern.

A. Schwartz & Sons.'

"The 20th of February fell on Saturday. At from half past seven to eight a. m. on Sunday morning, February 21st, the measuring and counting of the merchandise commenced; it was continued during Sunday and into Monday. The levy of the attachment by the marshal was made on Monday afternoon between 2:15 and 2:30. As to the time when the measuring, counting, and entering in the nine books duplicated, without the extension of the price, were completed: On this issue, on the part of the interveners, 29 witnesses were called. Nineteen testify that they, individually, completed their work, before the time of the levy of the writ, one testifies that he does not remember the time, one testifies that his work was completed on Monday evening,

or after the levy, four, who were not engaged in taking the inventory, and who were not there Sunday or Monday, but reported Tuesday for work, did not know of their own knowledge the time that the inventory was completed, but didn't see any inventorying going on in their department, one testifies that the inventory was completed before the levy, and the two Messrs. Schwartz's testimony is to the effect that, while the entries were not entirely completed, there being some things left unfinished, the entries were made before the levy. On the part of the plaintiff, 16 clerks testify that they completed the measuring and the counting and entering not till after the time of the levy, one testifies that he completed his work before the levy, one testifies that the clerks were measuring and counting goods after the levy, and two do not remember the time. The chief deputy marshal testifies that the measuring was going on after the levy was made. Another deputy testifies that they were unrolling goods and taking down goods from the shelves and placing them on the counter. He says he judges they were measuring. A third deputy, who was not there Monday, but was there Tuesday, does not testify as positively as the others, but says they were taking down goods from the shelves and putting them on the counter, but does not testify that on Tuesday they were counting or measuring. Capt. Donally, the United States marshal, testifies that Monday evening he was at the store, and heard them quarreling and contending about the quantity or measurement of goods. The senior Mr. Kern, one of the defendants, testified that the measuring and the counting were concluded at 5 or 6 o'clock Monday evening. It is to be observed that twenty-three witnesses testify to the completion of the measuring and counting before the levy of the writ; 24 testify, to the contrary, that the levy was made before the counting or measuring was finished. Of the 23 witnesses, 21 were clerks now in the employ of the interveners, and two were the interveners. Of the 24 witnesses nine were in the employ of the defendants, eight were formerly, but not now, in the employ of the interveners, two are now in the employ of the interveners, four were the marshal and his deputies; the remaining one was the senior defendant, Kern. This summary shows that the preponderance of testimony is against the claim of the interveners, and in favor of that of the plaintiff, and I find, as a fact, that the levy of the writ of attachment was made before the measuring, counting, and entering, without extension of the price of the goods, was completed. I find further, as facts, that on Saturday two checks, amounting in the aggregate to \$40,000, were delivered by the interveners to the defendants as the estimated price of the whole stock of goods agreed to be sold. That on Sunday morning the defendants delivered the keys of the store to the interveners, who opened the store with them on Monday morning. That on Monday, after the levy of the writ of the plaintiff, neither of the two checks having been presented for payment, and not having been paid, an agreement was entered into between the interveners and the defendants that the whole of the purchase price of the goods sold, except the twenty-five hundred belonging to G. Lehman, should be deposited with and held by F. J. Dreyfous in trust, to protect A. Schwartz & Sons from loss in case their title to the stock of goods should not be maintained. That it appears from the evidence that from this amount so deposited with Dreyfous, payments were made on the drafts of the defendants, so that the amount was reduced to \$27,415.56, down to May 2, 1892, and that subsequently this last amount was turned over to W. S. Benedict, Esq., who received the same, and holds and has paid a portion of the same, as appears from his statement:

"The H. B. Clafin Co. v. H. Kern and Son et al. No. 12,059. U. S. Circuit Court.

"Statement of W. S. Benedict.

"There was no written contract respecting the trust established by H. Kern & Son, in view of the attachment, to protect A. Schwartz & Sons. The check for \$37,500, which has been offered in evidence, was held by F. J. Dreyfous as trustee under this trust, and from its proceeds various payments were made by H. Kern & Son down to May 2, 1892. Mr. Dreyfous, having retired from the trust, the balance of \$27,415.56 was turned over to me as

money of H. Kern & Son, to be held in trust for the same purpose, viz. to protect A. Schwartz & Sons from danger of double liability in the premises.

By consent of H. Kern & Son, the following sums were paid from the said fund of.....	\$27,415 56
viz.: (1) Stenographer's fees.....	\$ 368 15
(2) J. A. Mercier, rent due by H. Kern & Son on the Canal street store up to sale of Feb. 20, 1892.....	7,083 33
(3) P. Roberts & B. Titche, attorneys of H. Kern & Son.....	1,000 00 8,451 48
Balance	\$18,964 08

"A balance of \$18,500, funds of H. Kern & Son, is held by me under the trust to protect A. Schwartz & Sons in the premises. The further balance of \$404.08 is also in my hands, less payments for disbursements incidental to the trust. W. S. Benedict."

"That it also appears that the defendants, after their insolvency, gave information as to this amount so held, surrendered by Mr. Dreyfous and Mr. Benedict to the insolvency court, and the terms and conditions upon which it was deposited and held. The facts as to the defendants' adjudication as insolvents and the proceedings in the insolvent court appear in the findings of the court upon the motions for a new trial filed December 17, 1892, which are adopted and made part of these findings. Upon these facts two questions arise: But for the peculiar arrangement as to the disposition of the price of these goods, and laying that for the time being out of consideration, would the sale have been complete? and would the title to the goods have passed to the interveners? There had been a delivery symbolical and actual; \$40,000 had been given in checks as the estimated price which was to be ascertained by measuring and counting, and the price increased or diminished, and paid or returned, accordingly. I think, laying aside the consideration of the agreement as to price, the case of *Shuff v. Morgan*, 9 Mart. (La.) 592, is in substance this case. In each case there was a delivery, and nothing remained to be done but the ascertainment of quantity. Articles 2458 and 2459 are but re-enactments of articles 6 and 7 under title 6, p. 346, Code 1808. In the case of *Shuff v. Morgan*, the court held that the rule *res perit domino* was a general but not a universal one; that, with complete title in the vendee, for him to run the risk of the destruction of the property sold was of the nature, but not of the essence, of the contract of sale, and that the reservation by the statute of the risk in the vendor did not prevent the title to the thing agreed to be sold passing to the vendor so as to prevent a creditor of the vendor from making a valid attachment. There is nothing peculiar in the provision in the contract of sale in this case. It was in substance the same as in *Shuff v. Morgan*. The whole effect of paragraph 8, when considered in connection with paragraph 6, is that the stock of goods was sold, and the title was vested in the vendors, the interveners. There was to be a tale of the goods to determine the exact amount of the price. The case of *Shuff v. Morgan* was decided in the year 1824, and has never been overruled or called in question. So that, so far as concerns the provision as to the tale, the property would have passed. There remains the question as to what the court must say as to the effect of the arrangement about the price. The facts necessary to be considered are these: A debtor is in failing circumstances; a sale of his whole stock of goods is made. The consideration is \$40,000. For this amount, checks are given. Before the checks are paid or presented, a creditor levies an attachment. By a secret agreement between the seller and the purchaser, the whole price (\$40,000) is placed in trust in the hands of a third person to indemnify the purchaser against loss by service of the attachment. The legal effect of such a qualification of an agreement to sell is to subordinate the question of who shall receive the consideration to the question, as to the validity of the sale. The trustee holds in trust for the vendor in case the sale shall be held to be valid, and for the vendee in case it shall be held to be void, and it

is a secret trust. In the eyes of the creditors the property has been placed beyond the reach of the creditors by the sale; by this secret trust the consideration for the sale also is placed beyond their reach. It is a sale if the attachment is defeated, and no sale if it is maintained. To render a sale valid there must be price. That price cannot conditionally belong to the purchaser. Nor can the indications of a payment be held out which are not according to fact, when the necessary effect of such indications must be to baffle the creditors of the vendor. I think such a transaction, before the checks have been paid, ingrafts onto the sale a qualification which becomes a part of the original agreement of sale, and characterizes it precisely as if it had been made along with it, and that courts must declare a transaction with such a feature invalid and ineffectual to defeat the rights of the attaching creditor to the extent of his attachment. The conclusions of law from the facts above found are: (1) That the attachment was dissolved by the insolvency proceedings in which the defendants made, and the proper court accepted, a surrender, of all their property. Section 933, Rev. St., 9 Stat. 213, 214, especially the intent and meaning of the statute as shown in the title and as declared in the body of the act. (2) That the plaintiffs have and recover against the defendants \$21,728.00, with interest as prayed for in their petition, and their entire costs in the cause and upon the attachment up to the time of the surrender, without any lien or privilege resulting from the attachment. (3) That the intervention of A. Schwartz & Sons be dismissed, and that they pay the costs of the intervention. The court finds as further facts, as follows: That Monday, February 22, 1892, was a legal holiday, and, under the state law, the banks in New Orleans were closed. Also, that the interveners' store on the corner of Bourbon and Canal streets was burned on the 17th of February, 1892, and that they were seeking for another store and stock of goods to continue their business and employ their clerks.

"[Signed]

Edward C. Billings, Judge."

Upon this opinion, findings, and conclusions of law, formal judgment was rendered the same day in favor of H. B. Claflin Co., plaintiffs, against H. Kern & Son, and in solido against Henry Kern and against the legal heirs and representatives of Emile Kern, made parties in this cause, in the full and entire sum of \$21,722, with interest, etc. This judgment gave no privilege upon the goods attached, but contained the following special clause: "It is further ordered, adjudged, and decreed, for the reasons assigned in the opinion of the court filed this day, that the agreement of February 20, 1892, herein, did not transfer to the interveners, A. Schwartz & Sons, the property attached, so as to affect the rights of plaintiffs as attaching creditors of the defendants herein, and that the said intervention be, and the same is hereby, dismissed at interveners' cost." The November term of the circuit court ended April 22, 1893, the day said judgment was signed. But on the 2d day of May, the circuit judge made and filed additional findings of fact. The record shows that these additional findings were made at the request of counsel for H. B. Claflin Co. and against the objections of Schwartz & Sons at the time the writ of error in this case was applied for, and that the filing of them was duly excepted to by Schwartz & Sons. H. Kern & Son, Henry Kern and Mrs. Henry Kern, and Schwartz & Sons have brought the case here by writs of error. The errors assigned by Schwartz & Sons are as follows: "(1) The court, having found, as a matter of fact and as a conclusion of law, that the attachment issued herein was set aside and dissolved by the insolvency and cession of the defendants in the cause, under the insolvent laws of Louisiana, in the state court, (No. 33,424, civil district court, parish of Orleans,) on the 8th of December, 1892, erred in proceeding to adjudicate on the title of the interveners to the property seized under the said process of attachment. (2) The court, having found the attachment herein was set aside and dissolved December 8, 1892, erred in not directing the delivery of the property attached to the interveners, from whose possession it was taken. (3) The court, having found as a matter of fact and law that the attachment herein was dissolved and set aside December 8, 1892, erred in assuming to decide on the title of interveners to the property which had been seized under said attachment, when there was no longer any issue remaining in the cause as to

such title. (4) The court erred in decreeing that the sale of their stock of merchandise, and the delivery thereof by the defendants, H. Kern & Son, to the interveners, A. Schwartz & Sons, did not vest the title thereto in said interveners; and the court erred in dismissing their intervention. (5) The court erred in decreeing that the agreement of February 20, 1892, herein, did not transfer to the interveners the property attached so as to affect the rights of the plaintiffs as attaching creditors of the defendants herein. (6) On the facts found and conclusions stated by the court, and the motions pending in the record, the court erred in not formally decreeing in the judgment that the attachment was dissolved and set aside December 8, 1892, by the insolvency and cession of the defendants in the cause in the civil district court for the parish of Orleans, No. 33,424. (7) The finding of facts having been made, and the judgment therein having been rendered on the 21st day of April, 1893, and signed on the 22d day of April, 1893, at and during the November term of the circuit court, which expired on the 22d day of April, 1893, the court erred in amending said finding of facts, and in finding additional facts, against the objections of the interveners, after said term had passed, and ordering the same to be filed at the April term following, to wit, on the 2d day of May, 1893."

The errors assigned by H. Kern & Son and Henry Kern and Mrs. Henry Kern are as follows: "(1) The court erred in rendering any judgment against Mrs. Henry Kern and against Henry Kern, as heirs of Emile Kern, or as legal representatives of Emile Kern, inasmuch as they were, as such heirs, never made parties to these proceedings. (2) The court erred in rendering any judgment against said Mrs. H. Kern, as heir or legal representative of said Emile Kern, because there were no proceedings conducted contradictorily with her in this cause. (3) The court erred in rendering judgment against said H. Kern and Mrs. H. Kern as one of the heirs or legal representatives of Emile Kern, because no evidence whatever was offered, nor is there any evidence whatever in the record, to show or establish that said Mrs. Kern is the heir or one of the heirs of said Emile Kern, or that she is the legal representative of said Emile Kern, or has in any manner accepted his succession. (4) The court erred in rendering judgment against said Mrs. Henry Kern, as heir or legal representative of Emile Kern, because plaintiff does not allege that she is the succession representative of Emile Kern, or that she has accepted his succession. (5) The court erred in rendering judgment against said Mrs. H. Kern in solido with H. Kern & Son and H. Kern and Emile Kern, because, if sued as the heir, she could under no circumstances be condemned for more than her virile share. (6) The court erred in rendering a judgment against said Mrs. H. Kern as heir or legal representative of Emile Kern, because she could, under no circumstances, be responsible for more than a virile share, and there is no evidence to show the number of heirs. (7) The court erred in rendering any judgment against Mrs. H. Kern as heir or legal representative of Emile Kern, because no jury was impaneled to render a verdict, nor did she appear in said cause, nor was there any waiver of any jury. (8) The court erred in rendering any judgment in the cause, either against the said Mrs. Kern or against the firm of H. Kern & Son, by reason of the failure to make the succession of said Emile Kern, or the legal representatives of said Emile Kern, parties; and, by reason of the failure of the plaintiff to procure a waiver of a jury, in consequence thereof the entire judgment is a nullity."

W. W. Howe, S. S. Prentiss, W. S. Benedict, John D. Rouse, and William Grant, for Schwartz & Sons.

Percy Roberts and Bernard Titcher, for Kern & Son.

H. L. Lazarus, I. D. Moore, and J. N. Luce, for H. B. Claffin Co.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). Although the record is so voluminous and, according to the brief and arguments

submitted, it is bristling with points of law, novel and otherwise, we find it necessary to consider two questions only.

1. Henry Kern and Mrs. Henry Kern complain of a judgment against them as the legal heirs and representatives of Emile Kern, condemning them in solido to pay the claim of Claflin & Co. against Henry Kern & Son, when, as the record shows, they have had no day in court, no default entered against them, nor the verdict of any jury holding them liable. It appears they were brought into the case after hearing and submission upon an assertion that they were the sole heirs of Emile Kern, deceased, and by notice only that they were made parties to the cause, and that any judgment rendered in the case should be rendered for or against them as heirs representing Emile Kern. Article 120 of the Code of Practice of Louisiana contains provisions as follows:

"If one against whom there was a cause of action die leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased. If the suit had already been brought against the deceased and he had not answered, it shall not be interrupted, but it shall be continued against the heir by a more citation or notice served on him to that effect within the delay for original citations according as the distance may be from his domicile to the court where the action has been brought. If, on the contrary, the deceased have two or more heirs the plaintiff may proceed personally against each of them for the share which he inherits, if that share be sufficiently known and ascertained by an inventory or partition, otherwise they can only be sued each for a virile portion, that is to say for an equal part of the debt dividing it in as many parts as there are heirs. If the suit had already been commenced against the deceased it shall be continued against his several heirs by citing each of them separately as if there were only one; but judgment can only be given personally against each for his hereditary share or virile portion, as above provided."

In the case in hand, the last provision quoted applies. Under that provision it was necessary to have cited each of the heirs of Emile Kern to answer the demand against them as heirs and legal representatives of Emile Kern, giving them, and each of them, an opportunity to admit or deny heirship, or to make any other defense personal to Emile Kern, deceased, or to themselves, which the case might warrant. This appears perfectly clear, as the law of Louisiana is well settled that the heirs are not liable for the debts of their ancestor unless they shall accept his succession. It is also clear, from the provisions referred to, and other articles of the Louisiana Code of Practice, as well as the Civil Code of Louisiana, that judgment can only be given against heirs when found liable for the debts of their ancestors for their virile portions. See Code Pr. La. art. 113; Civ. Code, arts. 1426, 1427. The judgment complained of is erroneous, both because the parties condemned did not have their day in court, and because they were condemned beyond the limits allowed by law, if liable at all.

2. The case shows that after the attachment sued out in this case against Henry Kern & Son, and before final trial and judgment, the said Henry Kern & Son made a voluntary cession of their property to their creditors under the insolvency laws of Louisiana, that this voluntary cession prior to final trial and judgment was brought to the attention of the court by suitable pleadings

both by A. Schwartz & Sons, interveners, and by Henry Kern & Son, defendants, and thus the question is fairly presented on the record as to the proper disposition of the attachment issued in the case. Authority to issue attachments in common-law causes in the circuit courts of the United States is found in section 915 of the Revised Statutes, which reads as follows:

"In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

Were this section standing alone on the subject, a very strong argument could be made that, wherever attachments in the state courts of Louisiana are affected after issuance by matters arising under other laws of the state, the circuit courts would be bound to give the same effect to such matters as would be given them in the courts of the state in similar cases, and therefore that, where an attachment would be stayed or dissolved by a subsequent cession under the insolvent laws prior to final judgment in the state courts, the same effect would necessarily follow in the circuit courts of the United States. To make the matter clear, however, that such effect is to be given, the act entitled "An act to make attachments which are made under process issuing from the courts of the United States conform to the laws regulating such attachments in the courts of the states," approved March 14, 1848 (9 Stat. 214, and now substantially embodied in section 933 of the Revised Statutes), was enacted. That statute is as follows:

"That whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by the plaintiff in such process, and any contingency occurs by which, according to the laws of a state, such attachment would be dissolved upon like process pending in, or returnable to, the state courts, then such attachment or attachments made upon process issuing from, or pending in, the courts of the United States within such state shall be dissolved, the intent and meaning of this act being to place such attachments in the courts of the states and the United States upon the same footing: provided, that nothing herein contained shall interfere with any existing or future law giving priority in payments of debts to the United States."

From this it is perfectly clear that attachments sued out of the circuit courts of the United States are placed upon the same footing with regard to all incidents thereto as like cases in the courts of the state. It is well settled in Louisiana that attachments issued in civil cases give rise to no lien prior to final judgment, and the law of Louisiana is that, when there is a cession to creditors under the insolvency laws of the state, the court accepting the cession shall order all proceedings, as well against the person as against the property of the debtor, to be stayed, and that, after such cession and acceptance, all of the property of the insolvent

debtor mentioned in the schedule shall be fully vested in the creditors (see sections 1790, 1791, Rev. St. La.); and, further, that all suits which may have been brought anterior to the failure shall be transferred to the court in which the insolvent debtor shall have presented his schedule, and shall be continued against his syndic. See Id. § 1816. The uniform construction of these laws in the courts of the state of Louisiana is to the effect that all attachments issued against the property of a debtor who thereafter makes a cession of his property under the insolvent laws are by operation of law perpetually stayed. See 1 Hen. La. Dig. "Insolvency," pt. 4, pp. 686-688, and cases there cited.

The question involved here was presented to the circuit court of the United States for the eastern district of Louisiana in the case of *Lafolnye v. Carriere*, 24 Fed. 346. It was there held—the circuit and district judges concurring—that the effect of the cession and proceedings thereon under the insolvent laws of Louisiana was to stay and practically dissolve all attachments then issued against the surrendering debtor, and against all property surrendered in the state court by the direct operation of the state laws, and in the national courts by the force of section 933, Rev. St. The same question was presented to the supreme court in the case of *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565, and that court said, through Mr. Justice Woods:

"It is not disputed that if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the dissolved firm of A. Carriere & Sons was a valid surrender of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana, the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments. Code Pr. art. 724; *Hanna v. His Creditors*, 12 Mart. (La.) 32; *Fisher v. Vose*, 3 Rob. (La.) 457; *Collins v. Duffy*, 7 La. Ann. 39. And, by section 933 of the Revised Statutes of the United States, an attachment of property upon process instituted in any court of the United States is dissolved when any contingency occurs by which, according to the law of the state where the court is held, such attachment would be dissolved upon the process instituted in the courts of said state."

The opinions in these well considered and adjudicated cases in the circuit and supreme courts of the United States, which would ordinarily settle the matter, are attacked with much plausibility by the defendants in error (*Tua v. Carriere*, as obiter) urging that, as a matter of fact and law, attachments sued out of the courts of Louisiana, and not merged in final judgments, are not dissolved by operation of law, but merely stayed in the courts of the state when the debtor makes a voluntary cession under the insolvent laws of Louisiana, and the proper proceedings are had and the proper orders are made in the court accepting the cession. This contention was presented to the learned judge of the circuit court, who disposed of it, in his opinion on the motions for a new trial and for dissolving the attachment (which opinion was made by reference to part of the "Opinion, Findings of Fact, and Conclusions of Law" found in the transcript), as follows:

"But it is urged on the part of the plaintiff, there is no provision of the Louisiana law which dissolves the attachment and destroys the lien; that the

obstacle to the attachment in the state court is that the suit of the attaching creditor is stayed, and he has an attachment, but he is simply prevented from enforcing it, and that there is no such obstacle in the United States courts, by reason of their being established under a distinct sovereignty, and that here the creditor, having no such impediment, can proceed and make his inchoate or conditional lien or privilege absolute. The answer to this is the statute. By its declared intent, the creditor with an attachment in the United States court must be put on the same footing with the creditor with an attachment in the courts of the state. In these last the creditor's attachment is perpetually stayed. It follows that somehow in the courts of the United States it must be also rendered inoperative, and, since the creditor here may proceed to judgment in order to prevent the inequality which the object of the statute was to prevent, he must proceed here with the attachment dissolved. In other words, it is only by dissolving the attachment in this court that the equality of rights of the creditors can be preserved."

With these views we entirely concur.

Defendants in error further contend that neither the interveners, Shwartz & Sons, nor the defendants, Henry Kern & Son, have any interest or right to suggest or plead the insolvency proceedings, and that no syndic representing the creditors of Henry Kern & Son (which syndic, it is said, is the real party in interest) has appeared in the case. This contention was sustained in the lower courts so far as the defendants, H. Kern & Son, were concerned, but rejected as to the interveners, "because the said interveners were parties to the cause, and have an interest in the dissolution of the attachment sufficient to make them parties to the litigation of this question." It seems clear that if the rights of the interveners are favorably affected or determined by any fact outside of the record, they must have a clear right to plead such fact. As to H. Kern & Son, defendants in the court below, the reason given why they should not be allowed to plead a fact which would defeat an attachment run against them is that, by reason of their insolvency in the state court, they are civilly dead. As the plaintiffs in the court below are demanding a judgment against H. Kern & Son, and this notwithstanding the well-known insolvency proceedings of the state court, we think they are not in a position to maintain, nor can we agree, that Henry Kern & Son are civiliter mortuis. Aside from all this, it is to be noticed that the insolvency proceedings in the state court were called to the attention of the court by the intervention of the provisional syndic, and that, although the said provisional syndic has since disappeared from the case, he has left of record in the cause, beyond dispute, the fact that, prior to the final trial and judgment in the court below, Henry Kern & Son did make a cession under the insolvency laws of Louisiana which was accepted in the proper court of the state. The first conclusion of law found by the circuit court is that the attachment was dissolved by the insolvency proceedings in which the defendants made, and the proper court accepted, a surrender of all their property. It is apparent that the omission to carry this conclusion into the judgment so as to make it effective was inadvertent, and should be corrected in the judgment given in this court. The attachment dissolved, the court has neither interest

nor jurisdiction to inquire into the ownership of the property attached, and the intervention of Shwartz & Sons naturally falls.

The judgment of the circuit court should be reversed, with costs to be adjudged against the H. B. Claffin Company, and the cause remanded, with instructions to dissolve the attachment against H. Kern & Son at their costs, and as of date December 6, 1892, and to dismiss the intervention of A. Shwartz & Sons at their costs, but without prejudice to any right the defendants, H. Kern & Son, or the syndic of the creditors of H. Kern & Son, insolvents, may have in or to or arising out of the forthcoming bond given by interveners in the case; and to otherwise proceed in the cause as law and justice may seem to require, but not inconsistent with the views expressed in this opinion, and it is so ordered.

POWELL v. UNITED STATES.

(Circuit Court, M. D. Alabama. February 19, 1894.)

No. 89.

UNITED STATES MARSHALS—DEPUTIES—COMPENSATION—ACTION FOR.

Rev. St. c. 16, on the subject of fees, provides for fees to United States marshals, but not for fees to deputies. Section 841 provides for a proper allowance to their deputies, which "shall in no case exceed three-fourths of the fees and emoluments received and payable for the services rendered" by such deputies. Section 787 requires the marshal to execute all precepts directed to him; and, in practice, the accounts of the deputy for services rendered go into the account of the marshal as vouchers for money paid out by him in the execution of process, and are so allowed by the courts. *Held*, that a deputy marshal is not an officer of the United States, and cannot maintain a suit against it for services rendered.

At Law. On demurrer. Petition of John W. Powell to recover of the United States compensation for services rendered by him as a deputy marshal.

George H. Patrick, for petitioner.

Henry D. Clayton, for the United States.

BRUCE, District Judge. The first question raised by the demurrer to the plaintiff's petition is: Can a deputy marshal maintain a suit against the United States for compensation for services rendered as such deputy marshal? The proposition of the counsel of the government upon the demurrer is: That there is no privity between the deputy marshal and the government, and that his relation, or rather his want of relation, to the government is such that, whatever his relation to the marshal and his remedy against him may be, he cannot maintain a suit for services rendered under an appointment as deputy marshal against the government of the United States. The petitioner, in reply to this view, brings to the attention of the court the statutes bearing upon the subject, and insists that these statutes show that the deputy marshal is, in contemplation of the law, an officer of the United States; that his services are rendered for the United States, are accepted by the United

States, and that the United States is therefore liable directly to him for compensation for same, and under act of March 3, 1887, he can maintain suit for his compensation, as he seeks to do in this case.

A brief examination of the statutes upon this subject is necessary. The marshal appoints one or more deputies. Rev. St. § 780. The deputy takes oath of office, but does not give bond, as the marshal does, to the United States. Section 783. The marshal is required to attend the sittings of the courts, and to execute all lawful precepts directed to him, and issued under the authority of the United States. Rev. St. § 787. Chapter 16, on the subject of fees, provides for marshal's fees, but not for fees to deputies. The marshal is the executive officer of the court, the precepts of the court are directed to him, and he executes process himself in person, or through his deputies. The deputy obtains the process from the marshal, executes it in the name of the marshal, and so makes his return, and he is paid for his services by the marshal. Section 841, Rev. St., provides compensation for the marshal "and a proper allowance to his deputies," and says:

"The allowance to any deputy shall in no case exceed three fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the attorney-general whenever the returns show such rate to be unreasonable."

With the limitation that he, the deputy marshal, is not to receive more than three-fourths of the fees received or payable for the services rendered by him, he may have any contract with the marshal for his compensation which they may see fit to make; but the fees go to the marshal, whether earned by him in person or by deputy. The accounts of the deputy for services rendered go into the account of the marshal as vouchers for money paid out by him in the execution of process, and are so presented and allowed by the court, and audited by the accounting officers of the treasury department at Washington. A system has grown up under the statutes for the keeping, rendering, and auditing of accounts of marshals, and of other officers of the courts, and the act of March 3, 1887, did not change this system. The act did not create new causes of action, but only made the government suable upon existing causes of action, and was not intended to change the system of keeping the accounts of this class of public officers. If the contention of the petitioner be correct, then accounts of every person, not only acting as deputy marshal, but persons who had, for instance, furnished the marshal teams and vehicles for transportation to serve process, would have a charge against the government, for which they could maintain suit. The clerks in the marshal's office, and all persons for whom vouchers for moneys paid are presented by the marshal for allowance, would all have claims against the government, for which suit might be maintained.

We have seen that the statute provides fees for the marshal, not for the deputy, and it may be noted that in section 841 the language is:

"The allowance to any deputy shall in no case exceed three fourths of the fees and emoluments received or payable for the services rendered by him."

Not that the fees are payable to the deputy; that is not the word of the statute, and the language employed seems to exclude such an idea. The most that can be said is that the deputy has an interest in the fees of the marshal, and the limitation of three-fourths to the deputy (one-fourth going to the marshal, doubtless in consideration of his responsibility) may be reduced by the attorney-general, showing that in contemplation of the law there can be no severance or division of interest in the fees between the marshal and his deputies for which each can severally make claim, but the fees (the fees and emoluments of the office) go to the marshal, and he is provided with an allowance from which he pays his deputies for their services. It seems clear from a consideration of the statutes on the subject, and the manner in which the accounts of the marshal are made up and settled by the accounting officers of the treasury department, that the deputy marshals are not employed by the government, and have no contract, either express or implied, with the United States in virtue of which they can maintain suit for services rendered in the execution of process.

Passing now from the statutes to the decided cases, it does not seem that any of them sustain the position here taken by the petitioner. The case of *U. S. v. Strobach*, 48 Fed. 902, is relied on to show that a deputy marshal is an officer of the United States, but the question there was as to whether he was indictable for the presentation of a false account for services, and not the question involved in this case. Even if a deputy marshal may in some sense be called an officer of the United States, he is not a salaried officer, and is paid not more than a fixed proportion of the fees of the marshal earned by him, the deputy. The case of *Fitzsimmons v. U. S.*, 4 C. C. A. 589, 54 Fed. 812, relied on by the petitioner, was an action by the United States against the marshal and the sureties on his official bond, in which it was held that a "United States marshal, in his character as a disbursing officer of the government, is not entitled, as between himself and the government, to credit for unpaid disbursements, or for services rendered and fees earned by his deputies, unless he has paid for the same."

Some other questions were passed upon in the case, but those are not the questions in the case at bar at all, and there is nothing in the opinion of the court that supports the contention of the petitioner here. It is not deemed necessary to refer here to other cases cited by the plaintiff's counsel. The case seems to fall within the influence of the general rule stated in *Anson on Contracts*, at page 774, thus: "A person who is not a party to a contract cannot be included in the rights and liabilities which the contract creates, so as to enable him to sue or be sued upon it." The supreme court of the United States said in the case of *U. S. v. Meigs*, 95 U. S. 748, where the court was considering a claim of a deputy clerk of the United States court: "It is very difficult to see how this deputy clerk can be called an employe of the government at all." So, in the case at bar, it is difficult to see how a deputy marshal can be called an employe of the government at all, or that he is more or

other than an employe of the marshal. The counsel for the government have cited many cases in support of their contention, among which are: *U. S. v. Meigs*, supra; *U. S. v. Driscoll*, 96 U. S. 422; *Wallace v. Douglass*, 103 N. C. 19, 9 S. E. 453; *Bollin v. Blythe*, 46 Fed. 181, and other cases more or less in point; and the conclusion reached is that a deputy marshal cannot maintain a suit against the United States for services rendered. Other questions were argued at the hearing, but it is not necessary to pass upon them in this case. The demurrer of the government to the petition of the plaintiff is sustained.

HICKS et al. v. NATIONAL LIFE INS. CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 70.

1. INSURANCE—CONTRACT—WHAT LAW GOVERNS.

A Vermont corporation did business as a life insurance company in the state of New York, having an office and an agent in New York city. A resident of New Jersey effected insurance in such company by delivering, through his agent, an application to its general agent in New York, and receiving the policy there from such general agent. *Held*, that the contract of insurance was a New York contract, and subject to the laws of that state as to forfeiture for nonpayment of premiums.

2. SAME—FORFEITURE—NONPAYMENT OF PREMIUMS—NOTICE—TIME.

Laws N. Y. 1877, c. 321, prohibits the forfeiture of life insurance policies for nonpayment of the premiums when they fall due, unless the insurer shall mail to the assured a notice of the amount of the premium due, with other particulars, in which case the policy shall be void for failure to pay within 30 days after the notice is mailed, with a proviso that the insurer may serve such a notice on the assured "at least thirty days prior to the day when the premium is payable," in which case default on that day will avoid the policy, according to its conditions. On November 2, 1891, an insurer mailed to one of its policy holders a notice that his premium would be due December 2, 1891, and that nonpayment on that day would avoid his policy. *Held*, that the notice was ineffectual, for the day of mailing is to be excluded, in the computation of time, and hence it was not mailed 30 days prior to the day when the premium fell due.

8. SAME—SURRENDER OF POLICY.

An insurance policy had been pledged as collateral security for a loan. After the death of the assured, his executors tendered to the creditor the amount of the loan, with interest, and demanded the policy. He refused to deliver it up, and the insurer, with full knowledge of these facts, procured a surrender of the policy from the creditor to itself. *Held*, that the tender extinguished the creditor's title to the policy; and, as the insurer acquired by the surrender no greater rights than he had, it is liable to an action at law on the policy by the representatives of the assured.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Horace L. Hicks and Henry W. Taft, executors of Walter Rae, against the National Life Insurance Company. The trial court directed a verdict for defendant, and the plaintiffs bring error.

The plaintiffs in error were the plaintiffs in the court below, and brought the action to recover the amount of 10 endowment bonds, in substance policies of insurance, for \$1,000 each, issued by the defendant March 2, 1888, payable at the expiration of 20 years to Walter Rae, or, in case of his death before that time, to his legal representatives, in 60 days after presentation of satisfactory proofs of his death. Rae died December 10, 1891. Proofs of his death were duly served upon the defendant, and the 60 days having expired, and payment been refused by the defendant, the suit was brought. It was alleged in defense that the policies had become forfeited and void, according to their conditions, by reason of the nonpayment of installments of annual premiums which became due and payable upon the 2d day of December, 1891. Evidence was introduced by the plaintiffs upon the trial for the purpose of showing that there had been a course of previous dealings between the defendant and the assured which amounted to a waiver of strict performance of the condition, and authorized the assured to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The plaintiffs also insisted that there was not a forfeiture of the policies, because the defendant had not complied with a statute of this state enacted in 1877, which declares that no life insurance company doing business in the state of New York shall have power to forfeit any policy thereafter issued, by reason of nonpayment of any annual premium or interest, or any part thereof, except as follows: "Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid, by the company, or by an agent of such company, or person appointed by it, to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when a premium will fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty days, prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for." At the time of issuing the policies, and from thence until after the death of the assured, the defendant was doing business as a life insurance company in this state, and had an agent and an office at the city of New York. The assured was a resident of New Jersey, and effected the insurance by delivering through his agent an application at New York city to the general agent of the defendant, and receiving the policies there from the general agent. On the 2d day of November, 1891, the agent of the defendant mailed at New York city a notice properly addressed to the assured at his place of residence, which was as follows:

"You are hereby notified that a premium of \$116 will fall due December 2nd, 1891, on contract No. 31756/60 & 31803/7 issued by the National Life Insurance Company of Montpelier, Vt., provided all previous premiums have been paid and said contract is otherwise in force, and that, unless the premium is paid when due, the policy, and all payments thereon, will become forfeited and void. This notice will not affect the provisions in said contract for 'cash surrender value,' 'extended' or 'paid-up' insurance. This premium is payable at the home office, but, for

the convenience of the assured, payment may be made, on or before the day when due, by currency, draft, check, or post-office order, to

Joseph Wells, General Agent,
"151 Broadway, New York."

It also appeared upon the trial that, at the time of the death of the assured, one Wells held the policies by an assignment made to him in July, 1891, as collateral security for a loan made by him at that time to the assured. After the death of the assured, his executors tendered to Wells the amount due upon this loan, and tendered to the defendant the amount due it for unpaid premiums upon the policies. Wells, however, refused to accept the tender, and, for a consideration paid to him by the defendant, surrendered the policies to the defendant. The defendant knew at the time that the plaintiffs had tendered to Wells the amount due on the loan. At the close of the evidence the trial judge directed the jury to render a verdict for the defendant, and granted the plaintiffs an exception. Error is assigned of this ruling.

Raphael J. Moses, Jr., for plaintiffs in error.

I. Newton Williams, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit JUDGE, after stating the facts as above, delivered the opinion of the court.

We do not deem it necessary to consider the question whether the evidence respecting the prior course of dealings between the assured and the insurer was sufficient to authorize a finding by the jury that strict performance of the condition for the payment of the premiums had been waived. We think the statutory conditions had not been fulfilled which were an indispensable preliminary to the right of the defendant to treat the policies as forfeited; and, this being so, the plaintiffs were entitled to enforce the policies, whether there had or had not been a waiver.

If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of Assurance Soc. v. Clements, 140 U. S. 226, 11 Sup. Ct. 822. The delivery of the policies in the present case was made in New York city to an agent of the assured, and, in legal effect, was as if the assured had been personally present, and received them. Then, and not before, the policies took effect.

The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the state treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through nonpayment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice. Carter v. Insurance Co., 110 N. Y. 15, 17 N. E. 396; Phelan v. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter v. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; McDougall v. Assurance Soc., 135 N. Y. 551, 32 N. E. 251; De Frece v. Insurance Co., 136 N. Y. 144, 32 N. E. 556. The stat-

ute declares, in substance, that no policy shall be forfeited for default in the payment of premium until a notice shall have been served by mail upon the assured, calling his attention to the day when a payment has fallen or will fall due, and to the consequences of a default. The notice must state that, unless the premium shall be paid within 30 days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have 30 days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited "until the expiration of thirty days after the mailing of such notice." The proviso authorizing an advance notice to be given is not intended to curtail the privilege of the assured, but gives the insurance company the option of serving the notice with the same effect as though served subsequently to a default; but it provides that this notice shall be served at least 30, and not more than 60, days prior to the day when the premium is payable.

The notice in the present case, having been given before the time when the premium was payable by the contract, should have been served at least 30 days prior to the 2d day of December. If, according to the meaning of the statute, the mailing of that notice upon the 2d day of November was not a notice of at least 30 days, the notice was insufficient. It has always been the rule in New York, in applying statutes in which a computation of time is to be made from the day on which an act is to be done, to exclude the day. Thus, in *Small v. Edrick*, 5 Wend. 137, the statute was that a notice should be served "at least fourteen days before the first day of the court," and the notice was served on the 9th day of November, the 23d day of the same month being the first day of the court; and it was held that this was a notice of only 13 days. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of the contract or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time, and so be excluded from the computation." *Cornell v. Moulton*, 3 Denio, 16. The principle of computation is thus expressed in *Sheets v. Selden's Lessee*, 2 Wall. 177.

"The general current of the modern authorities upon the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and to include the last day of the specified period."

Excluding, as must be done according to the authorities, the day of mailing in the computation in the present case the notice was served by the defendant 29 days, and not "at least thirty," prior to the time when it should have been in order to effectuate the forfeiture. The defendant is in no better position than it would be if no notice had been mailed.

It is insisted for the defendant in error that the trial judge should have directed a verdict for the defendant because, the

policies having been pledged to Wells and by him surrendered to the defendant, the plaintiffs could not maintain an action at law for the moneys due upon them. There is no merit in this position. Upon the tender to Wells of the amount due him upon the loan for which he held the policies as collateral his title was extinguished and immediately vested in the plaintiffs, and he would have been liable for the value of the policies in an action of conversion. The defendant acquired no better rights by obtaining a surrender from him, with knowledge of the facts, than he himself had. *Talty v. Trust Co.*, 93 U. S. 321. The judgment is reversed.

PENNSYLVANIA R. CO. v. REED.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 72.

1. RAILROAD COMPANIES—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE.

In an action for personal injuries it appeared that plaintiff attempted to board a moving train while she was incumbered with luggage, and that when she was about to step from the car step to the platform the brakeman, apparently intending to assist her, pushed her so violently that she fell to the platform. She testified that she was standing on one foot on the step at the time, holding to the rail at the side and about to raise the other foot to the platform. The brakeman denied the whole transaction. *Held*, that it was a question for the jury whether the plaintiff had safely established herself on the car steps, or whether the interference of the brakeman was necessary to assist her in so doing.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Even though it was negligence in plaintiff to attempt to board the train while in motion, if she had established herself safely on the car step the interference of the brakeman was unnecessary, and there was no contributory negligence on her part to defeat her right to recover for negligence or undue violence on his.

In Error to the Circuit Court of the United States for the Eastern District of New York.

Action by Martha Reed against the Pennsylvania Railroad Company. There was judgment for the plaintiff below, (56 Fed. 184,) and defendant brings error.

Henry G. Ward, for plaintiff in error.

George H. Pettit, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. Of the errors assigned, those only have been relied on in argument by counsel for the plaintiff in error which are alleged to have been committed by the trial judge in refusing to direct a verdict for the defendant, and in his instructions to the jury. The action was brought to recover damages for personal injuries sustained by the plaintiff while she was entering a passenger car of one of the defendant's trains. The complaint

alleged that, while she was attempting to get on board, "one of the defendant's brakemen carelessly, negligently, wrongfully, and violently pushed the plaintiff in such a manner that she was thrown down on the car, and received severe injuries." It appeared upon the trial that the plaintiff had purchased a ticket at Christiana which entitled her to a passage upon the train to Parkesburgh. As she approached to take passage the train started, but she nevertheless attempted to get on board. She was carrying a satchel, an accordion box, and a parcel. According to her testimony, while she was upon the car step, and about to step upon the rear platform, the trainman standing at the side of the car, apparently intending to assist her, pushed her with such violence that she fell upon the platform. She testified as follows:

"When I was in the act of standing up, holding on the rail at the right hand, and standing on one foot, the left foot was already raised to make the second step, and just then I suppose he thought I would fall off, and, in his way to assist me, he gave me a gouge in the back. I came right down."

Her testimony also tended to show that, in falling, she struck upon the accordion box, and received internal injuries. At the close of the testimony the defendant requested the court to direct a verdict in its favor, upon the ground that the plaintiff was guilty of contributory negligence. This request was denied, and an exception granted. The trial judge instructed the jury that there was no question of contributory negligence in the case; that if the plaintiff was thrown down by the moving train she had no right of action; but if the trainman pushed her with some undue violence, more than was necessary to properly assist her in boarding the train, and she was injured in consequence of that, the defendant was liable. The defendant excepted as follows:

"To so much of the charge as separates the act of the plaintiff getting on the moving train from the act of the brakeman pushing her, on the ground that the whole transaction is a single one, and should be considered, together, and that contributory negligence is imputable to the plaintiff from the beginning to the end."

The evidence for the plaintiff was consistent with two theories of the facts. It was such as to warrant a finding by the jury that the plaintiff had not succeeded safely in establishing herself upon the steps, and was in danger of falling off when the trainman intervened; or to warrant the conclusion that she was safely upon the steps, and there was no occasion for the interference of the trainman. Upon the first of these two theories, the question of the contributory negligence of the plaintiff was an important one. Upon the second theory, it was not. The trial judge assumed that the plaintiff was guilty of negligence in attempting to board the train, under the circumstances of the case. The evidence indicated that she attempted to do so while the train was in motion, and while she was incumbered with luggage. It also indicated that, while she was clinging with one hand to the railing of the car, and attempting to swing herself up the steps, the trainman, supposing that she needed assistance, and intending to assist her, used less care

than was necessary in doing so, and pushed her with such force that she fell upon the platform. If the testimony authorized the inference that there was not any need of assistance, it certainly authorized the contrary inference; and the jury would have been justified in finding that the trainman, in what he did, was trying to save her from the perils of her own imprudence. Upon this theory of the case, it cannot be doubted that it was the duty of the trainman to endeavor to assist her. It would have been the duty of any person to do so, as an act of common humanity, even though such a person were a stranger. If the plaintiff was injured in consequence of the negligence of the trainman while he was performing a duty which her own negligent conduct had imposed upon him, her negligence was a contributory cause of the injury, and she was not entitled to recover. The rule that contributory negligence on the part of the plaintiff will not disentitle the plaintiff to recover, if it appears that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence, is not fairly applicable to such a state of facts. That rule is but the statement, in another form, of the proposition that antecedent misconduct or negligence on the part of the plaintiff, such as could not have had any influence upon the conduct of the defendant, will not defeat a recovery for injuries inflicted by the immediate negligence of the defendant. It is a misuse of terms to speak of such negligence as contributory negligence. The true meaning of the rule is best understood by a reference to some of the adjudged cases in which it has been declared. One of the earliest cases is *Davies v. Mann*, 10 Mees. & W. 546. In that case an animal which had been left fettered in the highway was run over by the defendant's wagon, which, without its driver, was proceeding along the highway. The court held that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover. In *Austin v. Steamboat Co.*, 43 N. Y. 75, the plaintiff's vessel had been negligently run aground near the channel of a navigable river, and subsequently the defendant's vessel, while navigating that part of the river, was, by the carelessness of those in charge, brought into collision with the grounded vessel. It was held that the fact that the injured vessel was negligently where it ought not to have been was no defense against the negligence of those navigating the colliding vessel. The court, referring to the argument that the plaintiff's negligence contributed to the injury, said:

"Negligence must be proximate and not remote. It must be a negligence occurring at the time that the accident happened. Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury."

In *Radley v. Railway Co.*, L. R. 1 App. Cas. 754, the plaintiffs had negligently obstructed a railway siding belonging to them, but used both by them and the defendant, and the defendant's engineer, discovering that there was an obstruction, stopped his engine,

backed, and then, without attempting to ascertain the cause, went ahead, with the view to remove the obstruction by force, thereby injuring the plaintiffs' property. The court held that there was a question for the jury whether, although the plaintiffs had been guilty of negligence, the defendant might not have avoided the accident by the exercise of due care and diligence. In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, the plaintiff was injured by the violent striking of the defendant's steamboat against the plaintiff's wharf, and it was insisted that, notwithstanding the negligence of the defendant, the plaintiff could not recover because he was standing in a dangerous position upon the wharf. The court said:

"The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet the officers of the boat knew just where and how he stood, and might have avoided him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts the defendant's negligence was the proximate, direct, and efficient cause of the injury."

These adjudications, and many more that might be cited, are but the applications, under varying circumstances of fact, of the doctrine tersely stated in *Williamson v. Barrett*, 13 How. 109, as follows:

"A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself."

The learned trial judge apparently assumed that, although the plaintiff had been negligent in attempting to board the moving train, she had succeeded, and was safely on the car, and the interference of the trainman was obviously unnecessary. In that view of the facts, any officious interference with her by the trainman was unjustifiable, and the defendant was responsible for any injuries which the plaintiff received by his misconduct, notwithstanding her antecedent negligence. The plaintiff, although, according to her testimony, she supposed the trainman intended to assist her when he pushed her, did not know what his motive was. The trainman, in his testimony, denied the whole transaction. Because the evidence in the case was sufficient to authorize the jury to find that the facts were as they were thus assumed to be, the instruction which had been requested to direct a verdict for the defendant was properly refused, and the instructions given to the jury by the trial judge were not obnoxious to the exceptions taken by the defendant. If an instruction had been requested for the defendant that the plaintiff was not entitled to recover if the jury found that the trainman carelessly injured the plaintiff, while attempting to assist her when she was in danger of falling off the steps of the car, because her own carelessness was a contributory cause, the refusal to give such an instruction would have been error. So, too, had the defendant excepted to so much of the charge as instructed the jury that plaintiff was entitled to recover if the brakeman pushed her with "more force than was necessary to properly assist her on the train;" and the court had thereupon failed to qualify the charge with the further statement that

they must be further satisfied that the force used was more than a reasonably prudent man would have used under the circumstances, the exception would be sound. But the instruction requested required the court to inform the jury that, in any state of the facts, the negligent act of the plaintiff in attempting to board the train would preclude her from a recovery. Such an instruction could not have been properly given, and the refusal to give it was not error.

It is possible that the jury may have found that the defendant was liable because the trainman conducted himself with a zeal disproportioned to the emergency, and, while attempting to perform the duty made necessary by the plaintiff's own imprudence, used unnecessary violence; but they may have founded their verdict upon the other theory of the facts. This court has no power to grant a new trial in the exercise of discretion, and in actions at law can only determine whether error, raised by proper exceptions, requires the reversal of a judgment. The judgment is affirmed.

COHEN v. WEST CHICAGO ST. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. March 6, 1894.)

No. 109.

1. HORSE AND STREET RAILROADS—NEGLIGENCE—INSTRUCTIONS.

In an action against a street-car company for injuries received by plaintiff, caused by the car starting while he was trying to get on, it is reversible error for the court, after instructing the jury that if the car stopped a reasonable length of time, and plaintiff neglected to get on till the train had started, he could not recover, to omit to charge them to the effect that, even though the car stopped a reasonable time, yet if it started suddenly and violently, while plaintiff was in the very act of getting on, the company would be liable if its employes knew or ought to have known of his presence.

2. SAME.

Where the evidence shows that the train consisted of a grip and two trailers, and that plaintiff passed the trailers and endeavored to board the grip, it is error to assume in the instructions that plaintiff might have boarded one of the trailers, where the proof does not show whether the trailers could be entered from the side of the track on which plaintiff was standing, since the burden of proving contributory negligence is on the defendant.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action by Hymen Cohen against the West Chicago Street-Railway Company for personal injuries. Defendant obtained judgment. Plaintiff brings error.

A. B. Chilcoat and W. P. Black, for plaintiff in error.

Wm. B. Keep, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. It is proper here to call attention to the fact that this case has been submitted without objection upon several assignments of error founded upon objections to the charge of the court, covering several pages in the record, but in reference to which no exceptions were taken on the trial of the cause. This court cannot consider exceptions not made upon the trial, but which are taken for the first time upon a motion for a new trial, or in an assignment of errors drawn up after the writ of error has been issued, and the case brought to this court for review. Exceptions to the charge of the court must be taken on the trial, before the jury retire, and, if not taken then, cannot be considered and passed upon by this court. It would be very unfair to the trial court, as well as the opposite party, if counsel could draw up exceptions after the trial, in the privacy of his office, and, by embodying them in a motion for a new trial and in an assignment of errors in this court, have the same benefit from them as though taken in open court on the trial of the cause. The rule is too obvious to require any citation of authorities.

The action was brought to recover damages sustained by reason of an injury to the person of the plaintiff, received while attempting to board the defendant's cars in the city of Chicago. The plaintiff charges in his declaration that on March 31, 1891, while attempting to get upon the defendant's cars upon Madison street, a little west of Halsted street, and while he was embarking, and was in the exercise of all care, and without negligence or fault, defendant caused and permitted the car upon which the plaintiff was in the act of embarking to be suddenly and violently started forward without warning or notice to the plaintiff, by which the plaintiff was thrown from the car, his right foot being caught by the car, and he dragged some 20 feet, whereby he was greatly injured, his head being badly bruised, his right shoulder bruised and sprained, the small of his back sprained, his leg broken, and internal injuries sustained. On the trial there was the conflict of testimony so often witnessed in these cases. The plaintiff testified that when he came to the corner of Madison and Halsted streets he waited for the west-bound car, and when it came he gave a signal for the car to stop; that it slacked up for him to get on, and that, as soon as he got on the car with one leg, the car started, and he fell back in the middle of the street; that he was on the south side of Madison street, and that he got on the front grip, on the step; that, just as he got hold, the car started up, and he fell back; that the grip had a step running along the side of it, and he was trying to get on that step; that after he fell backward he lost consciousness, and on recovering saw a crowd of people; that the police were there, and he was taken to the county hospital; that his right leg was broken; and that he stayed at the hospital until May 7th, and then went home on crutches. On cross-examination he testified that the car stopped a minute or two before he got his foot on, but just as he was putting one foot upon the car it started. John Rosenthal, a witness for plaintiff, testified that he was sitting on one side of the car, on one of the open seats facing south, towards the direction from which the plaintiff came. Saw him attempt to get on the car. Saw him signal with something,

and the car stopped, and, before the young man got fully upon the car, the car, with full power, began to go, and the man fell down from the car, and the people began to halloo, and the car stopped a long way afterwards. That when the train started up, and the plaintiff fell off, it started off with full power. That the train had stopped about a minute, or a little more; not very long. That it did not give anybody a show to get on. Samuel Stulsoff's testimony is very similar: That he saw plaintiff give the signal to stop; that plaintiff was between the tracks at the time, and was west of Halsted and Madison about 20 feet; that the grip stopped, and the man took hold of the handle of the car, and put one foot on the car, on the step, and that then the car started, when the man had one foot on the grip; that the man fell, and there was a big alarm. Nathan Cohen testified that he saw the plaintiff step on the car, and the car just started with fair power, and he (witness) was frightened, and hallooted to the conductor, but he did not hear him; that the car dragged the plaintiff about 24 feet,—about to the alley between Halsted and Green streets; that the plaintiff was hauling himself with one hand, but could not hold on, as the train was too rapid, and he fell, and was dragged many feet. The defendant's testimony was directed to show that the plaintiff attempted to board the train while in motion, after it had left the corner of Madison and Halsted streets. John Salter, the conductor of the train, testified that there were in that train two cars and a grip. That he was on the first car back of the grip, and saw the accident. That he got to Halsted street about 10 minutes to 7 o'clock; took on passengers there; and he got the signal from the Ogden avenue car behind him to go ahead. That the whole train was west of Halsted street, and he passed the signal along, and they started up. That they took on 18 or 20 persons on the three cars at that place. That after they got started, looking south, he saw a man run between the tracks on the south side of the car. He got hold of the grip with one hand, and fell. That he then gave the emergency signal to stop. That he saw the man lying between the tracks, picked him up, and found he was hurt. That they were then near the alley, possibly 150 feet west of Halsted, about half way to Green street. That it was near the alley where the plaintiff attempted to get on. The other witnesses for defendant corroborated the testimony of the conductor.

The principal question which we are called to pass upon is whether or not the plaintiff's side of the case was fairly presented to the jury by the court in its general charge. The first assignment of error is that the charge of the court, in its entirety, is erroneous, in that it is highly argumentative, and manifestly unfair to the plaintiff. We cannot consider that question, because no proper exception was taken on the trial; and the same may be said of much that is relied upon in the third assignment of error. The only exceptions taken to the charge on the trial—and the record discloses but two—are covered by the second and third assignments of error. The second assignment of error is as follows:

"The declaration in this case alleged a right of recovery, for that the defendant caused its train of cars to be suddenly and violently started, with

a violent jerk, while the plaintiff was in the act of getting upon the grip car of said train, and when the fact that the plaintiff was so engaged in getting upon said train was known, or by the exercise of reasonable care might have been known, to the servants of the defendant in charge of said train. The evidence in the record was addressed to the support of this claim; but the entire charge ignored this ground of recovery, and the court refused to instruct the jury that if the defendant started its train while the plaintiff was in the act of getting upon its grip car, and when the defendant's servants saw the plaintiff so getting upon said train, or by the exercise of reasonable care might have so seen him, and by reason of the train so starting violently plaintiff was thrown down and injured, without negligence upon his part, then the plaintiff was entitled to recover. On the contrary, the court charged the jury in such a manner as to withdraw from the jury the consideration of, and to deny, the duty of the defendant to observe due care in starting its train, to see, by the use of all reasonable diligence, that no one was, at the time of starting the train, in the act of getting thereon."

The charge of the court was a general charge. No special instructions were asked for by plaintiff's counsel. Still it was the duty of the court fairly to present and submit to the jury the issues as they were presented by the testimony upon both sides. Each side had the right to have its case submitted to the jury as it was presented by the evidence; and if this was not done for the plaintiff, and proper exceptions were taken, he may avail himself of such exceptions, though no special instructions were asked. We are of opinion that the case made by the plaintiff was not fairly submitted to the jury, and that the exceptions taken on the trial reach this defect, because they called the attention of the court to the point during the giving of the general charge and at its conclusion. The exception taken at the close of the charge was as follows:

"Exception by plaintiff to said charge, and particularly to that part of the charge in relation to the plaintiff being able to get on some other car than the grip, and in fact that the charge did not present the right of the plaintiff to recover if the jury believed from the evidence that while the plaintiff was in the act of getting upon the car the defendant caused the same to be started suddenly, without warning, and with a violent jerk."

We think these exceptions sufficient to cover the particular points mentioned. They called the attention of the court to these defects in the presence of the jury, and gave the court an opportunity to remedy them if it felt so disposed. A better course, perhaps, would have been to have asked for special instructions, but we think it was not necessary.

The defendant's theory of the case was given to the jury over and over, to the effect that if the cars stopped a reasonable length of time for the plaintiff to get on, and he neglected the opportunity until the train had started, and then tried to get on while the cars were in motion, he could not recover. That was the defendant's case as presented by its evidence. But the plaintiff's case as made by his testimony was not fairly stated by the charge. The charge of the court seemed to go upon the theory that if the cars stopped a reasonable time, according to their schedule requirements, and the plaintiff did not embark within that time, the company could not be held for suddenly and violently, and without giving any warning, starting up the train while the plaintiff was in the act of

getting upon the cars, and while he had one foot upon the platform, and his hand on the railing. The court charged the jury that—

"It was the defendant's duty to stop cars a reasonable time to enable passengers desiring to leave the train to do so, and others desiring to board it to get on. What is reasonable time depends upon circumstances, the number of people to get off, and the number to board the train, and other matters. You are not to forget that these street cars are not operated as railroad trains are operated in the country; that is to say, their schedules do not permit them to stop so long at street crossings. They must stop at every crossing after clearing the street, and they must make their schedule time, which necessarily does not admit of long stops. The public is presumed to know this, and people are expected instantly to board the train, and those who desire to get off are expected to do so promptly. It is true, however, that it is the duty of the street-car company to stop its cars long enough to afford passengers a reasonable time to leave them, and others a reasonable time to board them. Bear in mind what I have already said to you, that it was the duty of the defendant to stop the cars a reasonable time,—long enough to afford the plaintiff and others fair opportunity to board the train. If the train stopped such a time, and then moved on, those in charge of it having no reason to believe that all who desired to board it had not done so, and the plaintiff did not take advantage of the opportunity afforded him, and attempted, for any reason, it matters not what, to go forward, and get on the grip while it was in motion, or just when it started, he was guilty of negligence. That is to say, that if the defendant afforded the plaintiff a reasonable opportunity to board that train in safety, and he did not avail himself of it, but attempted to get on after it had started, or just as it started, the defendant was not guilty of negligence, and the plaintiff brought the injury upon himself, and cannot recover."

This is undoubtedly good law so far as it goes, and it presented the defendant's case fully and fairly. But we take it to be good law also that, though the train stopped a reasonable time for the plaintiff and others to board it in safety, and the plaintiff did not, through inadvertence or his own negligence, avail himself of the opportunity thus afforded him, still if, while the cars were yet standing, and before they were started up, the plaintiff attempted to go on board, and while so doing, and after he had placed one foot upon the platform, without further fault on his part, and before he had reasonable time or opportunity to get upon the car, and while he was thus standing with one foot on the platform and the other upon the ground, with his hand grasping the railing, in the attempt to board the train, the cars were suddenly and without any warning started up with great force and with a violent jerk, which threw him to the ground, and caused the injury, the company would be liable if those in charge of and having the management of the train knew, or in the proper discharge of their duties ought to have known, of the presence of the plaintiff. The conductor of street cars, having the safety, and even the lives, of patrons in his keeping, has not discharged his whole duty to the public when he has stopped his train and waited what may appear, according to his schedule, a reasonable time for passengers to embark. He is bound to exercise the highest degree of diligence practicable in the circumstances—all the diligence reasonably in his power—to protect passengers and prevent accident. He is bound to know, when he starts his car suddenly and with full force,

that no person attempting to embark is at that moment with one foot on the platform and the other on the ground, and with his hand upon the railing, in the act of getting on board, or is otherwise in a position of danger.

There is, we think, another error in the charge to which exception was taken. The evidence showed that there was one car in the lead, called the "grip car," and two other cars behind, called "trailers." The plaintiff tried to board the grip car, and in doing so, it is claimed, passed by a portion of the other two cars. The court assumed in its charge to the jury that the plaintiff might have boarded either of the other two cars, and that he should have done so, because they were nearer to him. The court said:

"You will remember that the plaintiff said he was standing at or near Halsted street; that is to say, near where Madison street crosses Halsted street. It is not disputed, as I understand, that the rear of the last car had crossed Halsted street before the stop. The plaintiff testified that he was injured when he attempted to board the grip car, which was the forward car, which was certainly then some seventy feet west of Halsted street. If the train stopped there,—and there is no dispute on that point,—why was the plaintiff trying to board the grip car, the one furthest west? He said he stopped at the corner of Halsted and Madison to board the train when it came along. When it stopped, certainly one of the other cars must have been nearer him than the grip; and yet there is no dispute about the fact that he was injured when he attempted to board the grip. There is some evidence that he ran to get to the grip. I mention that as a circumstance. It is for you to say whether it is material. The evidence of the witnesses who stated that they saw the plaintiff apparently running past one of the cars to get to the grip is before you. Was it or not necessary, on his own statement, for him to move forward,—that is, westward,—to get on the grip? Was it or not necessary for him to pass the car next to the grip to get on the train, as the conductor of the car next to the grip said he did? Even if he was standing 15 or 20 feet west of Halsted street, he was certainly nearer the rear of the second car than he was to the grip car. Then why did he want to go down to the grip?"

Counsel for the plaintiff called the attention of the court to this part of the charge in these words:

"I think there will be no dispute—there was no proof made with reference to it, but I think it will not be disputed at all—that it is the custom always with these trains upon those double-track grips to keep up a gate on the trailers; in other words, to keep gates on the trailers closed on the side next the double track."

The court then remarked that it did not think there was any evidence of that kind, and did not modify the charge; and at its close, counsel, as we have seen, took exception to this portion of it. There could have been no presumption of fact, such as the court's charge proceeded upon, that the cars attached to the grip were open on the south side, so that they might have been boarded from that side by the plaintiff. There was no proof upon this point either way. This part of the charge bears upon the question of the contributory negligence of the plaintiff, and the presumptions on this question were in his favor, the burden being upon the defendant to prove such contributory negligence. We think that when the suggestion was made that it was the custom to keep the gates closed on the side next the parallel track, and exception taken to that part of the charge, as there was no proof offered on the

point, it should have been left to the jury, without assuming, as the court clearly did, that the defendant might have boarded one of the trailers, and was guilty of negligence if he failed to do so, and, instead thereof, passed by them to get upon the grip car in front. For these reasons we are of the opinion that the charge of the court in the particulars where exceptions were taken was erroneous, and that the judgment should be reversed, and a new trial granted.

SOUTHERN PAC. CO. v. BURKE.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 61.

MASTER AND SERVANT — INJURY TO BRAKEMAN FROM DEFECTIVE COUPLINGS—
QUESTION FOR JURY.

Plaintiff, a brakeman in defendant's employ, was required by its yard master to make a coupling between a caboose with an old-style draw-head and a train of seven sleepers with the Miller coupling. On the train pulling out, the caboose became detached, and the train was backed to enable him to recouple it. He went between the stationary cars, but found the link pin fast, and, while hammering it out, the train, without signal from him, suddenly backed, and crushed him. The engineer testified that he backed on signal from the rear of the train. The testimony showed that such couplings were not in their construction intended to be used together, and, in making connections with them, there was unusual danger; that they were, however, constantly used together by defendant; that plaintiff was acquainted with the company's rule in regard to making such couplings, and was following it when hurt; that he had been switching about two years, and had made such couplings only two or three times; that, had the caboose been coupled at the head of the train, there would have been much less danger, because the engineer could have seen and talked with the brakeman; that the pin used was a square pin, and had it been a round pin, fitting the hole, it could have been easily drawn out. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury. Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Robert S. Burke, the defendant in error, brought his action in the circuit court of the United States for the eastern district of Texas, at Galveston, against the Southern Pacific Company, plaintiff in error, to recover damages for personal injuries alleged to have been caused by the gross negligence of the company while he was an employé of the same, by which he lost his right arm, and suffered other serious injuries, to his damage \$10,000. The defendant company first filed a plea to the jurisdiction of the court, on the ground that neither the plaintiff nor defendant at the institution of the suit were resident citizens of the eastern district of Texas, which plea being overruled, the defendant company filed, under leave of the court, a demurrer and a general denial, and answered specially that Burke had been long in the service of the company as switchman; that he assumed all such risks as were incident to his employment; that he understood the nature and the extent of the service, and assumed all visible risks, whether ordinarily incident to the service or not, and all risks occurring through the carelessness, negligence, and unskillfulness of his coemployés in and about defendant's business, and all patent defects in the machinery, tools, cars, and appliances used on defendant's road; that defendant company used all proper care in procuring proper machinery and appliances, and skillful and experienced officers and laborers; that the machinery, track, and appliances were in

good order and suitable condition, and that the injury was caused by the want of care of the plaintiff, and in violation of the rules of the defendant company; and, further, specially answered that if any such injury occurred to plaintiff, as alleged, it was caused by the want of care of the coemployes in the employment of the defendant company, for which it was not liable. The defendant company also pleaded the statute of limitations for 12 months.

On the trial of the case, the cause was submitted to the jury on the issues joined, and on the following evidence:

"I was at that time about 19 years of age. I was employed by the defendant company as a switchman in its yards at Del Rio, Texas. Del Rio is an end of a division of the Southern Pacific Company. It is the end of the San Antonio division. Trains arriving at Del Rio from the east change crews. At about the hour of 7:30 or 8 o'clock p. m. on this night a train arrived at Del Rio from the east. It was an express passenger train, destined for California. As soon as this train arrived at Del Rio, and the train crew, conductor, engineer, and brakeman which had accompanied it to Del Rio left, it was turned over to Mr. Wade, the company's yard master at Del Rio, and the yard crew. I was one of the yard crew, working under Mr. Wade. This train consisted of an engine, a baggage and express car, seven Pullman sleeping cars, and at the end a caboose car, such as is used in the making up of freight trains. A caboose car is one which belongs to a freight train; a car in which the men belonging to a freight train sleep and ride. Engineer Norton relieved the engineer who brought in the express train. We received orders from Mr. Wade, the yard master, to back the train in on a siding, and detach the caboose car at the rear of the train therefrom, and to attach another caboose car which was in the yards thereto. This was done. I was ordered by the yard master, Wade, to make the couplings, and to place the caboose car in the rear of the seven Pullman cars. Pullman cars have what is known as Miller couplers. They are what is known as self-couplers, having a sort of goose-neck coupler with a lateral motion, and when two cars with Miller drawheads come together they couple themselves. The caboose car has the same drawhead as freight cars,—a stationary drawhead. Such drawheads were never intended to be coupled together, as the drawheads are wholly dissimilar, and in bringing two such drawheads together for the purpose of making a coupling there is great danger of the drawheads passing each other, and crushing the switchman. The only way the coupling can be made with reasonable safety is to take the link out of the stationary drawhead, set the pin in the stationary drawhead, put the link in the Miller drawhead, guide the link with the hand as the two cars are brought together, and put the link in the slot of the stationary drawhead. The concussion will cause the pin to drop as set in the stationary drawhead, and the coupling is made. It is an unusual thing in railroad service to couple passenger or Pullman cars onto cars having a stationary drawhead. I had been switching at the time of the accident about two years, and I had never made such a coupling more than two or three times. On this occasion, after the coupling between the rear Pullman and the caboose car had been made, the signal was given to the engineer to pull out of the yard, and in pulling out of the yard the caboose car became detached from the train. I signaled the engineer to stop, which he did. I then signaled him to back up, which he did. He knew from the signal which I gave him that the caboose car was detached from the rest of the train. He backed up until I signaled him to stop. I then went in between the rear Pullman and the caboose car to again couple them together. I found that the link was in the drawhead of the caboose car; that is, in the stationary drawhead. I had to get it out and put it in the drawhead of the Miller before I could make the coupling. I tried to pull the pin out. Found that it was stuck fast in the hole of the caboose drawhead, and I could not pull it with both hands. I found that it was a square pin, and, being in a round hole, the motion of the train had fastened it in the drawhead so that I could not pull it out without hammering it. As quick as I could I got a rock, and began hammering the pin so as to loosen it. This is the only way in which it could be gotten out. I was powerless to pull it out with my hands. While so engaged, the train sud-

denly came back without signal from me, for the purpose of making the coupling. The two drawheads passed each other, as they always do when brought together unless the switchman places the link in the drawhead of the Miller, and guides it, as the two cars come together, with his hand, into the slot of the stationary drawhead. The concussion caused the pin which was fast in the caboose drawhead to be driven through my right hand, and so crushed it that it had to be amputated. The two cars in coming together, in consequence of the passing of the two drawheads, were brought so close together as to crush me in between the two, breaking several of my ribs, and so injuring me as to cause me months of suffering, heavy expense, and loss of employment. Had the pin been round instead of square, I could have readily pulled it out with my hands. All of defendant's express passenger trains at that time, destined for California, had attached to them caboose cars. There was no reason for placing this caboose car in the rear of the seven Pullmans. It could have been put at the head of the train just as easy; and if it had been so placed, and it had come loose, I would have been, in recoupling it, within thirty-three feet of the engineer, so as to have talked to him and he to me, and not depended on signals. The risk to any switchman in making a coupling between a car with a Miller drawhead and a caboose car, the caboose car being placed at the head of the train instead of the rear, would have been very much less. The yard master, Wade, under whom I was working, was the highest authority of the railroad company at Del Rio. He had command of all the work done in the yards in handling and making up trains. He had authority to employ and discharge all men working in the yards. What I did I did under his orders.

("Witness is here shown rule No. 41, which is as follows: 'Coupling Cars. 41. Train men and other employes are required to exercise the utmost caution to avoid injury to themselves and fellow employes, and they are especially enjoined to use great care in coupling and uncoupling cars. Coupling cars by hand is strictly prohibited in all cases where a stick can be used to guide the link. Do not go between the cars to couple them unless the drawbars are known to be in good order. In coupling the Miller hook on to the other styles of drawbars, first insert the link in the hook, using the pin chained to the Miller platform.'")

"And he testified: 'I am acquainted with that rule. I was following it to the letter when I was hurt. I was doing my best to get the link out of the stationary drawhead in which it was fastened, so as to insert the link in the hook, using the pin chained to the Miller platform. The rule says that coupling cars by hand is strictly prohibited when a stick can be used to guide the link. This does not apply to making a coupling between a Miller drawhead and a stationary drawhead. In such a case you cannot guide the link with a stick. You have to guide it with your hand so as to insert the link in the slot of the stationary drawhead; otherwise, you will never make the coupling. I gave no signal to back the train when I was hurt, and no warning was given to me that the train was coming back until I was crushed between the two cars. The signal may have been given by Mr. Wade. He was back near where I was. I had been in railroad service when I was hurt since I was seventeen years of age, and had always given satisfaction as a switchman. My health was very seriously affected by the crushing that I got between the two cars when they came together. I am not as able-bodied and strong as I was when I was hurt. I was earning about \$75 per month when I was hurt. Since I got about I have tried to learn telegraphy, and I can render fair service as a telegraph station agent at a small station; but in doing telegraph work in a general office, when both hands are required, I am unequal to the task, as I can only use one hand, and that the left hand.'

"Plaintiff reads in evidence the statute of the state of Texas, as follows: 'Art. 4233. In forming a passenger train, baggage or freight or merchandise or lumber cars shall not be placed in the rear of passenger cars; and if they or any of them, shall be so placed and any accident happen to life or limb, the officer or agent who so directed, or knowingly suffered such an arrangement, and the conductor and engineer of the train shall each and all be held guilty of intentionally causing the injury and be punished accordingly.'

"Defendant's witness Norton testified as follows: 'I was employed on the night that Burke was hurt as engineer for defendant's company in the yards at Del Rio, Texas. I worked under the orders of the defendant's yard master, Wade. When a train came from the east, it was taken in charge by Yard Master Wade and his crew, the train crew leaving it at Del Rio. The yard master has charge of everything in the yards while trains are being handled and made up. He takes the place of the conductor that brought in the train, and no orders were followed except his. When the express passenger train came in on this night, I received orders from Wade (yard master) to back the train into the yards for the purpose of disconnecting the caboose car at the rear of the train, and attaching another caboose to the train in its place. The train was backed into the yards, the caboose disconnected, and another caboose attached. I received a signal to pull out. As I was pulling out I received a signal to stop, and another to back, and then to stop; all of which I obeyed. I understood from the signal that the caboose at the rear had become detached from the train, which was a long train of Pullman cars, seven or more. After standing still a few minutes, I got a signal, coming from toward the rear of the train, to back again for the purpose of making the coupling. This I did, which resulted in the injuries to Burke. There was no reason for placing the caboose at the rear of the train. It could have just as well been placed next to the engine, instead of at the rear of a passenger car; and, if it had been so placed, the risk to a switchman in making a coupling would have been greatly decreased. This would have placed the switchman the distance of the tender and one car length from me,—say about thirty-three feet,—which would have enabled him to have talked to me, and I would have taken my signals by words of mouth from him instead of from the rear of a long train of passenger cars at night by lantern. It was the custom of the Southern Pacific Company to send a caboose car along with each of its express passenger trains, and the cabooses were always placed in the rear of the passenger cars. The caboose car could have been placed at the head of the train with more ease than in the rear. The placing of it in the rear of seven passenger cars was done by orders of Yard Master Wade. There is a rule of the company which prohibits freight cars from being placed in the rear of passenger cars. Caboose cars are cars used on freight trains for the use of the train crews. They have the same drawheads as freight cars,—stationary drawheads,—but have the same trucks as are used on passenger cars.'"

—Which was all the evidence in the cause; and, the same being submitted to the jury, defendant (plaintiff in error here), by its counsel, requested the judge to instruct the jury to find a verdict for the defendant, which instruction was refused, whereupon defendant then and there excepted.

The jury found a verdict for the plaintiff in the sum of \$10,000, for which amount judgment was rendered against the defendant company. After vainly moving for a new trial, the defendant company sued out this writ of error, and brought the case to this court for review; making nine assignments of error, which may be summed up in the complaint that the evidence adduced on the trial was insufficient to warrant a verdict for the plaintiff, and that the court erred in refusing to instruct the jury to find a verdict for the defendant.

T. N. Waul, for plaintiff in error.

Wheeler & Rhodes, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge (after stating the facts as above). The substance of the error assigned herein is that the court overruled defendant's demurrer to plaintiff's petition, and refused to instruct the jury to find a verdict for the defendant, and left the question of negligence on the part of the defendant or contributory negli-

gence on the part of the plaintiff for their consideration. In *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, Chief Justice Fuller says:

"The case should not be withdrawn from the jury unless the conclusion followed, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

It is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably inferred, and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322. The judge below found that the facts were established from which negligence might be inferred, and the jury has said that negligence ought to be inferred from them; and we have only to inquire whether the judge erred in so submitting the question, or, in other words, whether, in any view which could be taken of the facts, as a matter of law recovery could be had. The facts are plainly and distinctly stated in the testimony, and it but remains to apply them to the law. It has been repeatedly declared by the supreme court that while employes must assume the risk incident to the positions which they accept, and to the negligence of fellow servants, to a certain extent, yet the servant does not assume risks arising from want of skillful collaborators, or defective machinery. In *Hough v. Railroad Co.*, 100 U. S. 213, Justice Harlan says:

"The obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employes; an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered."

—Citing and approving *Ford v. Railroad Co.*, 110 Mass. 241, where such doctrine is declared at more extended length. In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, Justice Field, in expressing the same idea, says:

"The servant does not undertake to incur the risks arising from the want of sufficient and skillful collaborators, or from defective machinery or instruments with which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provisions that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question."

Railroad Co. v. McDade, 135 U. S. 555, 10 Sup. Ct. 1044.

In this case the testimony was that the couplings were not in their construction intended to be used together, and in making connections with them there was unusual danger; that they were, though, habitually and constantly used together by defendant company; that plaintiff was acquainted with the company's rule in regard to making such couplings, and was following it to the letter when he was hurt; that he had been switching about two years, but had never had to make such couplings more than two or three times; that the pin used was a square or flat pin, and that had it been a round pin, fitting the hole in which it was used, he could have drawn it out with his hands, but, as it was, when he found it

jammed he was compelled to get a rock and attempt to drive it out, when he was injured by the backing train. The defendant introduced no evidence that the pin used was not a pin regularly furnished for such purpose, or that any more suitable one was provided, and we consider that an inference favorable to plaintiff's claim might reasonably be drawn from such testimony, standing uncontradicted and unexplained. Whether or not the character of the coupling and pin was faulty, and known to be so by defendant or defendant's officers, so that negligence might be inferred from their use, was certainly not a question of law upon which the court should pass; and whether the plaintiff was guilty of contributory negligence in going and remaining between the cars, while endeavoring to obey the commands of his superiors, could only be decided as a question of fact. *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. McDade*, 135 U. S. 555, 10 Sup. Ct. 1044.

In *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16, a case in which the question of contributory negligence had been withdrawn from the jury, and a verdict for the company directed, which was held to be error, the question was whether the plaintiff, in attempting to pass over cars when he knew that a step was missing from one of them, on account of which fault he fell, and was injured, was in so doing guilty of contributory negligence so as to justify the court in withdrawing the question from the jury and directing a verdict for the defendants. The supreme court held, in effect, that in the case of an employé not abandoning his station and duty upon the discovery of an insufficiency of appliance or apparatus, but remaining and attempting to do the best he could, the entire surrounding circumstances should be submitted to the jury for them to determine whether or not he was so guilty of contributory negligence as to forfeit his right to recover. This we consider a safe and reasonable rule, and one which may be applied to this case, and that the question was properly submitted to the jury whether, under the circumstances, the plaintiff, in remaining and endeavoring to complete the coupling, although he found the square pin jammed in a round hole, was so guilty of contributory negligence as to prevent a recovery.

In *Jones v. Railroad Co.*, 128 U. S. 444, 9 Sup. Ct. 118, Justice Miller, in speaking of the questions of negligence on the part of defendant and contributory negligence of the plaintiff, says:

"But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

In *Railroad Co. v. Cox*, *supra*, when the same question—the defect of coupling apparatus and the use of the square pin in a round hole—was under consideration, Chief Justice Fuller says:

"We think the evidence given in the record tended to establish that the coupling apparatus and the track were in an unsafe and dangerous condition; that the injury happened in consequence; and that those defects were such as must have been known to the defendants under proper inspection, and unless they were negligently ignorant."

In this case we think there was testimony which, uncontradicted as it was, tended to show that the appliances furnished for the coupling of the cars were insufficient, and rendered such duty unusually and unnecessarily dangerous, and in the performance of his duty, and on account of the fault of such appliances, plaintiff was injured; and whether or not such was the case was properly submitted to the jury. We therefore find no error in the record, and the judgment below is affirmed, with costs, and it is so ordered.

PARDEE, Circuit Judge. I respectfully dissent from the opinion and judgment of the court in this case because (1) the opinion implies, if it does not distinctly hold, that it is discretionary with the presiding judge on a trial before a jury in the courts of the United States to submit the case to the jury when the evidence submitted by the plaintiff is legally insufficient to warrant a verdict for the plaintiff; (2) the evidence submitted to the jury in the case in hand, with all the inferences that the jury could justifiably draw from it, was insufficient, in my opinion, to warrant a verdict for the plaintiff.

1. It is settled by the decisions of the supreme court of the United States that when the evidence given on a trial of the cause is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, should be set aside, the judge should not submit the case to the jury, but should direct them to return a verdict for the defendant. *Commissioners v. Clark*, 94 U. S. 284; *Randall v. Railway Co.*, 109 U. S. 482, 3 Sup. Ct. 322; *Gunther v. Insurance Co.*, 134 U. S. 116, 10 Sup. Ct. 448; *Railroad Co. v. Converse*, 139 U. S. 472, 11 Sup. Ct. 569, and cases there cited. See, also, *Doyle v. Railway Co.* (decided at this present term) 13 Sup. Ct. 333. "When there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff, such an instruction may be demanded, and it is the duty of the court to give it. To refuse is error." *Hickman v. Jones*, 9 Wall. 197. See *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433.

2. The allegations in the petition charging the negligence of the company are as follows:

(1) In using the flat pin in a round hole of the stationary drawhead of the caboose car, for which it was wholly unfitted, and requiring to be made the coupling between the caboose car and its passenger car, the said square pin being inserted into a round hole, in which it became fastened as in a vise, and from which it could not be removed with the hand, as it could have been done if the pin had been round, and the proper pin for the purpose for which it was used.

(2) In violating the statute law of the state of Texas, and placing in the rear of its passenger train a caboose car, the same being a car belonging to one of its freight trains, and requiring your petitioner to make a coupling of said caboose car to the rear passenger car of its said passenger train; the said two cars being, from the construction of their respective drawheads, wholly unfitted to be coupled together, and the coupling of the same greatly imperiling the life and limb of your petitioner,—all of which was well known to said defendant.

(3) And in using its said cars, and, as a part of the equipments thereof, cars having drawheads which were never intended to be coupled together; the drawhead of the caboose car being a stationary drawhead, and designed to

be coupled to a stationary drawhead, and the drawhead of the passenger coach, to which plaintiff was ordered to couple said caboose car, being what is known as a Miller drawhead, the same being a movable drawhead, and what is known as a self-coupler, and designed to be coupled to a car having a similar drawhead, the natural effect of the bringing together of two such drawheads being that the drawheads so dissimilar, and not designed to be coupled together, would pass each other, as they did in this case, injuring and disfiguring your petitioner for life.

Taking the evidence given on the trial, with all the inferences that the jury could justifiably draw from it, is it sufficient to sustain a verdict in favor of the plaintiff, on the ground of negligence of the defendant company, under either of the three heads mentioned?

First. With regard to the use of the flat pin, the evidence shows that the defendant in error made the first coupling between the Pullman car and the caboose car; which coupling was, in some respects, defective, because, in pulling out of the yard, the caboose car became detached from the train, rendering a second coupling necessary, in the making of which the defendant in error got hurt. To make a case against the company of negligence on this account, it should appear that the company, through its agents, not only furnished and provided this square pin to be used, but also that the defendant in error used it under the specific directions of the company, or of some of its agents superior to himself in authority. None of this appears, nor does the testimony tend to show that the company knew, or could reasonably have known, that the flat pin was in use, or was used on any previous occasion; and the evidence is clear that the square pin was visible and seen by the defendant in error, and that, after seeing it and noticing its defect (which, by the way, he should have noticed when he used it in the first coupling), and after failing at first effort to disengage it, he returned again, without protest or objection, to the work of disengaging it. He says:

"I tried to pull the pin out. Found that it was stuck fast in the hole of the caboose drawhead, and I couldn't pull it with both hands. I found that it was a square pin, and, being in a round hole, the motion of the train had fastened it in the drawhead, so that I couldn't pull it out without hammering it. As quick as I could, I got a rock, and began hammering the pin so as to loosen it."

According to the law of Texas, which should govern this case, if the employé knows of the defect in a piece of machinery he is called upon to use, by using it, except under orders of a superior, he takes the risk of the danger incident to that defect, whatever the danger may be. *Railway Co. v. Somers*, 78 Tex. 439, 14 S. W. 779; *Railroad Co. v. Myers*, 55 Tex. 116; *Railway Co. v. Barrager* (Tex. Sup.) 14 S. W. 242.

Second. The statute of the state of Texas which forbids the placing in the rear of passenger cars baggage or freight or merchandise or lumber cars, under a penalty, does not forbid the placing of a caboose car at the rear of the passenger cars in making up a passenger train. A caboose car is not a baggage car, nor a freight car, nor a lumber or merchandise car, but is, if classified as either

passenger or freight car, a passenger car, for which purpose it is generally used on all freight trains carrying passengers. Its make-up in a passenger train, if convenient or useful to the company, is entirely lawful, and from its use in this connection no negligence can be inferred. Besides this, the railway company may use such caboose in the make-up of its passenger trains at either end or in the middle thereof, as convenience may suggest, without being guilty of any negligence so far as the place in the train is concerned. The evidence shows that it was a custom of the Southern Pacific Company to send a caboose car with a train crew with each of its express passenger trains running west from Del Rio, to assist in case of accidents, and the cabooses were always placed in the rear of the passenger cars. The defendant in error testified that there was no reason for placing the caboose car in the rear of the passenger trains, and says "it could have been put at the head of the train just as easy." Even if this is taken to be true, still no negligence can be inferred therefrom, because the company had a right, so far as its employes were concerned, to put the caboose in that part of the train most convenient. As a matter of fact, however, if the caboose car had the link and pin coupling, while the passenger cars had the Miller coupling, to have placed the caboose car anywhere else except in the rear of the train would have greatly increased the inconvenience and risk to all the persons aboard the train, passengers as well as employes. The mischief to be remedied by the statute was the great risk and danger in hauling heavy and loaded freight cars behind passenger cars, and not any supposed danger to employes resulting from coupling said cars.

Third. No negligence can be inferred against the company because of the use of different drawheads on the cars lawfully coupled together in the same train. Certainly not in favor of any employe who, with full knowledge, as the defendant in error had, of the different drawheads, voluntarily assumes the duty of coupling cars. There is no law which requires any particular railroad to use only cars having uniform drawheads and coupling gear; and, until there is such a law, the use by any railroad of cars with dissimilar drawheads cannot be assigned as negligence. In fact, and resulting from the necessary interchange of cars, a general law adopting a uniform drawhead and coupling gear will be necessary before any particular railroad can be required to use only cars having uniformly the same coupling arrangements. From my view of the evidence, it is clear that the defendant in error was not injured through any fault of the plaintiff in error, nor of its agents, who, with regard to him, were vice principals; but was injured through the negligence of a fellow servant, his own negligence contributing thereto. The evidence clearly shows that the defendant in error was standing between the uncoupled cars of a train, in violation of the spirit of the company's rules, attempting to remedy the effect of his own conduct in previously using a square coupling pin, when his fellow servant, the engineer, without previous warning, backed the train and injured him. I am unable to

see, and the opinion of the court does not point out, how, by ordinary foresight, the railway management could have prevented the injury which the defendant in error received. The judgment of the circuit court should have been reversed, and a venire de novo awarded.

A motion for reargument was granted, and the case reheard before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge, and the following opinions were delivered:

(January 2, 1894.)

McCORMICK, Circuit Judge. This case was submitted on briefs of counsel at the last term of this court. A majority of the court delivered its decision, affirming the judgment of the circuit court. At a late day in that term a motion for rehearing was granted. The case has now been orally argued by counsel, and they have filed additional briefs. We have carefully re-examined the case. We conclude that the judgment of the circuit court must be affirmed. The case is stated in the opinion of the court delivered at the last term. We are content to rest our decision on the reasoning and the precedents therein relied on to support it. Our respect for the member of this court who could not concur in that opinion prompts a somewhat more extended statement of our views. The plaintiff in error urges only that "the court erred in refusing to instruct the jury to find a verdict for the defendant." The plaintiff in error says, in the brief filed on its behalf, December 5, 1892:

"There was no exception taken to the charge of the judge by the defendant, and no error complained of as the law was expounded to the jury, the error consisting in submitting the case to the jury in the absence of any testimony sufficient to justify a verdict."

The motion for an instruction to the jury to find for the defendant is substantially equivalent to the ancient practice of demurring to the evidence, a practice still followed in some of the states, but which never obtained in Texas. There, and in many of the states, a motion that the judge direct a verdict has become the practice in cases where a party deems that a demurrer to the evidence could be well taken. Such a motion was made in this case before the jury retired. It was refused. There was a verdict for the plaintiff, and a judgment thereon against the defendant. The defendant moved for a new trial. That motion was refused by the judge who tried the case, and the defendant brought this writ of error. It appears that the trial judge rightly understood the law applicable to the issues raised by the pleadings and by the evidence, if there was any evidence, and that the only error he made, the plaintiff in error being the judge, was in holding that the testimony proved or tended to prove facts from which fair-minded men might draw different conclusions as to whether the defendant was guilty of negligence under the law thus correctly given. Whether there is any evidence tending to prove the averments necessary to sustain a re-

covery is as much a question of law as whether the averments are good on general demurrer. What is evidence in the case, and whether in all the testimony introduced there is any evidence tending to support each of the necessary averments, are questions of law to be addressed to the judge, and his action thereon, when properly invoked and duly excepted to and made part of the record, is subject to review on writ of error. It is not discretionary with the presiding judge, on a trial before a jury in the courts of the United States, to submit the case to the jury when the whole evidence introduced on the trial is legally insufficient to warrant a verdict for the plaintiff. Some issues are not susceptible of direct proof. In a greater or less degree, all issues admit of inferences from established facts tending to establish the fact necessary to sustain the action. Negligence, like fraud, is susceptible in a high degree of this character of proof. Subject to the rule that there must be some evidence, it results from the nature of the case that the question of the existence of actionable negligence is one of mixed law and fact. Negligence and contributory negligence are incapable of exact definition. They are relative terms. To determine the existence of either as causing directly, or assisting directly to cause, an injury from which damage results, the conditions and mutual duties of the parties, the time, the place, the business, and all the attendant circumstances of each particular case must be considered. It has not been settled by judicial decisions, and probably will not be so settled, that any specific acts constitute negligence per se, or that specific acts cannot constitute negligence in some states of case which cannot be anticipated. Many expressions occur in reported opinions to the effect that this or that act or omission did or did not constitute or show negligence. All such language has relation to the case in which it is used. Courts of last resort, as well as courts of original jurisdiction, have to dispose of issues of law sharply made by contending parties. The nature of the case and the conditions of the forum do not require or admit of that nice weighing of words and phrases, or that exhaustive statement of exceptions, which we would reasonably expect of a careful commentator. Perhaps in no class of cases is it more incumbent on us to distinguish between the authority of the case and detached sentences of the opinion than in those involving the question we are now considering. The language bearing on that subject, so often cited with emphasis, is found in opinions affirming the ruling of the trial judge, or reversing his decision when he had improperly withdrawn the case from the jury. We have examined all the cases in the reports of the supreme court which appear to us to be germane to our present argument, embracing each case cited on the briefs for the plaintiff in error. Of the cases examined by us, only two were reversed in which the trial judge refused to withdraw the case from the jury, and in one of these (*Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397) the reversal was placed on the ground that the negligence proved was that of a fellow servant. The trial court had substantially submitted to the jury the question whether different servants of one master, about

whose employment and service there was no dispute, were fellow servants. In the other case (*Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433) it is decided that the facts established in that case do not show negligence on the part of the master, and that the circuit court erred in not so holding, and directing a verdict for the defendant. The result of the decisions we find stated in *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

The cases we have examined are cited in a note to this opinion.¹

We often hear, from counsel who represent large corporations, severe criticism on the conduct of juries in suits at common law for damages for personal injuries brought against corporations, and especially in such suits against railroad corporations. Our experience at the circuit, and the complexion of many records brought before us for review, attest that these criticisms are not unprovoked. Probably the provocation and the criticism alike result from the nature of the case. The volume of freight and passenger movement is immense. The number of persons engaged in it constitute a great army. The business is hazardous. The casualties that occur from unavoidable accident and from negligence exceed those commonly suffered from the conflict of armies in actual war. The sufferers are often subordinate employes, or other wage earners, on whose toil and earnings they and their wives and children, or other relatives to whom they owe and render duty, are dependent for support. It is to be expected that in every case the party injured will claim damages, and that the corporation will question its liability. The law furnishes no exact standard for measuring such unliquidated damages. It is not strange that the parties are often unable to adjust the matter. In such cases the claim must be abandoned or resort had to the courts, where the jury are charged to find from the evidence, under proper instructions and in the exercise of a sound discretion, whether the defendant was guilty of actionable negligence, from which the injury resulted, and, if so, the amount, if any, of damage to the plaintiff. In this contest the parties are often unequally matched. The plaintiff,

¹ *Parks v. Ross*, 11 How. 362; *Schuchardt v. Allens*, 1 Wall. 359; *Hickman v. Jones*, 9 Wall. 197; *Merchants' Bank v. State Bank*, 10 Wall. 637; *Pleasants v. Fant*, 22 Wall. 120; *Commissioners v. Clark*, 94 U. S. 284; *Railroad Co. v. Houston*, 95 U. S. 697; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166; *Brodnax v. Insurance Co.*, 128 U. S. 238, 9 Sup. Ct. 61; *Jones v. Railroad Co.*, 128 U. S. 444, 9 Sup. Ct. 118; *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. 382; *Gunther v. Insurance Co.*, 134 U. S. 116, 10 Sup. Ct. 448; *Aerkfetv v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Oteri v. Scalzo*, 145 U. S. 593, 12 Sup. Ct. 895; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railway Co. v. Mealer*, 1 C. C. A. 633, 50 Fed. 725; *Kidwell v. Railroad Co.*, 3 Woods, 313, Fed. Cas. No. 7,757; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16.

who has the burden of proof, is in many cases unable, and in others unwilling, to pay an attorney and the other costs of preparing and trying his case. From this has grown up a prevalent custom of contracting with practicing lawyers of skill and pecuniary means to take the case, conduct it, bear or guarantee the costs, and divide the recovery for compensation. It has been stated before us in oral argument, not in this case, nor by the counsel in this case, that in such cases the contract now customary in the state from which this case comes is for the lawyer to receive two-thirds of the recovery, to cover his fees and expenses, and the plaintiff to receive the remainder. An equal division of the recovery between the lawyer and his client has probably long been customary in that state and elsewhere. The corporation has salaried attorneys, permanently retained, who appear in every case. All the other practicing attorneys at the points where these suits are brought either have or have had such suits against the same defendant, or against a similar corporation, in which they have or have had this large personal interest. With the purest motives and the best of temper, this combination must, as it is known to do, have a strong tendency to bias the minds of the jury. The trial judge sees it, feels it, and, according to the temper of his mind, either unconsciously yields to it or holds himself over plumb against it. Others must say how far appellate judges are able to rise above this atmosphere, and hold an even balance. The evil is real and imminent. It may be difficult to devise an efficient remedy, and more difficult to secure its general adoption and application. In the courts of the United States, trial judges may grant new trials whenever and as often as in their judgment it is necessary to do so to mete out justice between the parties. Their action in granting or in refusing new trials cannot be assigned as error. Because of their absolute discretion in this matter, which long experience has sanctioned and found to be wholesome, they may be indulged and sustained in the exercise of a liberal discretion, though it be a legal, as distinguished from an absolute, discretion, in deciding before verdict that the proof will support only one verdict, and in directing the finding accordingly. They may well feel free to pursue this course, and should be encouraged to do so in all cases where in their judgment only one verdict should be permitted to stand. Such action, being subject to review, may be safely taken by the trial judge, and will be in the interest of economy of time and money to parties litigant and to the public. In this matter he exercises a legal discretion, but he acts on his own enlightened judgment; he is nearer the case than an appellate court can generally get, and, in a case like the present one, his judgment that reasonable men may fairly draw different conclusions from the proof merits consideration. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge. I adhere to the views expressed in my former opinion, and have little to add in view of the last opinion of the majority of the court. I do not question the law to be as

stated by Mr. Justice Lamar in *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, that:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

In fact, I do not understand that my views of the law in regard to the respective provinces of the trial judge and the jury are at all out of accord with those of the supreme court, or that I differ with my associates in this court, except with regard to the application of the conceded rules on the subject. What I insist upon is that where, under the law, the duty of the trial judge is to direct a verdict, this court, in reviewing the case, properly shown by the record, should meet the full measure of its responsibilities, and that in such a case it is not sufficient to fall back on the trial judge's opinion, as conclusive, "that reasonable men may fairly differ as to the effect of the undisputed evidence in the case." And in this connection it is proper to say that the observations of the court as to the frequency of personal injury suits, the skill and acumen with which each side is presented, the what used to be called "champerty" prevailing at the bar, and the general surroundings on the trial of such cases,—all, it is intimated, creating an atmosphere of prejudice above which the trial judge may not always rise,—instead of being an argument in favor of giving great weight to the ruling of the trial judge, who is frequently called upon to act on the spur of the moment, without sufficient opportunity to analyze and fully weigh the evidence, rather point the other way, and really furnish a strong reason, if one is necessary, why this court should look well into every properly presented case of complaint, and see that the trial judge neither trenches on the legitimate province of the jury, nor mistakes or neglects or abdicates his duty as judge, to the prejudice of the parties.

I do not entirely agree with the majority opinion as to the absence of all definitions of negligence and contributory negligence. The supreme court of the United States in *Railroad Co. v. Jones*, 95 U. S. 439, attempted to define negligence and give some rules in relation thereto, and the case has been cited with approval several times since, and as recently as *Railroad Co. v. Converse*, 139 U. S. 474, 11 Sup. Ct. 569. In the present case, I am inclined to say, as Mr. Justice Field said in the very similar case (as to manner of presentation in the appellate court) of *Railroad Co. v. Houston*, 95 U. S. 702: "Not even a plausible pretext for the verdict can be suggested unless we wander from the evidence into the region of conjecture and speculation." The last opinion of the majority of the court does not undertake to point out the specific negligence of the railroad company which rendered it liable, or any of the fair inferences of negligence on its part which reasonable men might draw from the undisputed facts in the case. In this respect the case is left where the first opinion left it, and there the court entirely ignored the fact that the defendant in error was not in-

jured by reason of any defective appliances of which he did not know, and the risk of which he did not assume, nor even proximately injured by any defective appliances whatever, but was, by his own and the other undisputed evidence, directly and proximately injured by the unexpected backing of the train.

As to the negligence of the railroad in using cars with different coupling appliances, upon which the opinion lays some stress, and as generally bearing on the case in hand, *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, is instructive, and can be read with interest. I quote as follows:

"With respect to the merits of the case, the decision of the court was also clearly correct. The intervenor was twenty-six years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant. He had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed through that yard, had none of those deadwoods or bumpers, but inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to anyone attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those it itself owns and uses. * * * It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars in that they had double deadwoods or bumpers of unusual length, to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

CITY OF EVANSVILLE v. WOODBURY et al.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

No. 37.

MUNICIPAL CORPORATION—POWER TO ISSUE BONDS.

Under Act Ind. 1847, incorporating the city of Evansville, and authorizing the city "to borrow money for the use of the city," the city has power to issue bonds for money so borrowed. *Railroad Co. v. Evansville*, 15 Ind. 395, followed.

In Error to the Circuit Court of the United States for the District of Indiana.

Action by Theodore C. Woodbury and others against the city of Evansville upon interest coupons. Plaintiffs obtained judgment. Defendant brings error.

The defendants in error brought two actions against the city of Evansville upon certain coupons taken from purported bonds of said city. Demurrers to the complaints were overruled, and the defendant below answered in seven paragraphs, consisting of general denial, allegations of want of au-

thority to issue the bonds, and nonconformity with certain general funding acts of the legislature, and denial of the plaintiffs' ownership. Demurrers were sustained to the paragraphs of the answers except those of denial. By agreement of the parties, the actions were consolidated, and submitted to the court for trial, and findings and judgment were thereupon in favor of the plaintiffs below. The bonds in question are each denominated "redemption bond," are negotiable in form, recite the issue under resolution of the common council of date stated, and as under and by virtue of the powers delegated by section 30 of the act of January 27, 1847, incorporating said city, and state the purposes of their issue. They are of several series and dates, and further recite authority and purpose as follows, respectively: (1) Of April 1, 1876, under resolution adopted December 14, 1875, series of \$300,000 to redeem \$300,000 "local improvement bonds;" (2) of February 1, 1881, under resolution adopted January 24, 1881, series of \$100,000 to redeem \$100,000 "of said city's bonds now outstanding;" (3) of April 15, 1878, under resolution adopted March 25, 1878, series \$100,000 to redeem \$100,000 "of bonds of said city;" (4) of June 1, 1877, under resolution adopted April 6, 1877, series of \$100,000 to redeem \$100,000 "of the bonds of said city." The defendants in error are bona fide holders of the coupons in suit.

George A. Cunningham, for plaintiff in error.

A. W. Hatch and George A. Sanders, for defendants in error.

Before JENKINS, Circuit Judge, and BAKER and SEAMAN, District Judges.

SEAMAN, District Judge (after stating the facts). There are several assignments of error, but the only points made by them are—First, that there is no power vested in the common council by the charter for the issue of either series of bonds; and, second, that the conditions of the indebtedness for which they were issued were not within certain general funding statutes of Indiana, and certain requirements of these statutes were not complied with. The bonds do not refer to the funding acts, and do not appear to have been issued under them, and upon the view here taken this second point is not material. The authority for the issue is rested upon section 30 of the act of 1847, incorporating the city of Evansville, and all argument in behalf of the plaintiff in error is directed against its existence in that section. Section 30 confers upon the common council the control and management of the finances and property of the city, and power to make ordinances, rules, and regulations for certain purposes, and on subjects enumerated in a number of clauses, among which are (clause 40) to take stock in any chartered company for making roads to said city, etc., and, where stock is taken, "to borrow money and levy and collect a tax for payment of such stock;" (clause 41) "to borrow money for the use of the city of Evansville." The question of the power conferred by this identical section of the charter was before the supreme court of Indiana, and a decision rendered, in 1860, prior to all the issues of bonds here in controversy, and is found in *Railroad Co. v. Evansville*, 15 Ind. 395. It arose out of bonds issued to pay for subscription to stock of a railroad. Construing the grant of power "to borrow money" for such payment, contained in the above-cited fortieth clause, that court held as follows:

"The city was expressly authorized to borrow money to pay for the stock subscribed. The power to borrow money necessarily implies the power to

determine the time of payment, and also the power to issue bonds or other evidences of the indebtedness."

The opinion then adopts the following expression from *Slack v. Railroad Co.*, 13 B. Mon. 1, viz.:

"Moreover, the first act under which the debt was created gave full power to the county court to provide for its payment either by taxation or by borrowing the money, which of course implied the power, as it did the necessity, of furnishing some evidence of indebtedness; and the court might doubtless have issued the bonds of the county, in some form, to the lender."

It was the fortieth clause of this section which was there construed, while the power to issue the bonds here presented must be found in the forty-first clause. The language is the same in each, authorizing "to borrow money;" in the one to pay for subscription, and in the other "for the use of the city." There can be no difference in the rule to be applied. The interpretation is of the statutory language, and must be held equally applicable to both clauses. A competent judicial construction of a statute enters into and becomes a part of it, as though it had been written in, so far, at least, as contract rights accruing under it are concerned. *Douglass v. County of Pike*, 101 U. S. 677; *Suth. St. Const.* § 319. The borrowing of money to pay outstanding indebtedness of the city was clearly a borrowing for the use of the city; and, if this ruling of the highest court of the state must govern here, the power to issue the bonds is well shown. That decision appears to have remained undisturbed, and is in accord with the doctrine constantly held by that court. *Dill. Mun. Corp.* § 119. It is worthy of note that the supreme court of the United States held directly the same construction upon a grant of power "to borrow money for any public purpose" in *Rogers v. Burlington*, 3 Wall. 654, and *Mitchell v. Burlington*, 4 Wall. 270. These decisions were five and six years after that in *Indiana*; and, although they appear to have been overruled in recent years, they would constitute some justification, if any were needed, for reliance by purchasers upon the *Indiana* interpretation. The federal courts have maintained a rule from their organization that in all cases depending upon a state statute they will adopt and follow the adjudications of the court of last resort in the state in its construction, when that construction is well settled, and without inquiry as to its original soundness. This rule is founded upon respect for property rights, as well as of comity, and had its early expression by Chief Justice Marshall, and has been upheld by an unbroken line of decisions. *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Nesmith v. Sheldon*, 7 How. 812; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Douglass v. County of Pike*, 101 U. S. 677. Therefore, the recent decisions in *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, and *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, cited in behalf of plaintiff in error as decisive, are not applicable. The rights of the holders of these bonds accrued under the previous interpretations by the *Indiana* courts; and, while these cases in the supreme court establish a rule for original construction, they do not govern as to the bonds in suit. The judgment below is affirmed.

SCOTT et al. v. SCRUGGS.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 168.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

Where the holder of a note extends it at the request of one maker, and without the knowledge or consent of the other, knowing at the time that the latter maker merely signed the note as surety, the latter is released from his obligation, although the holder did not know of the relation between the two makers at the time the note was given.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by Thomas M. Scruggs against John F. Scott and H. S. Freeman upon two promissory notes. Plaintiff obtained judgment. Defendants bring error.

W. R. Francis, for plaintiffs in error.

John C. Eyster, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. This action was brought by Thomas M. Scruggs, the defendant in error, against John F. Scott and H. S. Freeman, the plaintiffs in error, to recover the sum of \$2,601.65, the amount of two promissory notes made by the defendants, Scott and Freeman, dated the 4th day of January, 1890, and payable six months after date, to the order of the plaintiff, Scruggs, at the First National Bank of Decatur, Ala. The complaint also contains a count for the same amount on an account stated on the 4th day of January, 1890, and a count for money loaned on the same day. The defendant Scott pleaded the general issue. The defendant Freeman, in answer to the whole complaint, in addition to "Never was indebted," pleaded that he signed the notes in suit simply as a surety for the defendant Scott on a loan made to him at that time by the plaintiff, Scruggs; that this fact was well known to the plaintiff; that thereafter, and about the time of maturity of the notes in suit, the plaintiff, Scruggs, by an agreement made between him and the defendant Scott, without the knowledge or consent of the defendant Freeman, for a valuable consideration, extended the time of payment of the said notes, and the repayment of the said loan, for a definite time; and that the defendant Freeman was thereby discharged from liability as such surety. Issue was joined on this answer, and the case was tried on the 29th day of April, 1893, at the April term of the circuit court, the defendant Freeman alone defending the action. The court gave the general charge in favor of the plaintiff, and judgment was rendered against both of the defendants for the sum of \$3,191.02. From this judgment the writ of error is taken.

An action had been brought before this, on those identical notes, by the same plaintiff, Scruggs, against the same defendants, on the 21st day of March, 1891, in the circuit court of Morgan county, in the state of Alabama. The defendant Freeman interposed the

same defense as in the present action. On the trial the court gave the general charge in favor of the plaintiff, and judgment was rendered against both of the defendants. An appeal was taken from this judgment to the supreme court of Alabama. The supreme court reversed the judgment, and remanded the case to the Morgan county circuit court for a new trial. *Scott v. Scruggs*, 95 Ala. 383, 11 South. 215. At the November term, 1892, of the Morgan county circuit court, when the case was called for a new trial, the plaintiff took a voluntary nonsuit. Immediately thereafter, on December 20, 1892, the present action was begun.

The undisputed facts are that on May 23, 1889, Scott (one of the defendants) applied to the defendant in error, Scruggs, for a loan of \$3,000. Scruggs told him that he had some money to lend, and asked Scott what kind of security he could give him for it. Scott answered, according to Scruggs, that he could give him "a note signed by himself and H. S. Freeman," or "his note with H. S. Freeman on it." Scruggs agreed to let Scott have the money on these terms, and drew up two notes,—one for \$2,000, and the other for \$1,000. Scott signed these notes in Scruggs' office, and then took them out to get Freeman's signature. He brought them back, signed by Freeman, and delivered them to Scruggs, who gave him the money (first deducting the interest) in two checks, drawn payable to the order of Scott, at his request. Freeman signed these notes at his office, in Decatur. He was not present when the notes were delivered to Scruggs. He never had any conversation with Scruggs about the loan. The loan was not made for his benefit, and he did not, in any way, get any part of the money. A short time before these notes became due, there were some communications between Scott and Scruggs in reference to their payment. On the morning of January 4, 1890,—the day on which the notes were due,—Scott came to the office of the plaintiff, and told him that he could not pay the notes. Scruggs asked him how much he could pay. Scott said that he could pay \$500 in cash, and would renew the notes for the balance, and Scruggs agreed to this. Scott then wanted the notes drawn up so that he could take them out, and get Freeman's signature, as he had done before. Scruggs refused to do this, and insisted that Freeman should come to his office, and sign the notes there, in his presence. Scott then went out to find Freeman, but could not find him at first, and finally made an appointment with Scruggs to bring Freeman to his office at 4 o'clock that afternoon. At that time, Scott and Freeman came to Scruggs' office. Scruggs asked Scott whether he wanted the interest taken out of the \$500, or added to the notes, and Scott said he wanted it added to the notes. Scruggs then told Mr. Percival to draw up the notes, adding the interest, which he did; and Scott and Freeman signed these notes,—the notes in suit. Scott then delivered the new notes to Scruggs, and paid him the \$500 in cash; and Scruggs handed to Scott the old notes, of May 23, 1889, from which Scott then tore the signatures. Scott furnished the whole of the \$500 paid to Scruggs on January 4, 1890, and Freeman did not furnish any part

of it. A short time before the notes in suit fell due,—in July, 1890,—there was a correspondence between Scott and Scruggs as to an extension of the time of payment. As the result of this correspondence, Scott paid Scruggs \$104.06 for six months' interest on the notes, in advance; and Scruggs, in consideration of this payment, agreed to extend the time of payment for six months, to January 4-7, 1891, and indorsed the payment of the interest on the notes. All of this negotiation was by letter, and there was no personal communication between the parties about it. Freeman did not know anything about this extension of the time of payment, nor did he consent to it in any way whatever. He did not furnish any part of the \$104.06 paid by Scott to Scruggs. Freeman never heard anything about the notes in suit, after they were executed, and says he thought they were paid, until about a week before the beginning of the suit on them by the plaintiff in the circuit court of Morgan county, Ala., on March 21, 1891. In addition to the foregoing undisputed facts, there was uncontradicted evidence on the trial strongly tending to show that Scruggs, the defendant in error, knew from the beginning, and continuously thereafter, that the relation between Scott and Freeman in regard to the loan made to Scott, and in regard to the notes sued on, was that of principal and surety. On the trial, and over the objections of the defendant Freeman (plaintiff in error here), the court charged the jury as follows:

"It is not important to inquire what the relation or understanding was between defendants, Scott and Freeman,—as to whether they were both makers, or that one was maker, and the other surety,—unless it is shown that such knowledge and understanding was brought home to Scruggs, the other party to the loan, at the time the notes were accepted by him for the loan made, which was the consideration of the notes. The notes themselves are in evidence, and, as they are written, the defendants are makers of the notes, but that is not conclusive against defendant Freeman. But the burden is upon him to show that the notes are not the true expression and understanding between Scott and Scruggs at the time the notes were accepted by him (Scruggs) in consideration of the loan. * * * If you shall find that the plea of surety by the defendant Freeman is sustained by the proof, and that there was a mere renewal of the old notes by the giving of the new, then you will find the plea sustained, and your verdict will be for defendant Freeman on the notes in suit. If, however, you shall find that the plaintiff accepted the original notes for the loan without the knowledge that defendant Freeman was upon the notes only as a surety for Scott, your verdict must be for plaintiff, against both of the defendants. And even if you shall find that the defendant Freeman was upon the first notes only as surety, and that Scruggs accepted them for the loan, knowing that fact, still, if you find, what took place between the parties when the new notes were given, that it was the intention of the parties that the old notes should be paid and discharged by the giving of the new notes, then your verdict will be for the plaintiff, against both defendants. There is another view of the case to which I call the attention of the jury: If the contention of the defendant Freeman that the notes sued on are mere renewals of the old notes, which were not paid and canceled by the giving of the new notes, under the proof and instruction as to the law which have just been given, then the old notes, which are here in evidence in this case, being unpaid, and there being here a claim upon account stated in plaintiff's complaint, the old notes are competent evidence in support of such claim on account stated. It is not claimed that there is any such infirmity in the old notes as is set up against the notes in suit; that is, that there was any extension of the time of their payment without the knowledge and

consent of the defendant Freeman. And, therefore, if the jury, under the proof and instructions given, find for the defendant Freeman on the notes in suit, still, if the jury find that the notes are not paid, then their verdict may be upon the old notes for the amount found to be due, against both of defendants. And, if this view of the subject is correct, it results in the general charge that, if the jury believe all the evidence, they will find for the plaintiff, against both defendants."

The record also shows that at the request of the plaintiff (defendant in error here), and against the objections of the defendant Freeman (plaintiff in error here), the court charged the jury as follows:

"In this case the plaintiff relies on counts in his complaint on the two notes of the defendants dated January 4, 1890, and also on a count in his complaint upon an account stated. The defendant Freeman pleads that he signed the first two notes that are in evidence, of date May 23, 1889, as a surety, and that the last two notes are mere renewals; that they were not received in payment of the first two notes; and that no consideration moved to him (Freeman) as to the last two notes, and that he is only a surety on them; and that, by plaintiff's giving time to the defendant, he (Freeman) is discharged from liability on these notes. If this position be correct, and proved to your satisfaction, and if it be also proved that Scruggs had knowledge of the fact that Freeman was only a surety, these facts would discharge Freeman, as surety, upon the two notes last given. But, if these facts were true, then the first two notes, of date May 23, 1889, are unpaid; and the plaintiff, on the count in his complaint upon the stated account, would be entitled to recover the amount of the first two notes, with interest thereon, less the amounts shown to be paid to Scruggs since the date of the first two notes, and your verdict, for this sum, would be against both defendants. If the jury believe the evidence, their verdict should be for the plaintiff, against both of the defendants."

Also, that the defendant Freeman (plaintiff in error here) requested the court to charge as follows:

"If the jury find that the defendant Freeman signed the notes, which are the foundation of this suit, solely as surety for the defendant Scott, and that this fact was known to the plaintiff at the time of the making of the notes; and if the jury also find that the plaintiff, without the knowledge or consent of the defendant Freeman, by an agreement between him and the defendant Scott, for a valuable consideration, extended the time of the payment of the said notes for a definite time,—then the defendant Freeman is discharged as a surety, and the verdict must be in favor of the defendant Freeman."

—Which was refused.

In our opinion, the trial court took an erroneous view of the law of the case. The affirmative charge and the other instructions given should have been refused, and the charge asked for by the defendant Freeman (plaintiff in error here), as given above, with other charges requested by him, not necessary to repeat, should have been given. Whether the notes sued on were mere renewals of the notes given for the original loan, as we think they were (see *King v. Doane*, 139 U. S. 166, 11 Sup. Ct. 465), or whether a novation took place,—the original notes being thus taken up, as paid or otherwise satisfied,—is immaterial. It is also immaterial at what time the creditor, Scruggs, was informed that Scott was the principal, and Freeman the surety, provided such relationship actually existed, and the information was had or received by Scruggs prior to the execution of the contract between him and

Scott, without the consent of Freeman, for the extension of the time of payment. In *Insurance Co. v. Hanford*, 143 U. S. 187-191, 12 Sup. Ct. 437, the supreme court of the United States, by Mr. Justice Gray, declared the law directly applicable, and which controls this case, as follows:

"The case is thus brought within the well-settled and familiar rule that if a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety, because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract; and it is for the surety, alone, to judge whether his position is altered for the worse. 1 *Spence*, Eq. Jur. 638; *Samuell v. Howarth*, 3 Mer. 272; *Miller v. Stewart*, 9 Wheat. 680, 703. The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract (*Ewin v. Lancaster*, 6 Best & S. 571; *Corporation v. Overend*, 7 Ch. App. 142, and L. R. 7 H. L. 348; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386), or even if that relation has been created since that time (*Oakeley v. Pasheller*, 4 Clark & F. 207, 233, 10 Bligh [N. S.] 548, 590; *Colgrove v. Tallman*, 67 N. Y. 95; *Smith v. Shelden*, 35 Mich. 42)."

We are unable to see any force in the contention that as the plaintiff has declared on the common counts, as well as specially upon the notes, although the defense of the surety, Freeman, may be good because of the contract extending the time of payment, yet, as he contends that the original notes given for the loan were simply renewed by giving the notes sued on, therefore the plaintiff below (defendant in error here) can recover the amount of the old notes as upon account stated. There was only one loan, and only one debt. On that debt, Freeman was surety. If, by a contract between the creditor and the principal, without his knowledge, he was discharged as surety, he was discharged for the whole debt. The argument offered in support of this contention would be equally good if Freeman's defense had been payment, or even that he never signed the renewal notes sued on. The authorities cited by defendant in error in support of this contention are not all applicable to the case in hand. The judgment of the circuit court should be reversed, and the cause remanded, with instructions to grant a new trial, and otherwise proceed as the law of the case may require, and in conformity with the views herein expressed; and it is so ordered.

OGDEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1893.)

No. 75.

ACTION ON CONTRACT—CONCLUSIVENESS OF ENGINEER'S DECISION.

Where a contract for work to be done for the United States provides that "the decision of the engineer officer in charge as to quality and quantity shall be final, and he shall be the sole referee," a court will not disturb the decision of such officer in the absence of fraud or such gross error as would imply bad faith.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Suit by James N. Ogden and others against the United States to recover for work done under a contract to construct a levee. Plaintiffs were to be paid 28½ cents per cubic yard, and they had been paid in full, according to the estimate of the work made by Capt. Daniel C. Kingman, the engineer officer in charge of the work. They claimed, however, that they had done more work than that for which they had been paid. Defendant obtained judgment. Plaintiffs appeal.

J. R. Beckwith, for appellants.

F. B. Earhart, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. We affirm the judgment of the circuit court in this case. The defendant in the circuit court, the appellee here, is not an interested party in the sense in which those terms are used in judicial decisions. The work she proposed to have done was to be done not for any direct benefit to the government as a political corporation. She did not seek to drive a hard bargain with the appellants, or with others who might bid for the work. The proposals furnished all bidders with the means of fully acquainting themselves with the terms of the contract on which the work was to be done. A few extracts from the proposals show this:

"The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract."

"Bidders are requested to visit and inspect the location for levees before bidding for levee work."

"In case of any doubt or disagreement arising under these specifications, the decision of the United States engineer officer in charge shall be final, and he shall be the sole referee."

The specifications of the proposals were attached to the contract as a part of it. The form of contract referred to in the proposals contained this provision:

"All work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final, and he shall be the sole referee."

In view of the object and character of the work to be done, and the state of the contracting parties, this provision of the contract is not a hard one. From the nature of the case, an impartial, competent referee, invested with conclusive discretion, was required. The appropriation was to be expended under the direction of the secretary of war. This particular work was in charge of a captain of engineers in the United States army. No referee

more accessible, competent, or impartial could be suggested than such officer should have been. In the absence of fraud, or such gross error or mistake as would imply bad faith, his decisions must be upheld as conclusive on the appellants. The proof does not show fraud or such gross mistake in the action of this referee. That a court acting on the testimony in the record might have decided differently from the referee in the matter of the appellants' claim does not warrant the setting aside the decision of the engineer in charge of the work. The circuit court so held, and its judgment is affirmed. *Kihlberg v. U. S.*, 97 U. S. 398; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290.

BRADY v. UNITED LIFE INS. ASS'N.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 68.

INSURANCE—CONDITIONS OF POLICY—BREACH.

An application for life insurance, which was agreed to be a part of the contract, warranted the answers of the assured to questions asked therein to be "full, true, and complete," and the policy was conditioned to be void if they were not so. One of the questions demanded the name and address of each physician who had attended the assured within a given period; and the answer gave the name and address of a single physician. As a matter of fact three physicians had attended the assured within the period named. *Held*, that the answer was untrue and, being a breach of the warranty, vitiated the policy and destroyed the right to recover thereunder.

Error to the Circuit Court of the United States for the District of Connecticut.

Action by Mary Brady against the United Life Insurance Association. The trial court directed a verdict for defendant, and plaintiff brings error. Judgment affirmed.

E. F. Cole, for plaintiff in error.

Geo. E. Terry, (Harry Wilber, of counsel,) for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The assignments of error impugn the ruling of the trial judge in instructing the jury to find a verdict for the defendant. If the trial judge correctly instructed the jury to render a verdict for the defendant, upon the ground that there was a warranty by the assured of the truth of the answers made in his application for insurance, and upon the uncontradicted evidence one of the answers was untrue when made, it is unnecessary to consider whether the truth of other representations was, upon the evidence, a question of fact for the jury. The policy was issued October 2, 1891, upon the application of Michael Sinnott, made a few days earlier, and insured his life. It recites that the insurance was made "in consideration of the answers, statements, and agreements contained in the application,

which are hereby made a part of this contract." The application commences with the following recital:

"I, Michael Sinnott, residing at Waterbury, county of New Haven, and state of Connecticut, do hereby make application to the United Life Insurance Association for membership and a policy of insurance upon my life, and, as a consideration therefor, I warrant the statements and answers as written in said application to be full, complete, and true."

It contained, among others, the following inquiries and answers:

Q. "Has the applicant ever had any illness, local disease, injury, mental or nervous disease or infirmity? If yes, state nature, date, duration, and severity of attack." A. "About one year ago lost appetite for short time, but has had no trouble since." Q. "How long since you consulted, or were attended, by a physician?" A. "About a year ago." Q. "State name and address of such physician." A. "J. F. Hayes, M. D." Q. "For what disease or ailment?" A. "Indigestion." Q. "Give name and address of each physician who has prescribed for or attended you within past five years, and for what disease or ailments, and date." A. "J. F. Hayes, M. D., Waterbury, Conn."

It concludes as follows:

"It is hereby agreed that the answers and statements in this application, whether written by the applicant or not, are warranted to be full, complete, and true, and that this agreement, together with this application, are hereby made part of any policy that may be issued thereon, and that if any answers or statements made are not full, complete, and true, or if any condition or agreement shall not be fulfilled as required by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association."

It appeared upon the trial that Hayes was the medical examiner for the defendant who examined Sinnott at the time the insurance was applied for. He had attended Sinnott professionally within the year preceding the application. It also appeared by undisputed testimony upon the trial that in November, 1889, the assured was sufficiently ill to desire the services of a physician, and Dr. Lopez was called, and attended him professionally. He became dissatisfied with Dr. Lopez. Dr. Lopez was discharged, and on the same day another physician, Dr. Axtelle, was called, who, on that day, and on several other occasions during that and the succeeding month, visited and attended him professionally. Testimony was given tending to show that, at the time of these visits, he had heart disease, enlargement of the liver, and dropsy; but there was also testimony tending to show that he never had any serious illness. He died December 31, 1891.

It is a settled rule in the law of life insurance that answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. By the present contract it was explicitly provided that all the answers were warranted to be full, complete, and true. Its language, unlike that of the contract which was considered in *Moulton v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, is plain, unequiv-

ocal, and leaves no room for interpretation. It is a contract which must be enforced according to its terms, like those which were considered in *Jeffries v. Insurance Co.*, 22 Wall. 47, and *Insurance Co. v. France*, 91 U. S. 510. A true answer to the inquiry as to the name and address of each physician who had attended the applicant within the past five years would have afforded the insurer a valuable source of information in regard to the previous history and physical condition of the applicant. The inquiry called for the statement of a fact within the knowledge of the applicant, and not for one which might be merely a matter of opinion, in respect to which he might be mistaken. The answer was not incomplete or imperfect, but was untrue. It permitted no other inference than that Dr. Hayes was the only physician who had prescribed for or attended the applicant during the period covered by the inquiry. If the case had been submitted to the jury upon the issue whether that answer was true, and there had been a verdict for the plaintiff, the verdict would have been so manifestly unsupported by evidence that it would have been the duty of the court, in the exercise of a sound judicial discretion, to set it aside. Consequently, the trial judge properly withdrew the case from the consideration of the jury, and directed a verdict for the defendant. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. 266; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569.

The judgment is affirmed.

BURKE v. DILLINGHAM.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 137.

DEATH BY WRONGFUL ACT—LIABILITY OF RAILROAD RECEIVER.

The Texas statute giving a right of action when the death of any person is caused by the negligence of "the proprietor, owner, charterer or hirer" of any railroad, or their servants (Rev. St. art. 2899), creates no right of action against a railroad receiver. *Turner v. Cross*, 18 S. W. 578, 83 Tex. 218, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a petition of intervention filed by Mary A. Burke, individually and as next friend of Maude, Thomas, Bertha, Charley, and Sidney Burke, against Charles Dillingham, receiver of the Houston & Texas Central Railway Company, to recover damages suffered by them because of the death of Thomas W. Burke, an employé of the receiver, through the alleged negligence of the defendant. The court below, having sustained a demurrer to the petition, dismissed the same; and the intervener appeals.

The statute upon which plaintiff based her right of action was Rev. St. Tex. art. 2899, which reads as follows:

"An action for actual damages on account of injuries causing death of any person may be brought in the following cases: First, when the death of any

person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, or by the unfitness, negligence or carelessness of their servants."

To support the action of the court below, the appellee relied mainly upon the case of *Turner v. Cross*, 83 Tex. 231, 18 S. W. 578, and quoted the following language therefrom:

"Looking to the character of the property named in the statute, if it was the intention of the legislature—as seems manifest by the language used—to give right of action against all persons and corporations sustaining to the property the relations which the words indicate, in cases of injuries resulting in death, caused by their negligence, or the unfitness, negligence, or carelessness of their servants and agents, then there was necessity to name all the persons against whom right of action was intended to be given, so that any grade of ownership conferring personal right should be brought within the operation of the statute; and it was doubtless for the purpose of avoiding all misconception as to the intent of the legislature that 'hirsers,' 'charterers,' 'owners,' and 'proprietors' were named. The manifest purpose of the statute was to give right of action, for injuries such as are complained of in this case, against those in possession, in their own rights, of the classes of property named in the statute, when operated by themselves, or by servants or agents of their own selection, for whose acts or omissions they ought to be responsible; and the language of a statute ought to be such as to imperatively require it, before a court would be authorized to hold that such owners were intended to be made liable, directly or indirectly, for an injury occurring in the use of their property while under the management and control of an officer of a court having power to do with it as the court may direct, and to select his own servants without regard to the wish of the owner."

H. F. Ring and Pressley K. Ewing, for appellant.

E. H. Farrer, E. B. Kruttschmitt, and B. F. Jonas, for appellee.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

McCORMICK, Circuit Judge. On the authority of *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, we must hold that, for the injury which resulted in the death of Thomas W. Burke, the statute of Texas did not authorize a recovery of damages against the defendant in error. The demurrer to the petition was properly sustained, and the judgment of the circuit court is affirmed.

STURDIVANT v. MEMPHIS NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 170.

1. NEGOTIABLE INSTRUMENTS—LAW OF PLACE—CONFLICT OF LAWS.

A note executed and delivered in one state, and payable in another, is governed, as to the admissibility of defenses against an indorsee, by the law of the latter state, even when sued on in the state wherein it was executed.

2. SAME—VALIDITY—USURY—CONFLICT OF LAWS.

But such note, if valid where made, is not rendered invalid because it contravenes the usury laws of the state in which it is payable.

3. SAME—ACTIONS ON—PLEADING.

In an action by an indorsee, a plea setting forth partial failure of consideration, and want of good faith in the indorsement, is not redundant,

although the failure of consideration is also set up in another plea, since that matter must be repeated in order to make out a good defense against the indorsee.

4. SAME—PRACTICE.

Striking out such plea is reversible error, even when the general issue is also pleaded, since such defense cannot be shown under the general issue.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Action by the Memphis National Bank against Ben W. Sturdivant upon a promissory note. Plaintiff obtained judgment. Defendant brings error.

Defendant in error declared below against the plaintiff in error in assumption on a promissory note which was in the following words and figures:

"No. 2.

"\$7,500.00.

Twilight, Miss., Dec. 21, 1889.

"On the first day of March, 1891, we promise to pay to the order of Waddill, Catchings & Co., at their office in Memphis, Tennessee, in United States gold coin, seventy-five hundred dollars (with exchange of Memphis, Tenn.), for value received, and 8 per cent. interest per annum after maturity, payable annually until paid, and with 10 per cent. attorney's fees if placed in the hands of an attorney for collection. And, for the faithful payment of this note, we hereby waive all exemptions, appraisements, and rights of redemptions, in present or after-acquired property, as against the payee or assignee of this note, in regard to the collection thereof.

"[L. S.]

Ben W. Sturdivant & Son.

"Attest: L. A. Dessomes.

Indorsed:

"Waddill, Catchings & Co.

"Valley Commission Co., by George A. Waddill, President."

The said declaration contains an averment that the payees named, "for value, and before maturity, indorsed and delivered said note, for value, to the Valley Commission Company, who afterwards, and for value, before maturity of said note, indorsed and delivered the same to plaintiff, who bought said note in good faith, for value, without any notice of any prior equities existing between prior parties to said paper, if any such equities there were." To the declaration the plaintiff in error interposed five pleas, as follows: (1) Nonassumpsit. (2) Special plea that the laws of the state of Tennessee, in which said note was payable, forbid the taking of interest in excess of 6 per cent., and that by such law any writing which stipulates for a higher rate is void, and not collectible. (3) Special plea as to \$4,000, parcel of the sum demanded: A failure of consideration. (4) Special plea as to the sum of \$4,000, parcel of the sum demanded: Denial of the bona fide holding of the plaintiff and of its indorser, and a failure of consideration. (5) Special plea as to \$4,000, parcel of the sum demanded: Failure of consideration, and the law of Tennessee, which makes writings stipulating for interest in excess of 6 per cent. void. To these pleas the defendant in error responded as follows: To the first, by the general issue. To the second, by a demurrer alleging the contract to be valid according to the laws of Mississippi, where made. To the third, by a demurrer alleging the note to be negotiable paper payable in Tennessee, and therefore not subject to the anticommercial statute of Mississippi, but enforceable in full by defendant in error, who became a bona fide purchaser of it, without notice. To the fourth, by a motion to strike out all that part which relates to the failure of consideration, because irrelevant and redundant, the said failure having already been pleaded in the third plea. To the fifth, by a motion to strike from the files because wholly irrelevant and redundant, because both "the two defenses" therein had been already pleaded, by the third and the second pleas. After argument the court below sustained the demurrers to the second and third pleas,

and struck out the fourth and fifth pleas altogether. Thereafter, there was a jury, and verdict for the defendant in error for the full amount of the note, with interest and lawyer's fees; in all, \$9,610. The defendant below sued out this writ of error, assigning errors as follows: "First, the court below erred in sustaining the demurrer to the second plea of the defendant below; secondly, the court below erred in sustaining the demurrer to the third plea of the defendant below; thirdly, the court below erred in striking out the fourth plea of the defendant below; fourthly, the court below erred in striking out the fifth plea of the defendant below."

E. Mayes, for plaintiff in error.

W. V. Sullivan, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). In the briefs submitted, there is a contention as to the facts of the case claimed to have been shown on the trial, and on each side considerable argument is presented, based on the facts as each claims them to be; but, as we find no bill of exceptions in the record, we can in no wise consider matters of evidence. As the case is presented to us, we are limited in our examination to the rulings of the trial court on the pleadings.

1. The second plea is to the effect that the instrument sued on is void, and not collectible in law, because made payable in the state of Tennessee, the laws of which state forbid the taking of a rate of interest in excess of 6 per centum per annum, and forbid the stipulation for more, even in writing, and that by such laws any writing which does stipulate for a rate of interest in excess of 6 per cent. per annum is void. The obligation sued on appears to have been executed by citizens of Mississippi in the state of Mississippi, where the laws permit a rate of interest to be stipulated not in excess of 10 per centum per annum. The rule in such cases is declared in *Miller v. Tiffany*, 1 Wall. 298-310, as follows:

"The general principle in relation to contracts made in one place, to be performed in another, is well settled: They are to be governed by the law of the place of performance. And, if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring penalties of usury. The converse of this proposition is also well settled: If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case, also, for the higher rate."

See, also, *Scudder v. Bank*, 91 U. S. 408-412; *Cromwell v. County of Sac*, 96 U. S. 51-62; *Daniel*, Neg. Inst. §-922, where the authorities in support of the rule declared are collated. From these authorities, it seems that the ruling of the court sustaining the demurrer to the second plea was correct.

2. The third plea is a plea of partial failure of consideration. It was designed to present that phase of the case which looks to a holding by the court that the contract sued on is a Mississippi contract,—made so by the location of the parties themselves,—and therefore subject to the operation of the anticommercial statute of Mississippi, which is as follows:

"Sec. 1124. All promissory notes and all other writings for the payment of money, or other thing, may be assigned by endorsement, whether the same be payable to order or assigns, or not, and the assignee, or endorsee, may maintain such action thereon in his own name, as the assignor or endorser could have maintained; and in all actions on any such assigned promissory note, bill of exchange, or other writing for the payment of money or other thing, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and sets-off, made, had or possessed against the same previous to notice of assignment, in the same manner as though the suit had been brought by the payee," etc.

In case the statute just quoted is applicable, whether the plaintiff did or did not take the obligation sued on as a bona fide holder is immaterial. The question presented by this plea and the demurrer thereto is not a new one. The obligation having been made in the state of Mississippi, but being by the parties made payable in the state of Tennessee, said obligation, in the matter of performance, is to be governed by the law of the place where the performance is stipulated to be made. This is well settled in the courts of the state of Mississippi. *Frazier v. Warfield*, 9 *Smedes & M.* 220; *Coffman v. Bank*, 41 *Miss.* 212; *Harrison v. Pike*, 48 *Miss.* 46-54. The rule is the same in Tennessee. *Merritt v. Duncan*, 7 *Heisk.* 157; *Duke v. Hall*, 9 *Baxt.* 282. The rule is recognized in the courts of the United States. *Brabston v. Gibson*, 9 *How.* 263; *Supervisors v. Galbraith*, 99 *U. S.* 214-218. In *Harrison v. Pike*, *supra*, the court said:

"If the bill is drawn on a party in another state, or in a foreign country, or the note is made payable there, neither is, as a general rule, affected by our statute, but is governed by the law of the place where performance is to be made. Such is the character of a bill of exchange or a promissory note drawn or made here, but payable in New Orleans or New York. The effect is to select the laws of the other state or country, and locate the contract there, subject to them. The defendant, by making his note payable to his own order at New Orleans, and indorsing and delivering it to Thompson, domiciled the transaction in Louisiana, and submitted it to the laws of the state, and engaged that if the paper, in due course of business, was negotiated in that state by Thompson, the rights of his indorser should be measured by that law."

From these authorities, as well as on principle, it seems clear that the third plea was not good, and the demurrer thereto was well sustained. In fact, as we understand the argument of the learned counsel for the plaintiff in error as to this plea, he does not contend to the contrary; his contention being based upon both the second and third pleas, and to the effect that the contract is either to be taken and construed, in toto, as a Mississippi contract, or as a Tennessee contract,—if a Mississippi contract, then that the anticommercial statute applies, and the defendant can plead partial failure of consideration; if a Tennessee contract, and the laws of the state of Tennessee are to be resorted to to determine the rights of the parties, then the defendant can plead the usury law of the state of Tennessee. The argument presented is very plausible, but in the light of adjudged cases, and in the interest of commercial paper, we are unable to give our assent to its correctness, or to its applicability in this case. The law of the place where a contract is made and entered into, as a general proposition, determines its validity. *Scudder v. Bank*, *supra*. Tested by this rule, the contract sued on is

a valid, binding, and subsisting contract. The law of the place of performance governs the contract in the matter of performance. Authorities, *supra*. Tested by this rule, the obligation sued on as commercial paper is to be construed, in respect to the rights of bona fide holders for value, by the law of the state of Tennessee. In relation to the application of these rules, counsel says:

"Two very curious results are reached: First. The question as to one part of the obligation is determined by the laws of one state, while that as to the other part of the obligation of the same instrument is determined by the laws of a different state; the two parts of that obligation and question being principal and interest of the same note, payable both at the same time and at the same place. Second. A single judgment is recovered for both the entire principal and the conventional interest, the judgment for interest being recovered through, and only through, the laws of Mississippi, which allow eight per cent., which law, as to the principal, is denied, while the judgment for the entire principal is recovered through, and only through, the laws of Tennessee, in order to avoid an equitable partial advance which the laws of Mississippi (availed of in the interest) allow."

It cannot be claimed that there is any inconsistency in taking the law of the place where the contract is made to determine the validity of the contract, and then in taking the law of the place where the contract is to be executed in determining as to the performance.

In this case, we consider that the laws of the state of Tennessee with regard to usury, while applying to a contract made in Tennessee to be executed in Tennessee, do not apply in the case of a contract made in another state, in accordance with the laws thereof, to be executed in the state of Tennessee; but the law of the state of Tennessee, applicable, is that any contract made in another state, valid according to the laws of that state, to be performed in the state of Tennessee, shall be executed in Tennessee, in respect to interest, according to the stipulation of the parties. So that, as we view the case, the whole matter of performance, both as to principal and interest, is determined in accordance with the laws of the state of Tennessee. It may well be that the usury law of Tennessee, as well as the anticommercial statute of the state of Mississippi, is a domestic statute, to be applied to domestic cases, and that in both states the general law in regard to commercial paper governs interstate transactions.

3. The fourth plea is as follows:

"(4) And the said defendant, Ben W. Sturdivant, for a further plea in this behalf, as to the sum of four thousand dollars, parcel of the sum herein demanded, says that he denies that the plaintiffs and the said Valley Commission Company, or either of them, took said writing before maturity, as bona fide purchasers for value, without notice, and that the consideration therefor has partly failed, in this: that the said writing was executed for the purpose of covering advances of moneys to be made by the payees therefor to the order of the signers and of this defendant, and on no other consideration whatever, and that the said payees, although often requested to do so, have not made said advances, but have wholly failed and refused to advance the said sum of four thousand dollars, parcel thereof. And this he is ready to verify. Wherefore, he prays judgment," etc.

The motion to strike out the plea reads thus:

"And as to said fourth plea of said defendant, Ben W. Sturdivant & Son, the plaintiff moves the court to strike out of said plea all that part of it which relates to the alleged failure of consideration, because that part of said

plea is irrelevant and redundant,—the said alleged failure of consideration having been already pleaded by defendant in his said third plea,—to the end that the plea may be single, certain, and issuable.”

Acting upon this motion to strike out part, the court struck out the whole plea. The plea is one of partial failure of consideration, attacking the bona fide holding of the plaintiff, and is designed to present the defense under the ordinary rule of the commercial law which prevails in the state of Tennessee in respect to equitable defenses. The objection made to it was that all that part of it which relates to failure of consideration is irrelevant and redundant, the said alleged failure of consideration having already been pleaded by defendant in his third plea. We understand the rule to be that a plea, to be good, must be complete in itself, and that in order to defend against a negotiable note in the hands of an indorsee before maturity, the maker, when sued, must show (1) that he has a defense which would be good against the payee; (2) that the holder is not a bona fide holder for value. He must show both of these. Neither is good without the other. See *Goodman v. Simonds*, 20 How. 343; *Tittle v. Bonner*, 53 Miss. 585; *Grayson v. Brooks*, 64 Miss. 417, 1 South. 482. That part of the same matter was pleaded in another plea can be no objection, if necessary, and well stated, in the plea where pleaded. In this court it is not urged that the plea in question was not technically a good plea, but it is rather urged that the ruling of the court striking it out was error without injurv. it being contended that all of the evidence which could be introduced under the said plea could as well be introduced under the general issue, which was the first plea in the case, and this because the declaration alleges that the plaintiff is a bona fide holder for value; and, although such allegation was premature, yet it was made, it was put in issue by the general plea of nonassumpsit, and thus opened the door for proof which would otherwise not be admissible. Counsel on both sides have furnished the court with a good deal of learning on this subject, which we have read with interest, but do not care to review. It may be, as contended, that the premature averment in the declaration that the plaintiff was a bona fide holder is put at issue by the general plea, and that thereby the door is open for proof on that point, but that is not the whole defense made by the plea. The plea puts in issue, not only the good faith of the plaintiff, but necessarily that of its indorser, the Valley Commission Company; and not only that, but the other matter, also necessary, of equities existing between the maker and original payee. Without such equities being pleaded somewhere, we do not understand that evidence thereof could be admissible. Our conclusion is that the ruling of the court striking out the fourth plea was error prejudicial to the plaintiff in error, rendering it necessary to reverse the case.

4. The fourth assignment of error is in relation to striking out the fifth plea. The objection to this plea is that the two defenses set up therein are previously pleaded by the defendant in the second and third pleas. The questions presented have been substantially disposed of in our consideration of the second and third pleas, and require no further notice.

Although reversing the case for error in ruling on the fourth plea, we have considered the other questions raised because counsel so requested. The judgment of the court should be reversed, and the case remanded, with instructions to reinstate the fourth plea, award a new trial, and otherwise proceed according to the views herein expressed. And it is so ordered.

STURDIVANT v. MEMPHIS NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 171.

In error to the Circuit Court of the United States for the Northern District of Mississippi.

E. Mayes, for plaintiff in error.

W. V. Sullivan, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. This case is, in all respects, identical with the case of *Sturdivant v. Bank* (No. 170; just decided), 60 Fed. 730, and is to be ruled the same way. The judgment of the circuit court is reversed, and the case remanded, with instructions to reinstate the fourth plea, award a new trial, and otherwise proceed according to the views announced by this court.

UNITED STATES v. JEFFERSON.

(District Court, D. Washington, N. D. January 19, 1894.)

UNITED STATES—EIGHT-HOUR LAW—SEAMEN.

Seamen upon a government vessel are employed upon "public works of the United States" (27 Stat. 340) when engaged in removing obstructions to navigation in rivers and harbors, and to exact from them more than eight hours' labor per day at this work, or in the actual care and repair of appliances necessary to carry it on, will subject the offender to indictment.

At Law. Indictment charging E. H. Jefferson, master of the steam snag boat *Skagit*, with unlawfully requiring laborers employed in removing obstructions to navigation to work more than eight hours in a single day, in violation of chapter 352, Laws 52d Cong. (27 Stat. 340). Jury trial. Verdict, "Not guilty."

Wm. H. Brinker, for the United States.

L. C. Gilman, for defendant.

HANFORD, District Judge (orally charging jury). The act of congress upon which the indictment in this case is founded prohibits any officer of the United States having the direction or control of laborers upon any public works of the United States from requiring or permitting, intentionally on his part, more than eight hours' work in a calendar day. The statute does not apply to all persons employed in the government service. It is limited to work designated "the public

works of the United States." To bring a case, therefore, within the inhibition of the statute, the evidence should be sufficient to show that the officer having the direction and control of men employed upon some public work in which the government is engaged exacted from those men or intentionally permitted them to work more than eight hours in a calendar day upon such public work. The removal of obstructions to navigation in the rivers and harbors of the country is a part of the public work of the government. Men employed in removing obstructions are employed upon public works, and they are to be deemed to be engaged in public work while they are actually working upon the obstructions, and during the necessary time employed in going to and from the places where the work is to be performed and the places where they have to lodge or where they go to meals; and they are also to be deemed engaged in labor upon such public work when they are necessarily required to repair their tools, or grind axes, or do work of that kind. Anything that is incident to their labor in the public work is to be deemed labor upon that public work. There is evidence in this case tending to prove that the men named in the indictment were employed as seamen upon a government vessel. The steam snag boat Skagit is a vessel belonging to the war department, and in the public service, and the crew of that vessel are laborers of a different kind from those who are ordinarily employed upon public works of the United States. The statute does not apply to the crew of such a vessel. The evidence also tends to show that the same men who were serving as part of the crew of this vessel were also sent to labor upon public work in removing snags and obstructions from the rivers and harbors. Now, if you are satisfied from the evidence that these men were thus employed in a double capacity, you will have to discriminate, and, in order to convict, find that the defendant required them upon the public work, aside from their duties as deckhands or seamen on the vessel, to perform more than eight hours' work in a day. The policy of this law is something this court and members of this jury are not responsible for. Congress has made the law, and it is obligatory upon all of us to obey it, and enforce it; and we are called upon to do so, no matter how much the public service may be prejudiced by its enforcement; that is a matter congress in its wisdom has seen fit to enact into a statute, and all we can do is to obey it. The case is the same as other criminal cases,—one in which the government has to establish by proof every material allegation of the indictment in order to warrant a conviction; and the jury, upon consideration of the testimony, must decide what the facts are; and unless you are, by the testimony in the case, convinced beyond a reasonable doubt that the defendant is guilty, your verdict should be in his favor,—a verdict of not guilty. This requires you to be convinced beyond a reasonable doubt, by the evidence, that upon some day prior to the date of the indictment the defendant required some one of these men named in the indictment to perform labor in or about the removal of obstructions to rivers or harbors for more than eight hours in a single calendar day. The

particular dates named in the indictment are not material, but some one of the transactions specified in the indictment must be proved, to warrant a conviction.

UNITED STATES v. MOORE et al.

(District Court, N. D. New York. April 2, 1894.)

1. FORGERY—REV. ST. § 5421—FALSE NOTARIAL CERTIFICATE.

The making, or procuring to be made, an affidavit with the false statements that the pension claimant and identifying witnesses appeared before the notary, and that the alleged affiants subscribed their names and were sworn in his presence, where all its signatures are genuine, and no part has been altered, forged, or counterfeited, is not indictable under Rev. St. § 5421, which provides a punishment for every person who "falsely makes," or procures to be "falsely made," a writing, etc.

2. SAME—INDICTMENT.

An indictment for making, or procuring to be made, a false affidavit, must allege specifically in what the falsity consists, and connect defendant therewith.

At Law. Indictment of W. Bowen Moore and Achille J. Oishei under Rev. St. § 5421. Heard on demurrer.

William F. Mackey, Asst. U. S. Dist. Atty., for the United States.
John Laughlin, for Moore.

George W. Cothran, for Oishei.

COXE, District Judge. It is agreed by all that the indictment is founded upon the first paragraph of section 5421, of the Revised Statutes of the United States, which is as follows:

"Every person who falsely makes, alters, forges, or counterfeits; or causes or procures to be falsely made, altered, forged, or counterfeited; or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money;" shall be imprisoned, etc.

The indictment alleges that on the 24th of October, 1892, at Buffalo, the defendants "did then and there knowingly, wrongfully and unlawfully falsely make and willfully aid and assist in the false making of a certain affidavit and writing for the purpose of enabling another person, to wit, Christian Neusel, to obtain and receive from the United States of America a certain sum of money, to the jurors aforesaid unknown, then and there claimed to be due to the said Christian Neusel on account of his military services and disabilities incurred" during the war of the Rebellion. The indictment then sets out the affidavit in full. It contains the necessary facts to enable the applicant to obtain a pension. It is signed by him and by two identifying witnesses and states that all of the affiants appeared before the subscribing notary public. It also contains a jurat signed by "A. J. Oishei, Notary Public," in which he certifies that the affidavit was subscribed and sworn to before him, and that its contents were fully made known and

explained to the applicant and witnesses before they swore to it. The indictment then proceeds to point out that the affidavit was falsely made for the reason that the claimant and the identifying witnesses did not appear and were not sworn before the defendant Oishei. The defendants demur on the ground that the indictment does not state an offense of which the court has jurisdiction.

The authorities are unanimous in holding that the first paragraph of section 5421 is a forgery and not a perjury statute. It punishes one who falsely makes an affidavit and not one who makes a false affidavit. The words of the statute are *ejusdem generis* and are the words usually adopted to describe the crime of forgery. "False making" may almost be said to be synonymous with "forging." U. S. v. Staats, 8 How. 41; U. S. v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524; U. S. v. Wentworth, 11 Fed. 52; U. S. v. Reese, 4 Sawy. 629, Fed. Cas. No. 16,138; U. S. v. Cameron, 3 Dak. 141, 13 N. W. 561; State v. Willson, 28 Minn. 52, 9 N. W. 28; Mann v. People, 15 Hun, 155; State v. Young, 46 N. H. 266; Com. v. Baldwin, 11 Gray, 197; Barb. Cr. Law, 97; Whart. Cr. Law, § 653; Pen. Code N. Y. § 520. It is clear then, if the indictment merely charges the defendants with making an affidavit which contains a false statement of fact, that the offense cannot be punished under the paragraph quoted. For reasons stated hereafter it is thought that the indictment is defective under any construction of the statute, but assuming now that it contains a full and clear statement of all the acts of omission and commission attending the fabrication of the affidavit and jurat, it amounts only to an averment that the notarial certificate is false. The names signed to the affidavit and jurat are all genuine. No part of the affidavit has been altered, forged or counterfeited. The vice of the affidavit is that the statements that the claimant appeared before the notary, that the identifying witnesses appeared before the notary and that all of the alleged affiants subscribed their names and were sworn in the presence of the notary, are false. In short, the certificate contains a number of false statements; it is a false certificate, but not a forged certificate. No authority has been cited or found by the court holding that a notary who signs a certificate containing untruthful statements is guilty under a forgery statute. The statute must be construed strictly, and, until such authority is presented, I shall hold that the paragraph quoted does not cover such an offense.

But in any view of the law the indictment is defective. It cannot be sustained even if it be assumed that the statute covers an affidavit which contains false statements of fact. The affidavit in controversy is on its face sufficient in substance and form. It is an elementary rule of criminal pleading that it is not enough to set out a lengthy instrument and allege generally that it is false. U. S. v. Corbin, 11 Fed. 238; Whart. Cr. Law, § 1300. The defendant is entitled to know wherein it is alleged to be false in order that he may be prepared to meet the charge at the trial. Recognizing the force of this rule the pleader proceeds to point out the particular omission which constitutes the alleged false making, viz.,

that the claimant and witnesses did not appear and were not sworn before the defendant Oishei. The indictment is silent as to any act done by the defendant Moore, much less as to any unlawful act. There is nothing in the affidavit itself which shows that he drew it, or that he was present at its fictitious verification. Indeed, the falsity of the affidavit is predicated of an act of the defendant Oishei. If the affidavit is false only because Oishei made a false certificate it is manifest that Moore did not make it false. The test is this: If the United States proves just what it has alleged in this indictment the court will be compelled to discharge the defendant Moore. It can prove no more than it has alleged and it has alleged no act of his which made or tended to make the affidavit false. As to the defendant Oishei there is, perhaps, more doubt. The allegation as to him is that the witnesses did not appear before him. There is, however, no allegation that he was a notary public, that he signed the jurat or caused it to be signed or knew that it had been signed, or that "A. J. Oishei," whose name appears at the end of the affidavit, is the defendant. It is true that the indictment charges that the witnesses did not appear before the defendant, but there is no allegation, so far as this part of the indictment is concerned, that the defendant himself did any act whatever. For aught that appears to the contrary the entire affidavit may have been drawn by some third party—the defendant Oishei never having seen it or touched it with a pen. It follows that the demurrer must be sustained.

UNITED STATES v. MOORE.

(District Court, N. D. New York: April 2, 1894.)

William F. Mackey, Asst. U. S. Dist. Atty., for the United States.
John Laughlin, for Moore.

COXE, District Judge. The decision in the preceding cause disposes of this cause also. The demurrer is sustained.

UNITED STATES v. BEATTY.

(Circuit Court, D. Vermont. March 8, 1894.)

1. MAILS—USE OF, TO DEFAUD—FALSE PRETENSES—INDICTMENT.

An indictment for using the mails in furtherance of a scheme to obtain money by false pretenses alleged that defendant sent to one S. a circular which was set out in substance, and which stated that an organ of particular description, worth \$150, would be sent to him for \$33, warranted for ten years, and to be returned within three years if not satisfactory, in which event the money would be refunded. The indictment then alleged, in substance, that defendant intended to induce S. to believe that an organ would be delivered to him of the character, and upon the terms, described, whereas he did not intend to perform the representations contained in said circular, but did intend to obtain the said sum of \$33 by means of the said false pretenses. *Held*, that the scheme was set out with sufficient particularity and detail.

2. SAME—IMMATERIAL ALLEGATIONS.

Such indictment is not rendered insufficient by its failure to set out portions of the circular which it alleges are immaterial.

3. SAME—PARTICULARITY.

And where it alleges that the intent was to send an organ of a different character from that described in the indictment, and of less value, it is not necessary that it should specify the said differences.

4. SAME—PAST TRANSACTIONS.

A count in such indictment which does not set up a scheme for obtaining money thereafter under false pretenses, but only alleges false representations in the matter of money already obtained, is bad on demurrer.

At Law. Indictment against Daniel F. Beatty for using the United States mail with intent to defraud. On demurrer and motion to quash.

John H. Senter, U. S. Atty.

Charles M. Demond, for respondent.

WHEELER, District Judge. This cause has been heard upon a motion to quash, and demurrer to, an indictment in two counts,—one for causing a circular, and the other a letter, concerning a scheme devised for obtaining money under false pretenses, to be delivered by mail to one Ned E. Sawyer at Reading, in this district. The principal ground relied upon is that such a scheme, with criminal false pretenses, is not sufficiently set out. That the particulars of the scheme and false pretenses must be set out, and that charging an offense in the general words of the statute is not sufficient, seems to be well settled. *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571. In the first count, however, the circular, in substance, “apart from other printed and illustrated matter not here material,” is set out, and shows a cut of a handsome organ, said to be built of solid black walnut, durable and neat in appearance, having ten full stops, the catalogue price of which was \$150, which would “be sent, with stool and book, upon receipt of your check for only \$33;” warranted for ten years, to be manufactured from the choicest material the market affords or ready money can buy, and to be returned at any time within three years, “if you are not entirely satisfied, at our expense, and we will promptly refund you your money at 6 per cent.” The intention of the respondent that Sawyer, by means of said printed circular and the cuts, pictures, illustrations, and representations therein made and being, should be led to believe that, upon payment of the sum of \$33, the respondent would deliver to him such a parlor organ upon those terms, is set forth, and the charge proceeds:

“Whereas, in truth and in fact, the said Daniel F. Beatty did not then and there intend, upon the payment of thirty-three dollars to him, the said Daniel F. Beatty, by said Ned E. Sawyer, to deliver to said Ned E. Sawyer a parlor organ of the style named, described, represented, illustrated, and set forth in said circular hereintofore set out and set forth, but did intend to obtain the said sum of thirty-three dollars from said Ned E. Sawyer by means of said false pretense, and to deliver and send to the said Ned E. Sawyer an organ essentially different from the organ and instrument of music named, described, represented, illustrated, and set forth in said circular hereintofore set out and set forth; and whereas, in truth and in fact, the said Daniel F.

Beatty did not then and there intend, upon the payment of thirty-three dollars to him, the said Daniel F. Beatty, by said Ned E. Sawyer, to warrant the organ which he, the said Daniel F. Beatty, did then and there intend to deliver to the said Ned E. Sawyer, in the manner, and to the extent, named in said circular heretofore set forth, by a good, sufficient, adequate, and valuable warranty, but did then and there intend to obtain the said sum of thirty-three dollars from said Ned E. Sawyer, by means of said several false pretenses, without making any adequate, sufficient, and valuable warranty to the said Ned E. Sawyer; and whereas, in truth and in fact, the said Daniel F. Beatty did not then and there intend, upon the payment of thirty-three dollars to him, the said Daniel F. Beatty, by said Ned E. Sawyer, if at any time within three years from the date of the delivery to him, the said Ned E. Sawyer, of said organ, he, the said Ned E. Sawyer, was not entirely satisfied with said organ, that he, the said Ned E. Sawyer, should return to said Daniel F. Beatty said organ at the expense of said Daniel F. Beatty, nor, if said organ was so returned to him, the said Daniel F. Beatty, did he intend to refund to the said Ned E. Sawyer the said sum of thirty-three dollars, and interest thereon at six per cent. from the date of the payment of said thirty-three dollars to said Daniel F. Beatty by said Ned E. Sawyer, but the said Daniel F. Beatty did then and there intend to obtain the said sum of thirty-three dollars from said Ned E. Sawyer by means of said several false pretenses, and did intend, then and there, not to return said sum of thirty-three dollars to said Ned E. Sawyer at any time, nor for any cause. * * * And so the grand jurors aforesaid, upon their oaths aforesaid, do say that in the manner, and by the means, aforesaid, the said Daniel F. Beatty did then and there knowingly and wrongfully cause said circular to be delivered by the mail of the United States to said Ned E. Sawyer in the district of Vermont for the purpose of obtaining money of said Ned E. Sawyer by means of the scheme theretofore devised, as heretofore set forth and declared."

Here are not only a scheme and false pretenses in the words of the statute, but also details in specification. These details are, however, criticised principally because the whole of the circular is not set out; because the false pretense alleged as to intent in not sending such an organ as was described was not of an intent not to send any, or one of no, or less, value; because the difference intended is not set out; and because the things alleged to have been done are not all alleged to have been knowingly done. The part of the circular left out is alleged to be immaterial; and no reason or rule of law requires matters not material to be alleged. If this allegation is not true, and parts not set out qualify those that are, and show the want of a scheme devised, or the want of delivery of a circular by mail, to obtain the money under false pretenses, it would be admissible for that purpose under a plea of not guilty, but would not affect the sufficiency of the indictment. It would be a matter of evidence, and not of pleading. The organ proposed by the circular to be sent on receipt of \$33 was specifically described. That intended by the scheme alleged was one essentially different. The pretense that such a one as was described would be sent was false, even if one as good or better was intended to be sent. The particular kind might be material to the purchaser, and his money might be obtained by false pretenses as to that, although not profitable to the seller. Proof as to this might affect the fact, but would not affect the allegation, of intent, which is otherwise well made. The details of this essential difference would be known to the respondent if he intended to send any, and not to the prosecutor while the scheme was in the future; and the offense

consists as well in delivering by mail such a circular concerning such a scheme in the future as concerning such a scheme accomplished. The allegations in this respect are said to be broad enough to cover descriptions in parts of the circular not set out; but this cannot be, for those parts are by the other allegations not material, and these allegations are thereby confined to the parts of the circular set out. As argued for the respondent, where an offense consists in intent, generally, the acts constituting the offense must be alleged to have been knowingly committed; but here the intent itself is well alleged, which includes knowledge, and seems to be sufficient.

The second count does not set out any scheme devised except:

"For him, the said Daniel F. Beatty, to cause to be sent and to be delivered by said mail a certain letter, which then and there was in substance as follows, to wit:

" 'Washington, New Jersey, U. S. of America, April 7th, 1893.

" 'Can you expect the earth for \$33.00? We see we sent style K. This is sold for \$95.00 with no stool, book, box, packing, and put on cars; and, as you only paid \$33.00, you can sell it for \$95.00, and clear over \$60.00, less freight. It's an old box, but a bran new organ, and you have a good value for your money; in fact, the best of the bargain.

[Signed] " 'Daniel F. Beatty,

" 'Washington, New Jersey, United States of America.'"

"Said Daniel F. Beatty, in causing said letter to be sent as aforesaid, then and there and thereby falsely pretended to said Ned E. Sawyer, and then and there meant and intended that said Ned E. Sawyer, by means of said letter and the statements therein made, should be led to believe, that the organ which he, the said Ned E. Sawyer, had bought of him, the said Daniel F. Beatty, at a short time previous to the date of the letter hereinbefore set forth, for the sum of thirty-three dollars, and with which said organ he, the said Ned E. Sawyer, was dissatisfied, was in truth and in fact an organ which was worth, and which he, the said Ned E. Sawyer, could then and there sell for, the sum of ninety-five dollars in cash, which would profit the said Ned E. Sawyer more than sixty dollars, when in truth and in fact said organ was not then and there worth the said sum of ninety-five dollars, nor any considerable part thereof, as he, the said Daniel F. Beatty, then and there well knew, nor could the said Ned E. Sawyer then and there sell said organ for the sum of ninety-five dollars, or any considerable part thereof, as he, the said Daniel F. Beatty, then and there well knew; nor did he, the said Daniel F. Beatty, then and there intend and expect that the said organ could be sold for said sum of ninety-five dollars, or any considerable part thereof, but he, the said Daniel F. Beatty, did then and there intend, as he had theretofore devised and intended, to fraudulently retain and appropriate the said sum of thirty-three dollars, which he theretofore, by means of certain false pretenses, had fraudulently obtained of the said Ned E. Sawyer."

This is no scheme for obtaining money thereafter under false pretenses. It refers to money already obtained. That it had been obtained under false pretenses is alleged, but only in the general words of the statute, which, as before said, is not sufficient. This is not helped out by the first count, for that is not made a part of this count, which is left to stand by itself. If this letter had been alleged to have been written and delivered by mail, concerning the scheme set out in the first count, either by reference to that count or setting out the scheme in this, it might come within the statute; but as it is it is within U. S. v. Hess, supra, and not good. Motion to quash denied, demurrer sustained as to second count, and overruled as to first count, and respondent to answer over.

UNITED STATES v. CUTAJAR.

(Circuit Court, S. D. New York. February 12, 1894.)

1. CUSTOMS DUTIES—FRAUDULENT ENTRIES.

Loss of lawful duties is not a necessary element of the crime of making a fraudulent entry of merchandise, under section 9 of the customs administrative act (26 Stat. 131), and therefore the crime can be committed by an entry of cheese by means of false and fraudulent papers, notwithstanding the fact that cheese is subject to a specific duty of so much a pound, the weight to be determined by the public weigher, and not by the papers connected with the entry.

2. SAME—INDICTMENT—DUPLICITY.

An indictment under this section is not double because it charges in a single count a false and fraudulent entry by means of a false and fraudulent affidavit, a false and fraudulent paper, and a false and fraudulent written statement, as the making of these are all acts connected with the same transaction.

This is an indictment against William Cutajar for violating section 9 of the customs administrative act of June 10, 1890, by making an entry of imported cheese by means of a false invoice and other papers. Heard on demurrer to the indictment.

The section in question reads as follows:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

Henry C. Platt, U. S. Atty., John O. Mott, Asst. U. S. Atty., and Lucius E. Chittenden, for the United States.

Abram J. Rose, for defendant.

BENEDICT, District Judge. This case comes before the court on a demurrer to an indictment found under section 9 of the customs administrative act of June 10, 1890, in which the accused is charged with making an entry of imported cheese by means of a false invoice and other papers described.

Two points have been presented for the determination of the court. The first is whether the loss of lawful duties on the merchandise is a necessary element of the crime created by section 9. In my opinion it is not. As I read the statute, the words, "by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof," qualify only the previous words, "any wilful act or omission." This being so, the crime created by section 9 can be committed by an entry of cheese, notwithstanding the

fact that cheese is subject to a specific duty of so much a pound, the amount of which is determined by the weight made by the weigher, and not by the papers connected with the entry. If this were otherwise, I am not prepared to say that the crime created by the statute in question could not be committed by making a false entry of imported merchandise, subject to a specific duty charged according to its weight as ascertained by the government weigher, by means of an invoice in which the weight of the merchandise is falsely stated. It is not impossible that a loss of duty might accrue to the United States under some circumstances by means of such a false invoice. An invoice is important for the purpose, among other things, of enabling the correctness of the weigher's return of the weight to be tested. In this case,—of which I can speak, because the weigher who weighed this cheese was tried before me for making a false return,—if the invoice in question had stated the correct weight of the cheese, it may well be presumed that the falsity of the weigher's return would have been at once discovered, and the lawful duties accruing upon the merchandise collected, instead of the lesser sum that was paid. A correspondence between a false invoice and a false weigher's return doubtless facilitates the entry of the goods upon payment of less than the legal amount of duties, and so may be a means whereby the United States shall be deprived of the lawful duty on the merchandise. However, as the statute reads, in my opinion the crime provided for in section 9 can be committed by an entry of imported merchandise by means of a false invoice, notwithstanding that the merchandise is subject to a specific duty of so much a pound, as ascertained by weighing it at its landing.

The next question presented is whether the indictment is double because it charges in a single count a false and fraudulent entry by means of a false and fraudulent affidavit, a false and fraudulent paper, and a false and fraudulent written statement. In my opinion, the point is not well taken. "When a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, those which are actually done in the course and progress of its commission may be coupled in one count." *Heard, Cr. Pl. p. 128.* In this instance the making of the affidavit, the invoice, and the statement, were all acts connected with the same transaction, and represent a stage in the same transaction, viz. the entry of the cheese described. In my opinion, the indictment is not double. There must be judgment for the United States upon the demurrer, with liberty to the defendant to plead.

FOSTER, Secretary of the Treasury, v. VOCKE et al.

(Circuit Court, D. Maryland. March 20, 1894.)

CUSTOMS DUTIES—APPEAL FROM BOARD OF APPRAISERS—WHEN LIES.

An appeal from a decision of the board of general appraisers sustaining the claim of the importer of burlaps for a deduction of the excess weight

caused by the goods being wet, is not an appeal from a decision "respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification," within Act June 10, 1890, giving jurisdiction to the circuit court.

At Law. Appeal by Charles Foster, secretary of the treasury, from the decision of the United States board of general appraisers in favor of Claas Vocke & Co., importers.

John T. Ensoe, U. S. Dist. Atty., for appellant.
Brown & Brune, for appellees.

MORRIS, District Judge. Claas Vocke & Co. imported into the port of Baltimore 13 bales of burlaps per steamship Schiedam, which arrived and were entered November 10, 1891, and on November 14th the importers withdrew the entire importation for consumption. The merchandise, being burlaps, was dutiable at 1½ cents per pound. The appraiser, in his report on the invoice, dated November 13, 1891, stated: "Upon examination of the goods as above, we find they were damaged by water during the voyage, and would recommend that the invoice weight be accepted." On November 24th, the official return of the weights having been filed with the liquidating officer on the day before (November 23, 1891), the entry was liquidated, and the importers were notified of the excess of weight over the invoice weight, and the consequent increase of duty. On November 30th the importers paid the whole duty exacted, and on the same day filed their written protest, claiming that, as the bales were soaked with water, the weight was greatly increased. They claimed that the goods were not damaged, as the water would soon dry out, and then the goods would be merchantable as sound goods; but protested against paying duty on the weight of the water, which they showed was in some bales as much as 134 pounds per bale in excess of the ordinary dry weight. The collector, while conceding that the facts were as claimed by the importers, and that, if they had pursued their proper remedy, relief should have been and would have been granted, refused to allow any abatement, because by article 602 of the customs regulations of 1884, prescribed by the secretary of the treasury, it was provided that no abatement of duties on merchandise on account of increased weight, caused by accidental and unusual leakage or shipment of water on the voyage of importation, would be allowed unless due application in writing for such allowance, with oath of applicant, should be lodged in the customhouse within 10 working days after the landing of the goods. Upon appeal by the importers to the board of general appraisers, it was decided by them that it was sufficient that the importers had complied with the provisions of section 14 of the customs administrative act of June 10, 1890, and that they were not barred from relief by article 602 of the regulations of 1884; and they sustained the claim of the importers that the duty should be computed upon the actual weight as stated in the invoice. This appeal is from that decision of the board of general appraisers.

It is very obvious that by the act of June 10, 1890, congress did not intend to give to the circuit courts jurisdiction to re-examine and decide all the questions which might be appealed from the decision of the collector to the board of general appraisers. An appeal may be taken from the collector to the board of appraisers "as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character." An appeal from the board of appraisers to the circuit courts may be taken "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." The circuit court is given jurisdiction "to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." It is obvious that the present appeal is not from any decision respecting the classification of the goods as burlaps, or the rate of duty imposed thereon under the classification. It is conceded that the goods are properly classified as burlaps, and that the rate of duty is properly $1\frac{1}{2}$ cents per pound. The only question is as to the actual weight of the goods on which the duty is to be computed. This is not a question of law or of fact respecting the classification. It is a question of ascertaining the actual weight of the goods imported. *Passavant v. U. S.*, 148 U. S. 214-219, 13 Sup. Ct. 572; *In re Klingenberg*, 57 Fed. 195. In my judgment, this is not a question which the circuit court is given jurisdiction to hear and determine, and the appeal must be dismissed.

HUTTON v. STAR SLIDE SEAT CO. OF SPRINGFIELD.

(Circuit Court, S. D. Ohio, W. D. March 28, 1894.)

No. 4,619.

PATENTS—INFRINGEMENT SUITS—PLEADING.

Failure to aver that the invention of the patent has not been previously patented or described in any printed publication is a defect which may be taken advantage of by special demurrer.

Suit in equity by George B. Hutton against the Star Slide Seat Company of Springfield for infringement of a patent. Heard on special demurrer to the bill.

Price & Stewart, for complainant.
Paul A. Staley, for defendant.

SAGE, District Judge (orally). The defendant demurs specially to the bill that it does not set forth that the invention described in the patent sued upon has not been previously patented or described in any printed publication. The bill states that the invention was not known or used by others before complainant's invention or discovery thereof, and was not in use or on sale in this country for more than two years before his application for letters patent therefor. That this averment is good against a general demurrer was held in

McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000. In *Coop v. Institute*, 47 Fed. 899, it was held that the omission of the averment in regard to the invention having been patented or discovered in a printed publication was a defect in form which could be taken advantage of by special demurrer, and should be remedied by amendment. To the same effect see *Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.*, Id. 894; *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. 859; and *Hanlon v. Primrose*, 56 Fed. 600. The demurrer will be sustained at the cost of complainant, with leave to present an amendment within 20 days with an application for leave to file.

HOLTZER v. CONSOLIDATED ELECTRIC MANUF'G CO. et al.

(Circuit Court, D. Massachusetts. March 13, 1894.)

No. 2,923.

1. PATENTS—CONSTRUCTION OF CLAIMS—GALVANIC BATTERIES.

The first claim of the Holtzer patent for an improvement in galvanic batteries (No. 327,878) includes a "negative electrode, consisting of a carbon cup provided with a cover integral with it," etc. The specifications state that the "negative element and top or cover of the jar are formed of a single integral piece of molded material." *Held*, that the word "integral," as used in the claim, involves the idea of a cup and cover molded in one piece, and cannot be construed as relating to a whole composed of parts spacially distinct.

2. SAME—INVENTION.

The Holtzer patent No. 327,878, for a galvanic battery in which the negative electrode consists of a cup and cover molded in one piece, and having a central opening for the reception of the positive electrode, shows patentable invention in securing utility and durability through simplified methods.

This is a bill filed by Charles W. Holtzer against the Consolidated Electric Manufacturing Company and others for infringement of a patent for an improved construction of galvanic batteries.

Fish, Richardson & Storrow, for complainant.
Philip Mauro, for defendants.

ALDRICH, District Judge. The complainant seeks protection for an alleged invention covered by letters patent No. 327,878. The device or invention is supposed to produce an improved construction of galvanic batteries, sometimes called "agglomerate batteries" and sometimes called "open-circuit batteries." The complainant's battery, manufactured under the claims of such letters patent, is known in the United States and in foreign countries as the "Holtzer Cylinder Battery," and it is alleged that the defendants' battery adopts the substantial improvement resulting from the invention covered by such letters patent.

It is not understood that the complainant rests his case upon discovery of agencies employed to generate electricity, but upon improved methods calculated to make known agencies more practical and useful; that the invention is in the direction of simplicity

and durability, and that, by discarding many details of former batteries, a greater utility is produced. And, to state the complainant's claim in the words of the expert:

"The improvement forming the subject of the invention of the Holtzer patent consists mainly in making the negative element in the form of an inverted cup composed of a single integral piece of molded carbon, the bottom of the cup constituting the top or cover of the battery jar or reservoir containing the battery elements and liquid. The cover portion of the cup-shaped element is also formed with an external flange, which rests upon the mouth of the jar, and thus supports the carbon element in the jar while closing the mouth of the jar so as to prevent evaporation of the liquid. The portion of the negative electrode forming the cover of the jar is provided with a central opening which contains a perforated bushing or stopper of insulating material, through the perforation of which the zinc or positive element of the battery passes so that the said zinc is properly supported in the battery liquid, and at the same time insulated from the negative element except as the said elements are connected through the external and internal circuit of the battery. The cover of the cup-shaped negative element has secured to it, and in intimate electrical contact with it, a binding post or wire clamp constituting the positive pole of the battery to which the external circuit wire is connected."

It is also claimed among other things that:

"The advantages of the improved construction, in which the negative element and top or cover of the jar are formed of a single integral piece of molded material, instead of being made up of a number of parts, some of conducting and some of insulating material, mechanically fastened together, are simplicity of construction, and strength and durability, as there are no parts to become detached from one another, and greater electrical efficiency and durability, as there are no joints or contacts to become electrically separated or insulated from one another by the destructive action of the battery liquid."

The device on which the complainant principally relies is described as follows:

"I claim: (1) In an electric battery, the negative electrode, consisting of a carbon cup provided with a cover integral with it, the said cover having an opening for the reception of the positive electrode, and being extended over the edge of the jar to support the cup, substantially as described. (2) An electric battery consisting of a glass jar, a cup and cover attached thereto, forming the negative electrode, and an insulating bushing or sleeve placed in the cover, and a positive electrode supported by the said insulating bushing or sleeve, substantially as described."

The defendants' theory is that, under reasonable construction of the claims, the idea of a cup and cover molded in one piece was not intended, and that the complainant's contention in evidence that the leading and substantial feature of his invention is simplicity resulting from the cup and cover molded in one piece of the same material is not warranted by the claims filed in the patent office; and it is urged in this direction that the word "integral," used in this connection, does not mean necessarily one piece, and may, with equal consistency, relate to a whole, composed of parts spacially distinct. I cannot accept the defendants' view in this respect. Reading the claims in connection with the specification, it is apparent that the patentee's aim was in the direction of simplicity, and that he intended one piece molded of the same material, and that the word "integral" was used in that sense. It will be observed

by reference to the third paragraph of patentee's specification that he says:

"In accordance with my invention, instead of the usual glass cover, the positive carbon rod, and the usual agglomerate plates or blocks fastened to it by rubber bands, and the lead cap attached to the positive carbon outside of the cover and serving to suspend the said carbon within the jar, I employ a negative electrode, composed of the usual so-called 'agglomerate' material, molded under pressure to form a cup, and a flange to support the cup when placed in position in the usual glass jar."

The construction for which the defendants contend doubtless might result from technical and astute reasoning, but such is not the rule for construing claims of this character. *Manufacturing Co. v. Adams*, 151 U. S. 139, 144, 14 Sup. Ct. 295. The word "integral" might be employed under circumstances and in a sense to denote what the defendants claim for it, but we do not think it was used in this connection to describe a cup and cover of several parts of the same or different material, but, on the contrary, to describe one piece molded in such shape as to perform the function previously involved in a complicated mechanical construction comprising a considerable number of parts of different materials and attachments.

The complainant's invention must be accepted as a valuable improvement upon the means previously employed in this class of batteries. The device provides for a mechanical construction comprising practical utility and durability through simplified methods, and by means more satisfactory than any previously employed or known. That this invention is a useful improvement seems apparent from an examination of the complainant's claims and exhibits, in comparison with the claims set forth in prior patents, and the batteries, formerly used, as described in the evidence presented by the record. If there were doubt on this question, we might well consider the fact that the complainant's idea of construction was readily adopted by the public generally, as well as by these defendants. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 560, 13 Sup. Ct. 719; *Topliff v. Tonliff*, 145 U. S. 156, 164, 12 Sup. Ct. 825. It must, therefore, be found that the complainant's improvement involves patentable novelty, and that it was not anticipated by any form of construction previously known. Although the improvement is simple in its character, it is entitled to protection. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 560, 13 Sup. Ct. 719; *The Barbed Wire Patent*, 143 U. S. 275, 282, 12 Sup. Ct. 443, 450; *Loom Co. v. Higgins*, 105 U. S. 580, 591. Indeed, simplicity of construction is the leading characteristic of the Holtzer battery, and it is for the device which works this result that the complainant seeks protection.

The defendants' battery appropriates the essential idea of construction contemplated by the first and second claims of complainant's patent, and is an infringement thereof.

Let a decree be entered for an injunction and an accounting in accordance with the prayer.

MACK v. LEVY et al.

(Circuit Court, S. D. New York. February 20, 1894.)

1. PATENTS—DECREE—RES JUDICATA.

A decree which shows only that certain claims of a patent were sustained does not include an adjudication that the other claims were invalid.

2. RES JUDICATA—WAIVER.

The estoppel of a decree need not be relied upon, but may be waived; and it is binding upon both parties or neither. Hence, when defendant sets up new matter as a defense to a prior decree pleaded by complainant, the latter may treat the estoppel as waived.

This is a bill by William Mack against Levy, Dreyfus & Co. for infringement of letters patent No. 268,112, issued November 28, 1882, to complainant. On motion for rehearing. The prior opinion is reported in 59 Fed. 468.

Albertus H. West, for plaintiff.

James A. Hudson, for defendants.

WHEELER, District Judge. The defendants have moved for a rehearing upon the conclusiveness of the decree in the former suit between these parties. The bill in this suit alleges the issuing and infringement of the letters patent, and that they had been in controversy in a certain suit in equity in this court wherein the orator was complainant and these defendants were defendants, which came on for hearing before Judge Shipman, whereupon "the said court decreed that said letters patent were good and valid in law, and that the defendants had infringed upon the fourth and sixth claims thereof," and directed an injunction and an accounting. 59 Fed. 468. It also alleges a suit by the orator against the Spencer Optical Manufacturing Company, in which this court, held by Judge Coxe, "decreed that said letters patent were valid in law as to claims four and seven thereof." 52 Fed. 819. The answer admits the issuing of the patent, and the former suit and decree against the defendants, and alleges that the invention had been previously known to, and used by, among others, August Sten-dike, of and at New York; and, "of and concerning the said suit, these respondents allege, and will show to the court, that, upon the evidence therein presented at the hearing thereof, the said court made and filed a decision in writing, wherein certain facts were found and conclusions of law reached, upon and pursuant to which, and after the filing thereof, and the making of the interlocutory decree aforesaid, such proceedings were had that the respondents duly accounted as therein directed; and thereafter, on the 1st day of December, 1890, a final decree was therein made, in conformity to said decision and modification of said interlocutory decree, and filed by the court, wherein and whereby the respondents were adjudged to pay to the complainant the sum of \$800, in full for profits, damages, and costs of the said suit to the time of said decree, and the said patent was adjudged to be good and valid, but only as to the fourth and sixth claims thereof,—all of which, by said decision and interlocutory decree and final

decree, or certified copies thereof, here in court to be produced, will more fully appear; and that said final decree yet remains in full force and effect. * * * And these respondents further show unto your honors that facts are alleged in this answer, and evidence will be presented in this suit, material and necessary to the issues raised by the pleadings, which facts were not before the court in the suit above mentioned, because the evidence thereof was not available to the respondents for use therein, which facts these respondents believe, and thereupon allege, would have constrained the court to have made a judgment and decree altogether in favor of the respondents in said former case, had the evidence of such facts been before the court on the trial of the cause;" that the defendants began to make and sell opera-glass handles of the form and construction charged to be an infringement, whereupon proceedings praying an attachment as for a contempt of the injunction were instituted; "and that the matter came on for hearing on said motion, and was heard by the court, Hon. Nathaniel Shipman, judge, presiding, and on due consideration the attachment prayed for was denied, and a written decision was made and duly filed on the decision thereof, on or about the 21st day of March, 1892, wherein and whereby the true intent and meaning of the decision filed in the suit aforesaid on the final hearing thereof was more fully elaborated and explained, and the scope of the patent in suit more fully defined; and that an order was duly made pursuant to said decision, and filed by the court on the 25th day of March, 1892, as by reference to the said decision and order, or to duly-certified copies thereof, here in court to be produced, will more fully appear."

The answer was traversed. The orator produced in evidence the patent, the opinion of Judge Shipman, and the final decree signed by Judge Lacombe in the former suit between these parties, adjudging that the letters patent "are good and valid in law as to the fourth and sixth claims thereof," and the opinions of Judge Coxe in the suit against the Spencer Optical Manufacturing Company; and the defendants admitted manufacture and sale of an exhibit as a specimen of opera-glass holders which was like those before Judge Shipman in the contempt proceedings, and those held by Judge Coxe to be an infringement. The defendants introduced much testimony as to other anticipations, which was controverted, but none as to Stendike, and produced the contempt proceedings. The defendants now insist that they urged on the argument, and that the court should have held, that the decree in the former suit between these parties was conclusive as to the extent of the validity and as to the construction of the patent, which would acquit the defendants of infringement; and that the decision of Judge Coxe should not be followed because not between these parties.

The former decree between these parties was not at all conclusive between the orator and the Spencer Optical Manufacturing Company, because that company was not a party to that decree and would not be bound by it; and both parties must be bound, or neither is. 1 Greenl. Ev. § 524. The difference between those

cases appears to have been that, in the former, Judge Shipman found priority of the Stendike device; and, in the latter, Judge Coxe did not. That decree is not conclusive in all things here, because this suit is for an alleged new infringement arising since that suit was brought. It is conclusive, if relied upon, of whatever is properly brought forward and shown here to have been in issue, and tried and determined there. *Cromwell v. County of Sac*, 94 U. S. 351; *Russell v. Place*, Id. 606. "But to this operation of the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." *Field, J.*, 94 U. S. 608. The important questions here are whether the priority of the Stendike device, and the invalidity of all but the fourth and sixth claims of the patent, are so shown to have been decreed there as to be binding and conclusive here. Some of the claims might be in controversy, and others not, and decreeing the fourth and sixth claims to be valid (which is all that the final decree, if sufficient, shows) would not at all include decreeing the others to be invalid. *Russell v. Place*, 94 U. S. 606. Nothing shows anything about the Stendike device but the opinions of Judge Shipman and Judge Coxe. These are not decrees, nor even parts of the record on which the decrees were founded, but are only reasoning upon the records which, as authorities, become a part of the law of the subject. *Herrick v. Cutcheon*, 5 U. S. App. 250, 5 C. C. A. 21, 55 Fed. 6. The opinions and decree, as evidence, show that such opinions were rendered, and that such a decree was made. They do not show the issues and facts which were considered, but only that such consideration was had. They are precedents, and not estoppels. 1 *Greenl. Ev.* § 511.

There has been nothing about the Stendike device in this case to consider except the opinion of Judge Shipman with it in, and of Judge Coxe with it out. As in this case it is out, the opinion of Judge Coxe as an authority, not as evidence, has been followed, the same as Judge Shipman's would have been if it had been in. And an estoppel need not be relied upon, but may be waived. It is, as before said, binding upon both parties or neither, and as conclusive in respect to newly-discovered evidence as to that before known or introduced. The defendants, having set up a defense against it, have elected to treat it as open and not binding. As it could not be both open and shut, the orator might, as he has, treat it as waived.

Rehearing denied.

SESSIONS v. GOULD et al.

(Circuit Court, S. D. New York. April 2, 1894.)

1. PATENTS — CONSTRUCTION OF CLAIMS — PRELIMINARY INJUNCTION — FINAL HEARING.

The construction placed upon a claim by the court upon granting a preliminary injunction should be followed at the final hearing, when there has been no substantial change in the cause so far as it relates to the question of construction.

2. SAME—DEFENSES—PUBLIC USE AND SALE—PRESUMPTIONS.

The presumptions are strongly against the defense of public use and sale, especially in the case of an experienced inventor, who would not thus throw away the fruits of his invention; and the defense is not made out when the witnesses are shown to be unreliable as to their dates.

3. SAME—INFRINGEMENT—TRUNK FASTENERS.

The Taylor patent, No. 203,860, for trunk fasteners, construed as to the second claim, which is *held* to be valid, and to have been infringed by defendants; but *held*, further, that the first and fourth claims were not infringed.

4. SAME.

The Sessions patent, No. 255,122, for trunk fasteners, is void for want of novelty and invention.

This is a bill in equity filed by John H. Sessions against William B. Gould and others for infringement of patents for trunk fasteners.

Charles E. Mitchell and John P. Bartlett, for complainant.
Arthur v. Briesen, for defendants.

COXE, District Judge. This is an infringement suit founded upon two letters patent, viz. No. 203,860, granted to Charles A. Taylor, May 21, 1878, and No. 255,122, granted to John H. Sessions, Jr., March 21, 1882. Both patents are now owned by the complainant. They are both for improvements in trunk fasteners of the variety covered by letters patent No. 128,925, granted to Taylor in 1872. This first patent was the subject of protracted litigation. It was finally sustained by the supreme court, and given a broad construction in *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799.

The patents in suit were before this court on a motion for a preliminary injunction. The motion was granted, and a construction was then placed upon the second claim of the Taylor patent. *Sessions v. Gould*, 49 Fed. 855. As this art had its inception years before the patents in suit, and as the devices covered by them are only improvements upon the structure of the 1872 patent, it is clear that a broad construction of these patents is out of the question. Each inventor is entitled to have his contribution to the art protected, but nothing more.

No. 203,860.

The claims of the Taylor patent are as follows:

"(1) The plate, C, of a trunk catch or fastening, when the said plate has cast thereon one or more pins or posts, b, projecting horizontally from the rear face of the said plate, substantially as and for the purposes set forth. (2) A trunk catch or fastening, consisting of the combination of the plate, C, having thereon the lug or shoulder, L, the plate, G, and the snap loop, J, substantially as and for the purposes specified. (3) A trunk catch or fastening, consisting of the combination of the plate, C, having thereon the lug or shoulder, L, and the post or pin, b, the plate, G, box or recess, H, spring, I, and loop, J, having the cam, K, on its crossbar, all substantially as and for the purposes specified."

The defenses are lack of invention, noninfringement, and invalidity because of public use and sale by Taylor more than two years prior to February 18, 1878, the date of his application. I

am not quite able to ascertain from the complainant's brief whether he relies upon all these claims or only upon the second claim. Assuming that the first claim is valid, both the first and the third claims include as an element "the pin, b," which is described as being cast upon the plate which forms the upper part of the fastener. As the defendants do not have this pin, they do not infringe either of these claims. As before stated, the second claim has received judicial interpretation in this court. It was construed to contain a combination of the following elements: First. The plate, C, having thereon the lug or shoulder, L. Second. The plate, G, on which is the box or recess, H, for containing the spring, I, and through which box or recess passes the crossbar of the loop, J, having thereon the eccentric or cam, K, resting on the spring, I. Third. The snap loop, J, having thereon the cam, K.

It is contended that this construction is untenable because the same reasoning which places "the box, H," on plate, G, must place "the pin, b," on plate, C, and that the plate, C, with the pin, b, cast thereon, is a necessary element of the combination.

Again, it is said that the real advance pointed out in the patent is the use of the plate, G, beneath the box, H, and cast separately from it; that the claim must be construed as including such a plate, and, as the defendants do not have this plate, they do not infringe. It is evident, however, that these arguments were presented to the court on the motion, and were decided adversely to the defendants. The fact that in the defendants' fasteners the plate, G, and the box, H, are produced in a single casting, and not separately, as in complainant's structure, was held to be immaterial. So far as the construction of this claim is concerned, the cause is substantially in the same situation that it was in when the motion for an injunction was made. In such circumstances, I think the former decision should be followed. It is true that this rule has not always been adhered to in this circuit, but it is thought that the rule is a wise and salutary one for the orderly administration of equity jurisprudence, and especially so when it is so easy to obtain a speedy review.

The question of patentability, and all other questions, were reserved for final hearing. The claim, as above construed, is calculated to give the patentee what he has invented, and nothing more. His fastener is exceedingly popular, it has long been acquiesced in, and has sufficient novelty and points of excellence about it to support a patent.

The defense of public use and sale has not been sufficiently established. The burden is upon the defendants to satisfy the court that Taylor's fastener was publicly used prior to February 18, 1876. They have not done so. The witnesses called by the defendants are, in many instances, proved to be unreliable as to their dates, the presumptions are strongly against the defense, and it is altogether unlikely that an experienced inventor like Taylor would thus throw away the fruits of his invention. The court is convinced that the defense has not been established by the requisite preponderance of testimony.

No. 255,122.

The patent to John H. Sessions, Jr., is concededly a very narrow one. It introduces no new principle or mode of operation, but is confined to a clever method of forming and assembling the parts of a trunk fastener. The claim is as follows:

"In a trunk fastener of the class substantially such as is herein shown and described, the plate and spring box cast in one piece, with the snap loop receiving recesses, and the thin lugs by the side of said recesses, said lugs being adapted to be bent for holding the snap loop in place, substantially as described, and for the purpose specified."

Infringement is admitted. The defense is lack of novelty. The device of this claim is an improvement over the Taylor construction. So much may be conceded. But it is an exceedingly simple improvement,—such a change as would seem to be within the province of the skilled artisan. The patentee casts the box and plate in one piece instead of two, and holds the snap loop in place by thin lugs, which are adapted to be bent down for this purpose; but there was nothing novel about these features. The patent granted to Arnold for a trunk catch in June, 1878, shows a very similar construction. "The plate, A," says the patent, "is also provided with lugs, c, c, on each side of the recess, at about its center." It is true that these lugs are not shown as bent down, but they can be bent down, and Uitting, among others, showed the mechanic just how this could be done. Considering all that is shown in the prior art, and particularly the patents to Arnold and Uitting, I am constrained to hold that this patent is invalid for want of invention.

The complainant is entitled to the usual decree on the second claim of the Taylor patent, but without costs.

HUMPHREYS HOMEOPATHIC MEDICINE CO. v. HILTON.

(Circuit Court, S. D. New York. March 14, 1894.)

TRADE-MARKS—NUMERALS APPLIED TO SPECIFIC REMEDIES.

Numerals used by a medicine company to identify specific remedies for various ailments are, in effect, descriptive terms, and their use will not be protected as a trade-mark.

In Equity. Bill by the Humphreys Homeopathic Medicine Company against George W. Hilton to restrain the use of an alleged trade-mark.

Henry J. Homes (Alfred Taylor, of counsel), for plaintiff.

Wise & Lichtenstein (Morris S. Wise and George L. Huntress, of counsel), for defendant.

WALLACE, Circuit Judge. The complainant and its predecessors in business have for many years manufactured, advertised, and sold homeopathic remedies, consisting of 35 specifics for various ailments. They have advertised these remedies in various books

and pamphlets treating of hygiene and diseases, and containing directions for the use of the remedies. The remedies are sold in vials, each of which is labeled "Humphrey's Homeopathic Specific;" and upon the label is also printed a number, and the name of the ailment for which the remedy in the particular vial is intended, such as "No. 1, Fever;" "No. 5, Dysentery;" "No. 10, Cholera," etc. In the advertisements the remedies are referred to by the numbers, which run from 1 to 35, inclusive. The defendant also manufactures, advertises, and sells homeopathic remedies, consisting of 14 specifics for various ailments. He advertises them in books and pamphlets. He sells them in vials, each of which is labeled "Dr. Hilton's Specific," and upon the label of each is printed a number, but not the name of the ailment for which the remedy is intended. His numbers run from 1 to 14, inclusive, and in his advertisements the specifics for the different ailments are referred to by their respective numbers. In his system the different numbers do not stand for the same remedies as in the complainant's system. Thus, his No. 1 is a remedy for pimples, his No. 5 for canker, his No. 10 for inflammation of the bladder. The complainant insists that the defendant is guilty of unfair competition and that it has a trade-mark in the different numbers, to and including 35, as applied to homeopathic remedies, which the defendant infringes by the use of any or all of his 14 numbers.

Neither the complainant, its predecessors, nor the defendant was the first to adopt a system of putting up and selling medicinal remedies in connection with books or advertisements by which the remedies were separately numbered, the numbers placed upon the vials or packets, and the remedies referred to by their number in the books or advertisements containing directions for their use. It suffices to refer to the books and remedies of Dr. Samuel Thomson, author of the "Thomsonian Materia Medica and Botanic Family Physician." The defendant doubtless adopted it because of its convenience. He had a right to do so. The case is destitute of any indication that he has employed the system with a view to deceive the public, or to palm off his remedies as those of the complainant.

The complainant has no trade-mark in the naked numbers. They have never been used alone by complainant or its predecessors upon the remedies, but have always been used with words, the name of some ailment, and apparently also with a symbol consisting of a figure of a woman and lion. At best, the numbers are but an element of a trade-mark. As used by the defendant, they ought not to mislead the public, or tend to confuse the identity of his specifics with those of the complainant.

It is said in Browne on Trade-Marks (section 225) that mere numerals cannot be considered arbitrary symbols, and that there must be some collateral characteristics to invest them with the qualities of a trade-mark,—some peculiarity of form, ornamentation, coloring, or combination, to make them distinctive, and take them out of the common category. It is unnecessary, in the present case, to express an opinion as to the correctness of this proposition. It

may be that numerals, which are arbitrarily selected, without any purpose of identifying the article to which they are affixed from other articles of a similar class, may become the subject of a trade-mark. But the use of numerals as a short method of identifying the several members of a class, and distinguishing one of them from another, is as old as the use of written words. When so used, they are, in substance and effect, descriptive terms,—the number conveys to the reader details which otherwise would have to be amplified in words. Hence it is that the practice is so common with manufacturers and dealers of numbering the varieties so as to indicate by reference to advertisements, photographs, or other descriptive mediums the size, grade, or peculiar characteristics of each for their own convenience and that of their customers. No one can acquire an exclusive right to appropriate them for such a purpose. No one has the right to appropriate to his exclusive use a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. It is because of this principle that a trade-mark cannot be acquired by the adoption of a word which is merely descriptive of the quality, ingredients, or characteristics of a commodity. *Manufacturing Co. v. Spear*, 2 Sandf. 599; *Canal Co. v. Clark*, 13 Wall. 311; *Manufacturing Co. v. Trainer*, 101 U. S. 51. As used by the complainant and its predecessors, the numbers merely are not a valid trade-mark. The bill is dismissed, with costs.

HENDERSON v. TOMPKINS.

(Circuit Court, D. Massachusetts. March 21, 1894.)

No. 3,104.

1. COPYRIGHT—JUDICIAL KNOWLEDGE AS TO ORIGINALITY.

In a suit for infringement of copyright in a dramatic composition, the court will rarely interpose its judicial knowledge to the extent of finding on demurrer against the allegations of the bill touching questions of originality.

2. SAME—ALLEGATION OF AUTHORSHIP.

A bill for infringement of copyright alleged that complainant was the proprietor of a certain dramatic composition "written or composed" by citizens of the United States. *Held*, on demurrer, a sufficient allegation of authorship, in the absence of specific exception.

3. SUBJECTS OF COPYRIGHT.

The introduction, skeleton, and chorus of a "topical song,"—part of a dramatic composition,—though designed merely to amuse, though possessing little literary merit or originality, may be subject to copyright, if of value for the purposes for which they were designed.

In Equity. On demurrer to bill.

The bill of complaint was as follows:

David Henderson, of Chicago, in the state of Illinois, a citizen of the United States, brings this, his bill of complaint, against Eugene Tompkins, of Boston, in the state of Massachusetts, a citizen of the United States; and thereupon

your orator complains, and says: (1) That your orator, being the proprietor of a certain dramatic composition entitled "Ali Baba, or Morgiana and the Forty Thieves," written or composed by citizens of the United States, did, on or before the date of publication in this or any foreign country, viz. upon the 23d day of April, 1892, deliver at the office of the librarian of congress a printed copy of the title of the said composition, and received from said librarian a certificate of such deposit, hereunto annexed, and also did, not later than the date of the publication thereof in this or any foreign country, viz. upon the said 23d day of April, 1892, deliver at the office of the librarian of congress two copies of said dramatic composition, and received from the said librarian a certificate of said deposit, also hereto annexed, whereby the same became duly copyrighted. (2) That a part of said dramatic composition was as follows: "Cassim (scornfully): But Ali Baba's election is certain. Nico: I know it. Arraby: How do you know? Hack: She had a dream last night. Caliph (coming down stage): I wonder if dreams come true." And that the said dialogue was then immediately followed by a song entitled, "Quartette for Ali Baba: I Wonder if Dreams Come True," consisting of a number of verses of eight lines, in each of which the second, fourth, and eighth lines consist of the refrain, "I wonder if dreams come true," and the chorus after each verse is as follows: "Hi diddle diddle, the cat and fiddle, the parrot and monkey too. Bells they are ringing, there's fighting and singing, I wonder if dreams come true;" and that of each of the said verses, all except the second, fourth, and eighth lines aforesaid, were of a so-called "topical" nature (that is to say, relating to topics of current interest), and that the matter of the said topical lines was intended to be changed or varied from time to time to introduce allusions to new topics, the whole constituting what is known as the topical song, "I Wonder if Dreams Come True." (3) That the said song, so introduced by dialogue, forms an important and valuable part of the said dramatic composition, "Ali Baba," and constitutes one of the principal features of interest therein, and that the sole and exclusive right of publicly performing or representing the same is of great value to your orator. (4) That the defendant herein, well knowing the foregoing, and after the recording of the title of the said dramatic composition, and within the term of copyright therefor limited, and without the consent of your orator first obtained in writing, and signed in the presence of two or more witnesses, did publicly perform and represent, and is now so publicly performing and representing at the Boston Theater in said Boston, a certain dramatic composition, whereof a substantial and material and important portion consists of a dialogue between various characters in relation to having had a dream, the said dialogue terminating with a speech by one of said characters, as follows, "I wonder if dreams come true," which said speech is immediately followed by a topical song of a number of verses of eight lines each, the second, fourth, and eighth of which consist of the words or refrain, "I wonder if dreams come true;" that each of said verses is followed by the chorus of your orator's said song, and that the remainder of the lines in each verse are topical in character, and in substantial imitation of the said topical portions of your orator's said copyrighted song; and that the said performance and representation by the defendant of the said dialogue and the said song are a substantial and material infringement upon your orator's said exclusive right of publicly performing or representing the same. (5) And that by reason of the performance as aforesaid by the defendant of said dialogue and topical song in said Boston, in advance of the performance by your orator there of his said copyrighted composition and song, the same is made and becomes familiar and stale to the public, and thereby the attractiveness and value of your orator's said composition, subsequently to be produced by him in said Boston, have been and will be greatly reduced and impaired; and your orator is further informed and believes and charges that the defendant proposes to continue his said performance in other places, and throughout other parts of the United States, in advance of your orator's production of his copyrighted composition therein, to the great and continuing injury of your orator's rights in the premises. Wherefore, your orator prays that the said defendant may be required to answer the premises under oath, and may be decreed to ac-

count for and pay over unto your orator all gains and profits by the said defendant realized from his said infringement, and also the damage which your orator has sustained thereby, and that he may be restrained by an injunction of this honorable court from publicly performing or representing, or causing or permitting to be publicly performed or represented, any dramatic composition embodying, in whole or in part, any substantial or material portion of your orator's said copyrighted composition, and that he may be similarly enjoined pending this suit. And, to the end that your orator may have such relief, may it please your honors to grant to your orator writs of injunction conformable to the prayer of this bill, and also a writ of subpoena to be directed to the said Eugene Tompkins, commanding him, at a certain time, and under a certain penalty therein to be limited, personally to be and appear before this honorable court, then and there to answer to this bill, and to do and receive what to your honors shall seem meet.

Defendant demurred to the bill of complaint in form as follows:

The defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer sheweth: (1) That it appeareth by the plaintiff's own showing, by the said bill, that he is not entitled to the relief prayed by the bill against the defendant. (2) That, in particular, it appears by the plaintiff's own showing, by the said bill, that the matter which he has alleged therein as protected by the copyright laws of the United States, and as having been infringed by the defendant, is matter which does not, and does not tend to, promote the progress of science and useful arts, or either of them, and is not within the scope of the power granted to congress by the constitution of the United States, to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their inventions and discoveries. (3) That, in particular, it appears by the plaintiff's own showing, by the said bill, that the matter which he has alleged therein as protected by the copyright laws of the United States, and as having been infringed by the defendant, is not, and was not at the time of the deposit of the title of said alleged dramatic composition as alleged in said bill, original, but that the same, in form and substance, was then and theretofore existed as common knowledge, generally known, and common speech, generally and frequently used, within the limits of the jurisdiction of this honorable court; that the plaintiff's alleged copyright therein is void (a) because the same was not original with the plaintiff, or with those under whom he claims; (b) because the same was not and is not possessed of sufficient originality to entitle it to protection under the copyright laws enacted by congress in pursuance of the power conferred by the constitution of the United States upon congress "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. Wherefore, and for divers other good causes of demurrer appearing on the said bill, the defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.

Alexander P. Browne, for complainant.
Lauriston L. Scaife, for defendant.

PUTNAM, Circuit Judge. This case was argued orally in July last. The court would have been pleased to have disposed of it immediately thereafterwards, but counsel desired permission to file additional briefs, which was granted. They were not filed until October last. The case thus lost its place, and was not easily taken up again.

One ground of demurrer is an alleged lack of originality. It was claimed at the hearing that the court had the judicial knowledge touching the portion of complainant's dramatic composition under consideration requisite to dispose of the question of novelty on demurrer, but the court then indicated that it had settled views otherwise. The court had in mind the observations which it made in *Industries Co. v. Grace*, 52 Fed. 124, where it condemned the growing disposition to consider such questions on demurrer, and distinguished *Brown v. Piper*, 91 U. S. 37, so frequently referred to in this connection. In that case, however, the court had no necessity of making a definitive ruling, but it takes this opportunity to do so.

First of all it must be noted that there is a broad distinction between cases heard on bill, answer, and proof, and those on demurrer, although it may be that in the former class the court may sometimes be compelled to dispose of questions of originality from the same common knowledge and experience which it is asked to apply in disposing of this demurrer. Such questions, however, are mainly questions of fact; and the court, on bill, answer, and proofs, sits to try questions of fact as well as of law, and therefore is justified in using the same faculties and resources which other tribunals, in determining such questions, are justified in using, and is compelled to do so.

It was pointed out by the court in *Industries Co. v. Grace*, *ubi supra*, that as *Brown v. Piper*, *ubi supra*, was heard on bill, answer, and proofs, the complainant had full opportunity, and all the facts were before the court. On such a record, the court, as judges of the fact, could, with propriety, say that there was nothing on the face of the patent itself which could require its attention. The other cases referred to by the defendant, including *Densmore v. Scofield*, 102 U. S. 375; *Slawson v. Railroad Co.*, 107 U. S. 649, 2 Sup. Ct. 663; also other cases not referred to, as *Terhune v. Phillips*, 99 U. S. 592, and *Phillips v. City of Detroit*, 111 U. S. 604, 4 Sup. Ct. 580; and still others which might be cited,—were all heard on bill, answer, and proofs, and under such circumstances that the expressions "judicial knowledge" or "judicial notice" would naturally be used in a very loose sense. Certainly, in none of them was the precise proposition raised which is presented in this case, that is, whether the facts appearing on the face of the subject-matter claimed are such as to require the court to interpose its judicial knowledge, to the extent of finding on demurrer against the allegations of the bill touching questions of originality. This it must do with reference to matters strictly of judicial knowledge, as known at common law. The distinction is not a vain one, because erroneous matter of law, if perpetuated, becomes a deformity, while findings of fact, if likewise erroneous, are swept away, and become a portion of the undigested mass of such findings. Assumption on the part of courts of knowledge which they may not in fact possess, followed by numerous dismissals of suits on

demurrer, would involve the hazard of barring meritorious causes contrary to the express allegations of the bill. Especially would this occur in that class of cases referred to in *Industries Co. v. Grace*, *ubi supra*, in which the questions of utility and patentable novelty are in some degree determined by what transpires subsequently to the issue of the patent. We therefore concur in what was said by Judge Shipman in *Blessing v. Steam Copper Works*, 34 Fed. 753, as follows:

"To decide, in advance of an opportunity to give evidence, that no evidence can possibly be given upon the question of invention which would permit the case to be submitted to the jury, seems to me to be ill advised, except in an unusual case."

No doubt there is a limited class of cases in which the court must, on demurrer, from the standpoint of judicial notice, disregard allegations in the bill of novelty, patentable invention, and utility. This class divides itself into two great groups; one relating to matters of which the court must take notice without reference to common experience and knowledge, as these words are ordinarily understood, and the other to those within such experience and knowledge. But the latter, as stated in *Brown v. Piper*, *ubi supra* (page 42), involves a power which is to be exercised by the courts with caution. In that case the court further continued: "Care must be taken that the requisite notoriety exists," and "every reasonable doubt on the subject should be resolved promptly in the negative." To go beyond this will not only involve the courts in irreconcilable contradictions and inconsistencies, but shut out, unnecessarily, meritorious claims and defenses.

That, if the bill at bar expressly alleged originality, the case would come within these deductions is too clear to need consideration. It fails to allege authorship, except by an implication arising from the statute words "written or composed." Being, however, in that particular, in a form not uncommon, and no specific exception having been taken on that account, the court is required to presume that these words import originality, although it cannot commend so meager a form of alleging a proposition so fundamental.

The other point made by the defendant touches the quality of the complainant's copyrighted matter, and so falls much more easily within the judicial cognizance of the court. It is a general rule that what are the essential characteristics of matter patented or copyrighted, aside from mere originality or utility, is a question of law, and but little subject to the influence of extrinsic facts alleged in the bill, or proved on a hearing; and therefore, for the most part, they can be considered on demurrer. The defendant alleges that the subject-matter of this copyright does not tend to promote the progress of science and useful arts, and therefore is not within the scope of the power granted congress by the constitution. So far as this is a general proposition, aimed at all dramatic compositions of the character in question in the case at bar, it needs but little consideration. The court is not disposed to take the narrow view of the expression "useful arts" propounded on either side of this case,

nor does it deem it necessary to determine whether the purpose announced in this paragraph of the constitution directly or indirectly limits the powers of congress, as claimed by the defendant, and denied by the complainant. It is enough to say that whether we look only at the direct results of what is addressed to the taste, the imagination, or the capacity of being amused, and the enjoyment which immediately follows therefrom, or whether we look further, and consider what is essential to keep the physical, moral, and intellectual powers refreshed, all such have been regarded by the courts, ever since patents or copyrights were authorized by statute, as within the range of utility and the useful arts. Even when the intellect is strained to accomplish its greatest results, the standard prescription from Euclid may be useful, but an occasional one from the Book of Nonsense is not to be despised. The learned author of Walker on Patents has well said:

"Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is designed to be attached. In such cases, utility resides in beauty. Whatever is beautiful is useful, because beauty gives pleasure, and pleasure is a kind of happiness, and happiness is the ultimate object of the use of all things."

But the question need not be pursued, as it is fully covered by the decisions of the supreme court. In *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, the constitutional question was directly considered, and the monopoly of a photograph of "one Oscar Wilde" was protected.

This, however, runs off into another line of propositions insisted on by the defendant, which, to a certain extent, illustrate those already considered, and are also, to a certain extent, covered by what we have said on the question of originality. We refer to the claim that the subject-matter of what is set out by complainant is too trivial to demand the notice of the law. There is, in the main, the same difficulty in considering this question on demurrer that arose with reference to the first proposition discussed. It is true that some matter may be copyrighted, so trivial that the court can see, as a matter of judicial sense, that it is so clearly unimportant as not to be within the statute. But, in the field in which this particular copyright belongs, it is not easy for the court to make a determination of that character. This comes from the peculiarity of the essential nature of the subject-matter. If judicial tribunals could lay down maxims by which to determine judicially what dramatic compositions claimed to be humorous, or to appeal to the sense of humor, are in this particular within or without the copyright act, they would, by demonstration, be in possession of rules which would enable them to be themselves at all times witty, at their own option. The very essence of some kinds of humor is in unexpectedness and lack of proportion; and therefore neither courts nor juries have any certain rule for valuing it, except such as comes from evidence of the effect which the composition in question has on masses of men. The claim made by the defendant that "the box-office value" fails to furnish any test under the copyright laws of

the United States, with reference to dramatic compositions, is not sustainable. While, on the question of the patentable novelty of a patented article, its salability is to be considered only guardedly, and in doubtful cases, yet with reference to matters like this at bar, touching which there are no rules except in the unmeasured characteristics of humanity, their reception by the public may be the only test on the question of insignificance or worthlessness under the copyright statutes.

On this proposition, and also on the question of what degree of originality is required in order to sustain a copyright, the extracts so freely made by counsel from *Drone* are too general to especially guide the court, and the solution is in the practical application of the law as found in the decided cases. There is a very broad distinction between what is implied in the word "author," found in the constitution, and the word "inventor." The latter carries an implication which excludes the results of only ordinary skill, while nothing of this is necessarily involved in the former. Indeed, the statutes themselves make broad distinctions on this point. So much as relates to copyrights (Rev. St. § 4952) is expressed, so far as this particular is concerned, by the mere words, "author, inventor, designer or proprietor," with such aid as may be derived from the words "written, composed or made," found in Id. § 4971. In this respect the language of Id. § 4929, providing for patterns for designs, is in marked contrast. Designs are therefore assumed to fall in line with mechanical patents, and are held to require the exercise of the inventive faculty. *Smith v. Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768. But a multitude of books rest safely under copyright, which show only ordinary skill and diligence in their preparation. Compilations are noticeable examples of this fact. With reference to this subject, the courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved. An example of the moderate degree of literary merit sufficient to entitle a dramatic composition to protection under the statutes, is found in *Daly v. Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3,552, and again in *Daly v. Webster* (decided by the court of appeals for the second circuit), 4 C. C. A. 10, 56 Fed. 483, each touching the "railroad scene," so called. There is also the case, not officially reported, of the comic song, entitled, "Slap, Bang, Here We Are Again!" protected by the common pleas division, although the impression which the title gives would suggest little value, except what might be shown by sales. It appeared in this case that the copyright was worth from £1,000 to £2,000, and at the time of the trial as many as 90,000 copies had been sold.

On the patent side of the statute, it was truly said in *Robinson on Patents*:

"A mere curiosity, a scientific process exciting wonder, yet not producing physical results, * * * whatever its novelty, and whatever skill has been involved in its production, does not fall within the required class of useful inventions."

Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure. On the whole, the authorities sustain the implication arising from Mr. Drone's statement of the converse rule, as follows:

"To be worthy a copyright, a thing must have some value as a composition, sufficiently material to lift it above utter insignificance and worthlessness."

And in view of the fact that the demurrer necessarily admits, for all present purposes, that the defendant has taken the trouble to imitate the complainant's production, another observation of Mr. Drone is also pertinent:

"If it has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."

Notwithstanding these observations, which bar the court from sustaining the demurrer on the points discussed, complainant must be cautioned that the bill alleges that the song which the defendant is claimed to have imitated, forms "an important and valuable part" of complainant's dramatic composition, and that the infringement is "substantially material," and that the bill contains other allegations of similar purport. The court does not intend to bar itself from refusing an injunction and a master, in the event these allegations should not be sustained, even if there was enough left to entitle the complainant to nominal or trivial damages at law. *Crump v. Lambert*, L. R. 3 Eq. 409; *Attorney General v. Sheffield Gas-Consumers' Co.*, 3 De Gex, M. & G. 304; *Story*, Eq. Pl. §§ 500-502; *Smith v. Williams*, 116 Mass. 510; *Chapman v. Publishing Co.*, 128 Mass. 478.

One difficulty remains, to which attention has not been called by either party. Nevertheless, as it disenables the court from disposing of the case understandingly, the court must notice it sua sponte. The bill describes the song in question as a portion of a certain dramatic composition, and as an important and valuable part thereof. It does not say whether, by the word "song," is intended merely the words of the song, set out in the bill, or whether it includes the music which accompanies the words, and which, with the words, constitute a "song," in its more customary sense. The fact that it is part of a dramatic composition, leaves the inference in favor of the latter; but on this point the bill should be specific. The difficulty becomes a practical one, on pursuing the bill further. It states, in terms, that the defendant adopted complainant's refrain and chorus, but contains no express allegation touching the music which inferentially accompanied them. As the matter stands, the court is unable to see whether or not the music formed a part of the complainant's song, and, if it did, whether the music or the words were the novel or essential feature, and whether the defendant adopted the music, or only the words. Therefore, the court is unable to ascertain, from the allegations of the bill, whether in fact the

defendant did adopt any essential part of the complainant's dramatic composition; and the bill must be amended to make the case clear in this particular, before we can proceed further with it.

As this difficulty was not noticed by either party, neither is entitled to any consideration on the question of costs. If the complainant desires to amend, he may do so, or he may dismiss the bill, but in either case without costs to either party. Bill dismissed, without costs, unless, on or before May rules next, complainant amends in accordance with the opinion this day filed. Neither party to recover any costs accruing before or at that time.

THE ADVANCE.

THE SEGURANCA.

THE VIGILANCIA.

THE ALLIANCA.

EMPIRE WAREHOUSE CO. v. THE ADVANCE. SAME v. THE SEGURANCA. SAME v. THE VIGILANCIA. SAME v. THE ALLIANCA.

(District Court, S. D. New York. March 27, 1894.)

1. MARITIME LIENS—WHARFAGE—DOMESTIC VESSELS.

A maritime lien arises for wharfage furnished to domestic vessels, when the wharfage is obtained in the ordinary course of navigation on the engagement of the master or officers of the ship.

2. SAME—CREDIT OF THE VESSEL.

To sustain a maritime lien, there must be in all cases, either in fact or by presumption of law, a credit of the ship; and when such credit is negatived by the evidence no such lien, whether maritime or statutory, will be recognized.

3. SAME — PERSONAL CONTRACT FOR WHARFAGE — OTHER CONSIDERATIONS INCLUDED.

Where wharfage was furnished to a steamship company under a contract which, for a single price per day, embraced other valuable considerations, the supply of which would give no lien on the ship, and which it was impossible to separate from the wharfage, and the contract did not look to any credit of the ship, but only to the personal responsibility of the company, it was held that no maritime lien was created for the wharfage.

Ullo, Ruebsamen & Cochrane, for libelants.

Carter & Ledyard and Mr. Baylies, for mortgagee, Atlantic Mut. Co.

BROWN, District Judge. The above libels were filed to procure payment out of the proceeds of the vessels above named, which upon their sale have been paid into the registry, for wharfage and for certain gunny bags, and the hire of an engine on the wharf used in the discharge of cargo, and for the engineer's services. The vessels were all owned by the United States & Brazil Mail Steamship Company, and belonged in this port, where all

the claims in suit arose. The defense is that none of the claims are maritime liens; and that no lien was acquired under the state statute, because no specifications were filed as required by the state law.

The bills for the Advance accrued in January and February, 1893; for the Allianca, from October to February; for the Seguranca, from September to February; for the Vigilancia, from October to February, 1893. The steamship company became insolvent in February, 1893, and a receiver was soon after appointed. These libels were filed in March and April following.

Ever since the decision of Benedict, J., in the case of *The Kate Tremaine*, in 1871 (5 Ben. 60, Fed. Cas. No. 7,622), it has been the law and practice in this district to recognize a maritime lien for wharfage furnished to domestic vessels, when the wharfage is obtained in the ordinary course of navigation, on the engagement of the master, or officers of the ship. See, also, *The Allianca*, 56 Fed. 609, 613. In all cases, however, to sustain a maritime lien, there must be either in fact, or by presumption of law, a credit of the ship; and whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized. *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396, 403. In the present case the wharfage was not furnished in the ordinary course of navigation, nor upon the request or upon any contract of the master, or any other officer of the ship. The evidence leaves no doubt that it was furnished in accordance with the terms of an unsigned memorandum of agreement, which had been previously drawn up upon negotiations between the libellant and the president of the steamship company some two years before, though the memorandum was never signed by the parties, through some difference as to the length of time the arrangement should continue, a consideration that in no way affects these cases. This oral agreement governed all the subsequent dealings of the parties, and the bills rendered were in conformity with it.

The agreement provided for the payment of \$30 a day for "the entire use of the Robert pier," "for loading and discharging outward and inward cargoes, and also for receiving and storing freight on the pier pending the arrival of any of the company's steamers, and for such time as any steamer or steamers of the company may be in berth or berths for inward ^{and} or outward cargo on the wharf;" that the steamship company "for such day or days as it does not use the Robert pier, shall upon notification in writing two days in advance be relieved from the payment of \$30 per day," the libellant to be notified four days prior to the arrival of the steamers. During occupancy by the ships it was "optional to use the pier for any and all purposes which may be considered for the best interests of said steamship company or any of its patrons." The agreement also gave the right "to use free of charge for outward freight on the ground floor, one of the libellant's stores (warehouses), the same not to exceed the amount of room the steamship

company has now the right to occupy; but to use the said ground only when the company cannot accommodate outward freight on the wharf with safety and security."

The agreement, it is obvious, embraced considerably more than ordinary wharfage rights. The contract rates were very much in excess of the statutory rates, evidently in consideration of the storage and other facilities offered. The contract was, in fact, rather a contract for the exclusive use of the wharf, and a partial use of the stores, upon certain days, having relation to the arrival and departure of the steamers for any purposes "useful to the steamship company, or its patrons," rather than for mere ordinary wharfage of the steamers. The price for the wharfage per day was the same, though the vessels differed much in size; the price was not according to tonnage, like the usual wharfage rates; and the payment was to continue so long as there was inward or outward cargo on the wharf, and until notice, whether any steamer was present or not. The bills of the libellant, moreover, were made out against the steamship company as personal demands; they were allowed to run as such for a considerable period; and no claim was ever made upon or against the vessels until after the company's failure, and a receiver of the company had been appointed. See *The Kate*, 56 Fed. 618. The whole number of days charged for and remaining unpaid is 148, amounting to \$4,440.

I am constrained to find that there is no maritime lien in this case, (1) because whatever wharfage privileges were furnished, were furnished under a contract which for a single price per day embraced other valuable considerations, the supply of which would give no lien upon the ship, and it is impossible to divide the price per day into different parts; (2) because the evidence indicates beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship, but only to the personal responsibility of the steamship company. The *J. M. Welsh*, 8 Ben. 211, Fed. Cas. No. 7,327; *The Stroma*, 41 Fed. 599, affirmed 3 C. C. A. 530, 53 Fed. 281; *The Curlew*, 54 Fed. 899; *The Allianca*, 56 Fed. 609; *The Kate*, Id. 614.

As respects the gunny bags supplied for the purpose of reconditioning the broken parts of the cargo, as well as the use of the stationary engine on the wharf, and the services of the engineer in running it, it is impossible to distinguish the present cases from other cases of supplies furnished to domestic vessels in the home port. *The Seguranca*, 58 Fed. 908, 910.

The libels must be dismissed.

WERNER v. MURPHY et al.

(Circuit Court, D. New Jersey. March 27, 1894.)

1. RECEIVERS—SUITS BY CREDITORS—FRAUDULENT CONVEYANCES.

A creditor of a New Jersey business corporation cannot maintain, in a federal court, a suit to set aside alleged fraudulent conveyances made by it, when its affairs have been already placed in the hands of a receiver by a New Jersey court; for by the New Jersey statute relating to corporations the receiver is invested with all the rights and equities of creditors, and he, only, can enforce them. Nor will his mere refusal to act authorize the creditor to sue in person, for the statute gives to any person aggrieved by the receiver an appeal to the chancellor who appointed him.

2. SAME—LEAVE OF APPOINTING COURT.

A creditor of a business corporation which has been placed in the hands of a receiver cannot, without leave of the appointing court, maintain a suit in another court to set aside fraudulent conveyances of the corporate assets.

3. FEDERAL COURTS—CITIZENSHIP—JURISDICTIONAL AMOUNT.

A creditor who has a claim of less than \$2,000 against an insolvent corporation, and who sues for himself alone, cannot maintain the suit in a federal circuit court on the ground of diverse citizenship, although he seeks to set aside fraudulent conveyances of corporate assets greatly exceeding \$2,000 in value.

This was a suit by Henry Werner against Franklin Murphy, receiver of the Crane-Cahoone-Barnet Company, and others, to set aside alleged fraudulent conveyances, and enforce collection of certain notes made by that company. Defendants demurred.

Frederic W. Ward, for complainant.

Coult & Howell, Guild & Lum, and George W. Hubble, for defendants.

GREEN, District Judge. The complainant, Henry Werner, is an unsecured creditor of the Crane-Cahoone-Barnet Company, a corporation existing under and by virtue of the laws of the state of New Jersey, which on the 23d day of March, 1892, was decreed to be insolvent by the court of chancery of that state, and for which the defendant Franklin Murphy was duly appointed receiver. The complainant alleges in his bill of complaint that he was induced on or about the 18th of February, 1892, by representations made by certain officers of that corporation concerning its solvency, to become the purchaser, for value, of certain promissory notes made by it; that such representations were false, and made with fraudulent intent, and that the company was in fact insolvent at that time; that in view of such insolvency, and with full knowledge of it, the company, on or about the 29th day of February, 1892, made, executed, and delivered, to various persons and corporations named, mortgages covering all its property, to secure an indebtedness of \$116,000, and, in addition, made an assignment of all the accounts due to it, to secure the further sum of \$31,000. The bill charges that the indebtedness of the company was largely in excess of the value of its assets so mortgaged and assigned, and that the mort-

gages and assignment were made to secure moneys owing to the officers or directors of the company, or to banks which had loaned moneys to the company upon paper for the payment of which, at maturity, its officers or directors were personally liable. The bill further charges that the action of the company in making these mortgages and assignment, and the acceptance thereof by the several defendants, were contrary to law, and, so far as the complainant was concerned, were in fraud of his rights as creditor, and that he is entitled, in equity, to have such mortgages and assignment set aside, as invalid, and that after an accounting by the receiver, and a discovery by all the defendants, in the premises,—which he prays for,—he should be paid, out of the assets of the company remaining in the hands of the receiver, the full amount of his claim. This bill was filed July 21, 1893, after the company had been declared insolvent, and after a receiver had been appointed, and is for the benefit of the complainant alone. To this bill a demurrer has been filed by all the defendants, and for causes therefor they have assigned want of equity, multifariousness, misjoinder of causes of action, and want of jurisdiction in this court. So far as may be necessary, these causes of demurrer will now be considered.

It appears from the bill of complaint that at the time when it was filed there was pending, and undisposed of, in the court of chancery of the state of New Jersey, a suit in which Walter Gracen and William Riker, as partners, were complainants, and the Crane-Cahoone-Barnet Company was defendant, the object of which was to have the defendant decreed to be insolvent, and to have a receiver appointed to wind up its affairs. It is very clear that, if the complainant, in that suit, could obtain the relief he now asks for, the present action must fall. What, then, was the scope of that suit? Based as it was upon the statute of New Jersey entitled "An act concerning corporations," it is to that we must look for an answer; and it is apparent, upon examination, that the act in question is quite broad enough to afford full protection to any creditor of an insolvent corporation who chooses to assert his rights under it. Thus, upon a decree of insolvency against, and the appointment of a receiver for, a corporation, the receiver becomes immediately possessed of the assets of the corporation, holding them in trust for its creditors and stockholders. He is the representative of the creditors, and, as such, has imposed upon him the duty of avoiding any instrument raising an alleged incumbrance which may be void as to them. *Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571. He is given full power and authority to demand, sue for, collect, receive, and take into his possession, all rights, credits, and property of every description, belonging to the corporation at the time of its insolvency. He may maintain suit to annul a sale of personal property made in fraud of creditors, or to remove fraudulent liens placed thereon. *Miller v. Mackenzie*, 29 N. J. Eq. 291. In a word, he stands before the court invested with all the rights and equities of the creditors of the insolvent corporation; and it is his duty,

therefore, to avoid any act of the corporation committed in fraud of those rights and equities. *Trust Co. v. Miller*, 33 N. J. Eq. 155, 160. Such being the powers and the duties of a receiver, it seems clear that the receiver of the Crane-Cahoone-Barnet Company could have maintained a suit in equity to set aside the mortgages and assignment in question, if such an action on his part were advisable. In fact, it is settled in New Jersey that the receiver is not only the proper party to bring such an action, but is the only party who could maintain it. *Minchin v. Bank*, 36 N. J. Eq. 439. Nor has a general creditor of an insolvent corporation, after the appointment of a receiver, the right to maintain either a bill for discovery, or settle the validity or priority of claims or incumbrances upon the property of the company, or to inquire into the validity of assignments or transfers of the property thereof. Such duty is imposed upon the receiver, and he, alone, can execute it. *Smith v. Falls Co.*, 4 N. J. Eq. 505. It is quite apparent, then, that the complainant should have taken such action in the suit pending in the court of chancery of New Jersey as would have afforded him the relief he seeks; and, in fact, the complainant states in his bill that he has requested the receiver in that suit to institute proceedings to cause the mortgages and assignment to be vacated and canceled, and the property affected thereby to be recovered, and applied to the payment of his claim, but that the receiver has refused to comply with said request. Beyond this, however, the complainant does not seem to have gone. And yet there is distinct provision made in the New Jersey statute regulating corporations which affords the complainant the redress he desires. Section 82 of the corporation act gives an appeal directly to the chancellor, to any person who feels himself aggrieved by the proceedings or determination of the receiver in the discharge of his duties. If the complainant had chosen, he could have carried his grievance in this matter instantly to the chancellor, and obtained immediate redress. He failed to do this. He had an opportunity to have his day in court. Having declined it, he cannot now seek the aid of another tribunal to accomplish the same purpose.

There is another serious difficulty in sustaining the case of complainant as presented. It is doubtful, from the bill of complaint, whether Mr. Murphy, the receiver of the Crane-Cahoone-Barnet Company, is brought into this court as receiver, or in his individual capacity only.

In either view, the bill cannot be maintained, in its present form. If it be the intention to treat Mr. Murphy individually, and not officially, then it is apparent that there can be no accounting of the assets of the insolvent corporation, for only the receiver of the company can account therefor; and yet it is only after an accounting of those assets that the complainant can have his claim paid and satisfied. If, on the other hand, as the prayer for relief seems to indicate, the intention was to bring Mr. Murphy before this court as a receiver, then this action cannot be permitted to proceed; for it nowhere appears in the record that permission to sue the re-

ceiver has been obtained by the complainant from the court which appointed him, and such permission is a condition precedent to the successful maintenance of this action here. When a court of competent jurisdiction appoints a receiver of the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court, and the court itself administers that estate for the benefit of those whom it shall ultimately adjudge to be entitled to it. It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. No suit can be brought against a receiver without the express permission of the court which appointed him, except in the cases distinctly countenanced by statute. *Barton v. Barbour*, 104 U. S. 126; *Railroad Co. v. Cox*, 145 U. S. 601, 12 Sup. Ct. 905; *Porter v. Sabin*, 149 U. S. 479, 13 Sup. Ct. 1008. As was well said in the case last cited, by Mr. Justice Gray:

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by the court of the estate in the receiver's hands to be interfered with, by a court of the United States deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remained in its custody, to be administered and distributed by it. Until the administration of the estate has been completed, and the receivership terminated, no court of the one government can, by collateral suit, assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."

There is still another difficulty in the way of the maintenance of this suit. The complainant, as has been said, is a creditor of the Crane-Cahoone-Barnet Company upon two promissory notes. These notes amount to the sum of \$1,489.33, exclusive of interest. The jurisdiction of this court is invoked upon the sole ground of diversity of citizenship of the parties; the allegation being that the complainant is a citizen of New York, while all the defendants are said to be citizens of the state of New Jersey. In such cases the value of the matter in dispute must, in order to confer jurisdiction upon federal courts, exceed the sum of \$2,000, exclusive of interest and costs. It is apparent that while the bill of complaint seems to deal with mortgages and assignments of property of much larger value than the statutory limit, in reality the only sum involved in the controversy is the complainant's claim of \$1,489.33. If that claim should be paid, this action must fall. The complainant is not acting for the corporation, nor for the stockholders, nor for any creditor other than himself. He is simply seeking the payment of his own claim. That claim, once paid, destroys his entire interest in the controversy. It must be taken, therefore, as the real value of the matter in controversy, and as it is less than the jurisdictional amount the action cannot be maintained. For these reasons the demurrer is sustained.

THOMPSON v. CHICAGO, ST. P. & K. C. RY. CO. et al.

(Circuit Court, D. Minnesota, First Division. April 14, 1894.)

1. REMOVAL OF CAUSES—REMAND.

A cause may be remanded prior to the beginning of the term at which (Act 1887-88, § 3) the removing defendants are required to file the transcript in the federal court, when the party moving to remand gives proper notice, and himself files the transcript. *Delbanco v. Singletary*, 40 Fed. 177, and *Mills v. Newell*, 41 Fed. 529, followed. *Kansas City & T. Ry. Co. v. Interstate Lumber Co.*, 36 Fed. 9, disapproved.

2. SAME—PETITION—NONJOINDER OF A DEFENDANT.

Failure of one of the defendants to join in the petition is fatal to the right of removal (Act 1887-88) when there is no separable controversy.

This action was brought in a Minnesota court by Barney Thompson against the Chicago, St. Paul & Kansas City Railway Company, the Chicago Great Western Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company. It was removed to this court by the two defendants first named, and the Chicago, Milwaukee & St. Paul Company now moves to remand.

John A. Lovely, for plaintiff.

H. H. Field, for Chicago, M. & St. P. Ry. Co.

Daniel W. Lawler, for Chicago, St. P. & K. C. Ry. Co.

SANBORN, Circuit Judge. The defendant the Chicago, Milwaukee & St. Paul Railway Company moves to remand this case on the ground that one of the defendants did not join in the petition for removal. The plaintiff is a citizen of Minnesota, and he brings this action against all the defendants for negligence in so operating their trains that they collided and injured him. The Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of the state of Wisconsin, the Chicago, St. Paul & Kansas City Railway Company is a corporation organized under the laws of the state of Iowa, and the Chicago Great Western Railway Company is a corporation organized under the laws of the state of Illinois. The two latter companies petitioned for the removal of this cause, but the St. Paul Company did not join in the petition. The latter company has filed a transcript of the record, and made its motion to remand this case upon proper notice, nearly two months before the first day of the next session of this court, at which a copy of the record is required to be filed by the petitioning defendants under section 3 of the act of congress of March 3, 1887, as amended by the act of August 13, 1888 (Supp. Rev. St. U. S. 613). The petitioners object that the motion is premature, and insist that the case cannot be remanded until the opening of the next term of this court. An objection of this character was sustained in *Kansas City & T. Ry. Co. v. Interstate Lumber Co.*, 36 Fed. 9, but such an objection was overruled in *Delbanco v. Singletary*, 40 Fed. 177, 181, and *Mills v. Newell*, 41 Fed. 529. The rule and the reasons for it expressed in the latter cases are more satisfactory to me, and I proceed to decide the motion upon the merits.

The first clause of section 2 of the removal act of 1875 (18 Stat.

471) is similar to the second clause of section 2 of the act of 1887 (Supp. Rev. St. p. 612). The only difference between the two clauses is that under the act of 1875 it was provided that either party might remove the suit, while under the act of 1887 it is provided that the defendant or defendants being nonresidents of the state may remove it. It was well settled under this clause of the act of 1875 that a removal could not be effected unless all the parties on the same side of the controversy united in the petition, and I think there is no doubt that the same rule must be held to apply to this clause of the act of 1887. *Ruckman v. Land Co.*, 1 Fed. 367; *Smith v. McKay*, 4 Fed. 353; *Rogers v. Van Nortwick*, 45 Fed. 513. It follows that, as one of the defendants in this action did not join in the petition for removal, the case was not properly removed to this court under this clause of the act of congress.

The second clause of the second section of the act of 1875 provided that, whenever there should be a controversy which was wholly between citizens of different states, and which could be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy might remove the suit into the circuit court. The third clause of the second section of the act of 1887 is identical with this clause of the act of 1875, except that the words "plaintiffs or" have been omitted. It is well settled that this clause of the acts of 1875 and 1887 governs that class of cases only where there are two or more controversies involved in the same suit one of which controversies is wholly between citizens of different states. In the case before us there is but a single controversy,—a joint cause of action against all the defendants,—and hence the case could not be removed to this court under this clause of the act. *Telegraph Co. v. Brown*, 32 Fed. 337, 342; *Hyde v. Ruble*, 104 U. S. 407; *Corbin v. Van Brunt*, 105 U. S. 576; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Plymouth, etc., Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034.

The motion to remand must accordingly be granted.

GEORGIA PACKING CO. et al. v. MAYOR, ETC., OF CITY OF MACON.

(Circuit Court, S. D. Georgia, W. D. August 2, 1893.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORDINANCE—LICENSE.

An ordinance allowing persons selling meat of their own raising, to do so when and where they please, without license, and imposing on other meat dealers restrictions as to the time and place of selling, and the amount that may be sold, and requiring them to pay a license tax, is unconstitutional, as discriminating against interstate commerce, since it prevents dealers in meat raised in other states from competing on equal terms with those dealing in meat raised in the neighborhood.

Suit by the Georgia Packing Company, W. L. Henry, and others against the mayor and council of the city of Macon to enjoin the

enforcement of a city ordinance. The averments of the bill are those following:

The complainants are wholesale and retail butchers in the city of Macon, in this district. They supply meats to the people of Macon and the surrounding country, dealing exclusively in dressed meats. They do not slaughter. Five-sixths of the meats they furnish their customers are cattle reared in western states, killed and dressed there, and shipped in refrigerator cars to Macon. These are of a better quality than the meats obtained in the country contiguous to Macon, and, for that reason, the complainants state, would naturally be regarded with more favor by the public, if the complainants had the equal protection of the laws. But complainants insist that this is not the case, for the mayor and council of the city of Macon are depriving them of the equal protection of the laws, and of due process of law, and of the right they have to conduct their business conformably to law. The gravamen of the complaint is that on the 2d day of June, 1888, certain market regulations were enacted for Macon. Market hours were prescribed, as follows: In winter, from daylight until 10 o'clock. In summer, from 3 a. m. to 9 a. m. By the municipal law, winter begins October 1st, and summer April 1st; but on Saturdays the market house is open from 3 o'clock p. m. to 8 o'clock p. m. in winter, and 9 o'clock in summer. These regulations further provide that it is unlawful to sell or offer for sale any meats on the streets or elsewhere in the city of Macon during said market hours, and heavy penalties are prescribed for a violation of this rule. Stalls are rented in the market, but none for a sum less than \$150 per annum, but, although a butcher may rent a stall, yet his business is practically destroyed, for the ordinance provides that no person shall be permitted to buy more at the market than is necessary for the use of his or her family, except during the last hour of the market hours; and, further, that no person shall sell, or contract to sell, to any one, any article of produce or meat which is to be delivered outside of the market building, after market hours. Not only, therefore, is complainants' business cut off elsewhere during the market hours, but even as renters of stalls they claim they are so hindered and limited as to prevent them from selling meats in any considerable amount to those who are willing to buy. It is further provided by the market ordinances that all persons not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon, at any time during the day or night, shall pay a license tax of \$500 per annum, said license to be paid in advance, provided this section "shall not apply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves, after market hours." By this last clause we may safely presume that it is meant it shall not apply to farmers bringing into the city, for the purpose of sale after market hours, the flesh of any animal raised by themselves. It is further provided that after the expiration of market hours every person having any product or article for sale shall remove the same from the market place. On account of this last provision the complainants complain that they are forced to haul their meats to and from the market at great trouble, expense, and annoyance; that, on account of the restrictions and hindrances above mentioned, although the market hours constitute the principal portion of the day, when the people have ordinarily been accustomed to make their purchases of meat, yet the sales at the market do not constitute one-half of the sales at retail made after market hours at the complainants' respective places of business elsewhere in the town, so that a large part of their capital and time is wasted during market hours; that the ordinance further provides that a license shall be imposed on butchers or others who have no stall in the market, and who shall sell from any shop or wagon (other than non-residents selling meat of their own raising), and no license shall be issued for less than \$500. This, it is alleged, is a discrimination in favor of the producers of meat raised in the country tributary to Macon, and against meat producers who market their products in the western markets, and ship them for sale to Georgia.

The license tax, exclusive of the market ordinance, for the year 1893, upon wholesale dealers in meat, selling to the trade only, is \$25. Complainants

aver that the wholesale meat trade in Macon handles western meats only. There is not enough meat produced in the country around Macon to create a wholesale business, and the tax operates to put a burden upon interstate commerce, and to give an undue advantage to dealers in meats raised near Macon. If the complainants should not rent a stall in the market house, under these ordinances they must pay a license of \$500, even though they sell only after the market hours are over; while farmers from the surrounding country may retail meats brought into the city without any license whatever. The market ordinance, so far from undertaking to prevent the sale of meat on the streets of the city of Macon outside of market hours, expressly recognizes such sales. It is not, therefore, an ordinance intended to prevent the selling of meats on any particular street or in any particular locality. Nor does it provide for the inspection of meats elsewhere than at the market, and in point of fact the bill alleges the officials of the city have at no time undertaken to inspect meats elsewhere than in the market house. It is, then, not an ordinance, made for the protection of health, or for the inspection of meats, or for compelling the sale of meats in any particular locality, which, it is conceded, might be done under the exercise of the police power, but that, under the guise of police regulation, it is an ordinance wholly for the collection of a revenue. That, as such, it is in violation of the constitution of the state of Georgia and of the United States, in that it prescribes a cheaper license tax for those who sell in the market, and at their regular places of business, than for those who sell at their regular places of business, and no tax at all for farmers selling in the city after market hours, while handlers of western meats, not stall holders, must pay a tax of \$500 to sell in the city after market hours. The constitution of the state of Georgia provides that "all taxation shall be uniform upon the same class of subjects." The constitution of the United States provides that "the citizens of the different states shall be entitled to the equal protection of the laws."

One of the complainants, W. L. Henry, has already been arrested for offering wholesome western meats for sale at his place of business, and selling during market hours, and was tried before the recorder of the city of Macon on the charge that he had sold meat at his place of business during the market hours, and was fined \$25 and costs. This was appealed to the supreme court of the state, which court held that the ordinance was valid. 18 S. E. 143. The mayor and council of the city of Macon threaten to continue to arrest and fine complainants every time they undertake to sell or offer for sale, during market hours, any meats, at their said places of business. Complainants further aver that they will each be damaged in very large amounts, exceeding the sum or value of \$2,000, exclusive of costs. The bill prays that the court will grant a writ of injunction perpetually enjoining and restraining the defendants, their clerks, attorneys, agents, servants, and employes from enforcing or endeavoring to enforce against complainants any penalty provided in said ordinances for selling or offering for sale any of said meats at their respective places of business or elsewhere in the city of Macon otherwise than at said market house, or from selling their meats at any time during said market hours; and be further enjoined from collecting or attempting to collect the license fee fixed by said ordinances for the sale of meats elsewhere than in said market house; and, further, from interfering with complainants for selling at any time during market hours such meats as they may have to offer for sale to all persons who may there desire to buy, and that said market ordinances may be decreed to be unconstitutional and void. They ask for a provisional injunction pendente lite.

The mayor and council of the city of Macon demur to the bill for want of jurisdiction in this court upon the ground that all the parties are citizens of the state of Georgia, and further because it does not appear that a question is raised depending upon the violation of any part of the constitution of the United States; and they answer that they have the right to regulate the selling of meat in the city of Macon, and to confine the sales thereof to the market house in said city during market hours. They further answer that they have the right to fix a license for the sale of meats and other articles in said city. They deny that the effect of the licenses so fixed by them in any way violates the constitution or the statutes of the United States.

No preliminary injunction was granted, and, the facts not being in dispute, the court, after argument, took under advisement the matters presented by the bill, the answer, and the demurrer.

Marion Erwin, for complainants.

R. W. Patterson, for defendants.

SPEER, District Judge (after stating the facts). It will be observed from the averments of the bill that there is no attempt to prohibit the sales of meat, elsewhere than in the market house of the city. The ordinances in question, therefore, are not directed towards the avoidance of green grocers and butcher shops. It cannot, we think, be denied that it is within the power of the city to fix one or more localities for the sale of meats. This may be done to facilitate inspection, but, since, by permission of the city, a very large amount of the meat is sold at the butcher shops and places of business elsewhere than in the market house, it is evident that the prohibition of sales during market hours at such places is not intended to prevent sales of uninspected meat. It is true, in point of fact that the city authorities do not inspect meats except at the market house, yet the ordinance authorizes them so to do. After providing that "no person shall sell any article not wholesome for food," it provides that "the clerk and inspector shall seize any such article he may find in market, and cause it to be destroyed, and the offender shall be punished," etc. The meaning of the word "market" in this sense cannot be "market house," but it means all articles of food offered for purchase or sale in the city. The city law, therefore, expressly authorizes the maintenance of butcher shops at any other place in the city, and further provides for the inspection of meats at such places. It cannot, then, be satisfactorily argued that these regulations are made either to compel the concentration of the meat business at the market house or to facilitate the inspection of meats. If, in order to facilitate inspection, the ordinance had expressly forbidden the sales of meat in the city elsewhere than at the market house, it might not have been difficult to sustain its constitutionality, even though it might have gravely interfered with interstate commerce. Such an ordinance would seem to be within the legitimate police power of the city. *Slaughterhouse Cases*, 16 Wall. 36; *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 4 Sup. Ct. 652. But, the ordinance not being of this character, the argument in its support, based upon that theory, must logically fail. *Vide* opinion of Mr. Justice Harlan in *Minnesota v. Barber*, 136 U. S. 329, 10 Sup. Ct. 862. *Vide*, also, *Spellman v. New Orleans*, 45 Fed. 3; *Ex parte Kieffer*, 40 Fed. 399.

It is not disputed that the business conducted by complainants is almost entirely that of selling meats raised in western states. These meats are transported to Macon and stored and offered for sale by means of the refrigerator apparatus. Complainants, thus engaged, must, in obedience to the ordinance, rent a stall in the market, and pay \$150 therefor. They must, if engaged as wholesale dealers, also pay a license tax of \$25 for the privilege of carrying on their business. From these burdens one who deals in meats pro-

duced in the surrounding country, is wholly exempt. Not only is this true, but in the most important hours for the purpose, during the day, the complainants are denied the right of making sales of any amount, for the reason that their places of business elsewhere than in the market house must be closed, and in the market house they are permitted to sell to any one person no more than enough for consumption in one day. While this is true, the producers of meat in this state may sell before and after market hours any amount they please, without the imposition of any tax or license charge whatever. It cannot be denied that the effect of this discrimination operates severely against the sale of meat produced in other states, and, whatever may be the power of the city government to discriminate between the producers of meat in the surrounding country and those who sell the same meat in the city, they have no power to make a regulation which operates in favor of home products and against the production of other states, and such regulations are in contravention of the constitution of the United States. Nor does it matter how such regulations are denominated, or how they are expressed. In the case of *Welton v. Missouri*, 91 U. S. 275, it was declared by the supreme court that a license tax required for the sale of goods is, in effect, a tax upon the goods themselves; and, further, that the statute of Missouri, which required the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state, and requires no such license tax from persons selling in a similar way, goods which are the growth, produce, or manufacture of the state, is in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states; and further that this power protects property "which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with, and become a part of, the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin." The decision itself was pronounced by that venerable and illustrious jurist, Mr. Justice Field, who for years has devoted his strong powers to the unswerving defense of what he has deemed the rights of the states. "It will not be denied," he declares, "that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce, and the obstacles to its growth, previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. 'It was regulated,' says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*, 'by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions

were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control of this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress.' 12 Wheat. 446." He continues: "The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation favorable to the interests of one state and injurious to the interest of other states and countries which existed previous to the adoption of the constitution might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states." What a state may not do, it may not authorize a city to do. Mr. Justice Miller, in his luminous and valuable lectures on the Constitution, upon exhaustive consideration of authorities, expresses the same conclusion. Miller, Const. pp. 433-473, Lecture 9.

In the case of *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. 855, the supreme court passed on this state of facts: The state of Virginia had enacted a statute which provided that all flour brought into the state and offered for sale therein must be reviewed, and have the Virginia inspection marked thereon, and imposing a penalty for offering for sale without such review or inspection. The court held this to be repugnant to the commerce clause of the constitution, because it is a discriminating law, requiring the inspection of flour brought from other states, when it is not required for flour manufactured in Virginia.

In the case of *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, Mr. Justice Harlan, delivering the opinion of the court, remarked:

"Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon congress, or infringe on those granted and secured by that instrument. But it may not, under the guise of exerting its police powers, enact inspection laws, and make discriminations against the products and industries of some states in favor of the products and industries of its own or other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any regulation which, in terms or by its necessary operation, denies this equality in the markets of the state, is, when applied to the people and the products or industries of other states, a direct burden upon commerce among the states, and therefore void."

Of this case we may say, as was said of it by Justice Bradley, that "it is unnecessary to prolong the discussion or to cite further authorities." *Voight v. Wright*, *supra*.

It is clearly evident that the local regulations of the city of Macon, imposing a tax of \$500 or \$150 and other restrictions on the selling of western meats, and nothing of the kind on the sale by producers of their own meats raised in this state, by their necessary operation deny to the former equality in the markets of this state, and are a direct burden upon commerce among the states, and are therefore void. See, also, *Railroad Co. v. Husen*, 95 U. S. 465.

The language of the ordinance is:

"All persons not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon at any time during the night or day, shall pay a license tax of five hundred dollars per annum, such license to be paid in advance: provided, this section shall not apply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves, after market hours."

And the tax ordinance of 1893, as follows:

"Be it ordained by the mayor and council of the city of Macon, and it is hereby ordained by the authority of the same, that the following licenses and special taxes shall be levied and collected in the city of Macon for the year 1893: Butchers and others who have no stall in the market, and who shall sell from shop or wagon, other than nonresidents selling meats of their own raising; and no license shall issue for less than five hundred dollars."

It is true, the tax ordinance excepts from its verbal operation "nonresidents selling meats of their own raising," but, since it is evident that the only persons who can avail themselves of this privilege are nonresidents who live in the immediate vicinity of Macon, it effectually excludes meat producers from all other states. Nor is this conclusion to be avoided merely because this enactment purports to apply alike to the vendors of meat in this state as well as to meats produced in other states, for "the burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Brimmer v. Rebman*, *supra*. The case of *Osborne v. Mobile*, 16 Wall. 479, which seems to hold a contrary doctrine, has been overruled in later decisions. See *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851.

It follows, also, that the wholesale tax upon the business of meat selling within the city of Macon is void, the evidence showing that this business depends entirely upon the sale of western meats, there being no pretense of imposing a tax on home-made meats sold in bulk.

For the foregoing reasons the defendants must be enjoined from collecting these taxes. Because their regulations are also unconstitutional as imposing an unlawful restriction upon commerce between the states, they must be restrained from enforcing or endeavoring to enforce against the complainants the penalties provided in the ordinances for selling or offering for sale their meats at their regular

places of business, or in the city of Macon otherwise than at the market house, and from selling their meats at any time during market hours, as prohibited in said ordinances; and from collecting or attempting to collect from complainants the license fee fixed by such ordinances for the sale of meats elsewhere than in the market house; and must be further enjoined from preventing the complainants, who have rented stalls at the market house, from selling at the market house as much of their meats as they may have the opportunity to sell, to any and all persons who may there desire to buy. That, in so far as the said market ordinances are intended to support these restrictions, they are unconstitutional and void.

Let the demurrer be overruled. The answer is held insufficient.

MAYOR, ETC., OF CITY OF MACON v. GEORGIA PACKING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1893.)

No. 192.

1. CIRCUIT COURT OF APPEALS—JURISDICTION OF CONSTITUTIONAL QUESTIONS.

The questions whether the business of dealing in western meats constitutes interstate commerce (Const. art. 1, § 8, par. 3), and whether certain city ordinances discriminate against such commerce, involve the construction or application of the constitution, and cannot, therefore, be considered by the circuit court of appeals. Judiciary Act, March 3, 1891, §§ 5, 6.

2. SAME—APPEAL FROM INTERLOCUTORY DECREE.

The circuit courts of appeal can have no jurisdiction of an appeal from an interlocutory decree granting or continuing an injunction; under section 7 of the judiciary act of March 3, 1891, if the case is of such a character that they would have no jurisdiction of an appeal from a final decree therein.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

In Equity. Bill by the Georgia Packing Company and W. L. Henry against the mayor and council of the city of Macon. Defendants demurred, and on rule to show cause the circuit court rendered a decree for an injunction pendente lite. 60 Fed. 774. An appeal was taken from this interlocutory decree, under section 7 of the act of 1891.

The Georgia Packing Company, a corporation organized under and in pursuance of the laws of the state of Georgia, and having its principal place of business in the city of Macon, Bibb county, Ga., and W. L. Henry, a citizen of the United States, residing in Macon, in Bibb county, Ga., brought their bill in the court below against the mayor and council of the city of Macon, state of Georgia, complaining that by reason of certain ordinances of the said mayor and council, fully set out in their bill, their business as wholesale and retail butchers and dealers in western meats in the city of Macon was interfered with and discriminated against, the exact method and manner of discrimination and interference being fully and in detail set forth in the bill; and thereupon complainants averred as follows: "Your orators further aver that said ordinance, viewed as a scheme to collect revenue, as aforesaid, is in violation of the constitution of the state of Georgia and of the United States, in this: that it prescribes a cheaper license tax for those who sell as well in the market and at their regular place of business than for those who sell at their regular place of business, and no tax at all for farmers selling in

the city after market hours, while handlers of western meats, not stall holders in the market, must pay a tax of five hundred dollars to sell in the city after market hours; the constitution of Georgia providing that 'all taxation shall be uniform upon the same class of subjects,' and the constitution of the United States providing that citizens of different states shall be entitled to the equal protection of the laws. Said ordinance is likewise an attempt to regulate interstate commerce, and in such a manner as to deny to citizens of states other than the state of Georgia, selling their meats through your orators, the equal protection of the laws, and is illegal for that reason. Your orators further aver that the said mayor and council of the city of Macon well knew that the said ordinance could not be sustained as a tax measure under the constitution of the state of Georgia, and that, therefore, they have endeavored to give the appearance of inspection laws to the ordinance, which, in fact, has none of the elements in it which would render the same legal as a police measure, it not being based on consideration of public health or morals, or intended to prevent the crowding and obstruction of the streets and public places; and that, by reason of the premises, the enforcement of said ordinance has and is operating to deprive your orators of their inalienable right to carry on their aforesaid business without any unnecessary restrictions or hindrances, whereby your orators have been and are being deprived of their liberty and property, without due process of law." The bill prayed for a perpetual injunction, and for an injunction pendente lite, restraining the defendants from in any manner enforcing said ordinances against orators. To this bill the defendants demurred upon the following grounds, to wit: "(1) Because it appears upon the face of said bill that this court has no jurisdiction of the subject-matter thereof, it appearing that all the parties, plaintiffs and defendants, are citizens of the state of Georgia; (2) because it appears on the face of said bill that there is no question raised upon any violation of any part of the constitution of the United States; (3) because it appears that only persons known residents of the state of Georgia, who are affected by the case complained of, and any parties to said bill." And on the same day, without waiving the demurrer, the defendants filed an answer, saying: "That under the charter of the mayor and council of the city of Macon the defendants have the right to regulate the sale of meats in the city of Macon, and to confine sales thereof to the market house in said city during market hours. Further answering, they say that said defendants have the right to fix a license for the sale of meats or other articles in said city. They deny that the effect of the license so fixed by them is to in any way violate the constitution or statutes of the United States." On a rule to show cause why the injunction pendente lite should not issue, the matter of the bill was heard before the circuit court, which thereupon rendered a decree for injunction pendente lite, enjoining and restraining the defendants from enforcing against complainants, or any of them, certain market ordinances of the city of Macon, specifying the ordinances complained of in the bill, and reciting the following reason: "It having been made to appear to the satisfaction of the court that said ordinances, in their necessary operation, and in the manner in which they have been and are being applied by the said defendant and its officers, discriminate in favor of the meat products from the country contiguous to Macon within the state of Georgia and against the meat products of other states, and impose restrictions and burdens upon interstate commerce in contravention of the constitution and laws of the United States" From this interlocutory decree an appeal has been prosecuted under section 7 of the act of 1891, creating and establishing this court, assigning, among others, the following errors: "Second. Because the court erred in holding, deciding, and decreeing that the said ordinances complained of in any wise interfere with the operation of the rights of complainants, so far as interstate commerce is concerned. Third. Because the court erred in holding, deciding, and decreeing that the said complainants were entitled to an injunction because the said ordinances, or any of them, are a restriction upon interstate commerce."

Dessau & Hodges, for appellants.

Marion Erwin, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). From the bill, the demurrer, the answer, the decree of the court, and the assignment of errors, each and all, it clearly appears that the case is one that involves the construction or application of the constitution of the United States. As the parties are all citizens of the same state and district, the jurisdiction of the court below rests entirely upon the case as one arising under the constitution of the United States.

The questions presented are: First, whether the business of the complainants is interstate commerce, within the meaning of the third paragraph of section 8, art. 1, of the constitution; and, second, do the ordinances complained of amount to a regulation of interstate commerce, and, as such, discriminate against complainants' business?

The fifth section of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, provides "that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: * * * In any case that involves the construction or application of the constitution of the United States." The sixth section of said act provides "that the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decrees in the district court and in existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The supreme court, in construing this section, says: "The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed." *McLish v. Roff*, 141 U. S. 661-666, 12 Sup. Ct. 118; *Lau Ow Bew v. U. S.*, 144 U. S. 47-56, 12 Sup. Ct. 517.

The seventh section of said act provides "that where, upon a hearing in equity in a district court or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals."

As, under the sixth section, this court can have no jurisdiction over any final decree rendered in the cause in which this present appeal is taken, it follows that we have no appellate jurisdiction over any interlocutory decree rendered therein, granting or continuing an injunction.

The appeal is dismissed.

REJALL v. GREENHOOD et al.

(Circuit Court, D. Montana. November 6, 1893.)

No. 236.

1. COURTS—CONFLICT OF JURISDICTION—CREDITOR'S BILL.

A creditor's bill filed in a federal court alleged that one of the defendants therein had made an assignment, in which plaintiff was a preferred creditor, and that the other defendants, though having notice of this assignment, had taken possession of the property, and had converted a part of it. These defendants filed a plea alleging that they had sued in the state court to have the assignment set aside, as fraudulent, and that a receiver had been appointed in such suit. *Held*, that the pending of this suit was no bar to the bill in the federal court, especially as plaintiff was not a party in the state court.

2. SAME—RECEIVER OF STATE COURT.

The possession of the property by the receiver of the state court is no bar to the plaintiff's bill, as against those who instituted the suit in which the receiver was appointed.

3. SAME.

Such bill cannot be maintained against the receiver, however, without permission for that purpose first obtained from the state court.

4. EQUITY—PLEADING—OBJECTIONS TO BILL—ANSWER.

The objection that the bill cannot be maintained because it shows that plaintiff was given preference for an amount greater than that which was actually due him, and hence that the assignment was fraudulent, can only be raised by answer.

In Equity. Bill by Ernest Rejall against Greenhood, Bohm & Co., Max Kahn, L. H. Hershfield, Aaron Hershfield, Charles M. Jefferis, William Muth, and Merchants' National Bank.

George F. Shelton, for complainant.

McConnell, Clayberg & Gunn, for defendants.

KNOWLES, District Judge. This is a suit in equity brought by complainant for himself, and in behalf of all other creditors of Isaac Greenhood and Ferdinand Bohm. The bill sets forth that the complainant is a creditor of said Greenhood & Bohm; that on the 12th day of February, 1892, the said Greenhood & Bohm assigned all their property to Max Kahn for the benefit of their creditors; that complainant was made a preferred creditor, with others, to the sum of \$45,000; that said Max Kahn accepted said trust, and entered upon the duties thereof, and took possession of all of said property; that the defendants the Merchants' National Bank, L. H. Hershfield, and Aaron Hershfield had notice of said assignment, and that on the 13th day of February, 1892, the said defendants, the Merchants' National Bank of Helena, L. H. Hershfield, Aaron Hershfield, and one Charles M. Jefferis, with force and arms, broke into the store building formerly occupied by the said Greenhood & Bohm, and which said store and building were in the actual possession of the said assignee at the time, and forcibly took possession, and seized all of the goods and chattels so assigned to said Max Kahn, and deprived him of the possession of the same; that subsequently said Merchants' National

Bank, L. H. & A. Hershfield, and Charles M. Jefferis caused one William Muth to be put in possession of said store and goods and assets; that said Muth has sold, from time to time, said goods, and collected a portion of said assets; that at the time of the said assignment to Max Kahn the value of the goods in the store of said assignee was \$100,000, and the assets, consisting of accounts, notes, evidences of indebtedness, and the personal property, were of the value of \$80,000; that said property was sufficient to pay all of the preferred creditors; that complainant was a preferred creditor, to the amount of \$45,000; and that the amount actually due him was \$42,033.83. The defendants put in several pleas to this action. The plea of L. H. Hershfield, Aaron Hershfield, and that of the Merchants' National Bank, is, in substance, as follows: (1) That Charles M. Jefferis was, and is now, the duly elected, qualified, and acting sheriff of the county of Lewis and Clarke, state of Montana. (2) That on the 13th day of February, 1892, an action was commenced in the district court of the first judicial district of the state of Montana, in and for Lewis and Clarke county, in which the Merchants' National Bank was plaintiff, and Isaac Greenhood and Ferdinand Bohm, partners, were defendants; that said action was prosecuted for the purpose of obtaining judgment against the said defendants Greenhood & Bohm for the sum of \$20,000, together with interest thereon at the rate of 10 per cent. per annum from the 27th day of November, 1891, and for \$13,000, with interest thereon at 1 per cent. per month from the 19th day of November, 1891, and for the sum of \$1,000, with interest thereon from the 19th day of January, 1891, at 10 per cent. per annum, and for costs of suit; that said action was based upon several promissory notes in the sums and dates above named; that said property was taken possession of by said Jefferis, as sheriff, in an attachment proceeding auxiliary to said suits; that on the 8th day of April, 1892, judgment was rendered in said action in favor of the plaintiff in said action, the Merchants' National Bank, for the sum of \$35,781.38; that subsequently, on the 21st day of April, 1892, an action was commenced in the district court of the first judicial district of the state of Montana, in and for the county of Lewis and Clarke, by the defendant the Merchants' National Bank, as a judgment creditor, to set aside the aforesaid assignment of Greenhood & Bohm to said Max Kahn, as a fraud upon creditors, which is still pending; that pending said action a receiver was appointed, namely, William Muth, to take charge of the property of said Greenhood & Bohm, by the above-named state court, and as such officer he took charge of the same, and has acted in regard to said property as such, under said order; and that said order is still in force, and the action in which it was made is still pending. The plea of the defendant Jefferis is substantially the same, as also that of the defendant Muth, who sets forth that he took possession of said property under the order of the district court of Montana in and for Lewis and Clarke county, and now holds the same as such receiver, and has no other interest

in such property, except as such officer of the court. This plea, for the purposes of this argument, must be taken as true.

The first point presented is that this suit cannot be maintained because the same subject-matter is involved in a suit in the district court of the first judicial district of Montana. This point is not well taken. The courts of Montana pertain to one government, and this court to another. It is a settled rule that a suit in a court in one sovereignty is no bar to a suit in another sovereignty, even when the parties are the same. There is no claim that the plaintiff, Rejall, is a party to the proceedings in the state court; but, if he is, it makes no difference. This view is fully sustained by the case of *Gordon v. Gilfoil*, 99 U. S. 168. Other federal authorities might be cited to the same effect, but this is controlling.

The second point is to the effect that, in a suit pending in the above court of the state of Montana, the property which is the subject of the action in this case is in the hands of a receiver appointed by said state court. It appears that the property, the subject-matter of the action, has passed out of the hands of said Jefferis, as sheriff, into the hands of a receiver. Courts of the federal government will not disturb the possession of property in the hands of a state officer, taken pursuant to a writ or order of the state court. But when there is no purpose to disturb this possession, or the officer has parted with the possession, of the same, there is no occasion for barring an action in a state court. In the case of *Buck v. Colbath*, 3 Wall. 335, it was held that when a United States marshal had levied upon certain property as that of the defendant in an action in a federal court by virtue of a writ of attachment, the action in a federal court was no bar to an action in the state court against the marshal by a person not a party to the action in which the writ of attachment issued, and claiming ownership of the property seized thereby, against the marshal, for trespass. In that case the court said:

"It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether their rights require them to take possession of the property or not."

In the attachment suit, judgment was obtained. Another suit began, in which a receiver was appointed, and the possession of the property taken by him. The defendant Jefferis no longer had possession of the property. But it is urged that, because the property is in the hands of a receiver, therefore this action cannot be maintained. This point was considered in the case of *Hickox v. Elliott*, 27 Fed. 830, usually called the "Holladay Case," and it was there held that the fact that the property in the hands of a receiver, concerning which the action was maintained in another suit, would not bar the action. And when we consider the reason of the rule which would forbid a court entertaining a suit for property in the custody of another court, namely, to prevent a conflict of

jurisdiction in regard to the same, for the possession thereof, we can understand that those who do not connect themselves with the actual custody of that property cannot ask that a suit which might involve the title to the same, but does not interfere with the custody thereof, should be barred.

As to the plea of the defendant William Muth, I think it must be sustained. He is the receiver of the property, made such by the state court. The suit in this case would involve a determination as to his right to that possession, and might ask him to account for the same. No permission was obtained of the state court to bring this suit. Under such a state of facts, it cannot be maintained. In the case of *Barton v. Barbour*, 104 U. S. 126, a suit was commenced against a receiver in a court of the District of Columbia. He had been appointed such receiver by a court of the state of Virginia. No permission to sue the receiver had been obtained from the court that appointed him. The supreme court held that the court in the District of Columbia had no jurisdiction to entertain the suit. Other authorities might be cited to the same effect.

In this case an argument was presented by Gov. Carpenter, attorney for defendants, to the effect that the bill of complaint showed upon its face that the plaintiff was not entitled to the relief demanded. There was no objection to the point being presented. The contention is that, as the bill shows that plaintiff was a preferred creditor, to the extent of \$45,000, in the assignment made by Greenwood & Bohm to Max Kahn, and also that the said Greenwood & Bohm owed him but \$42,035.83, it was void as to creditors; but, according to the allegations of the bill, the property assigned by said firm to said Kahn was of about the value of \$180,000,—more than sufficient to pay all the preferred creditors. Who the other creditors not preferred are, does not appear, or how much was due them. If there was enough property to pay the preferred creditors, no fraud would be found as to them. The plaintiff seeks to present the point that the naming of the amount of the debt of plaintiff in the assignment as \$45,000 was a mistake, with no intention of defrauding creditors. But there are no allegations in the bill which would warrant the court in ruling upon that point. Counsel for defendants contends that the point presented arises under a statute which originated in New York, and that there it has received a construction to the effect that, where an assignee prefers a creditor for a larger amount than his claim, it shall be deemed fraudulent as to creditors. I am satisfied that this rule, maintained by many decisions of the highest court of New York, is not a construction of a statute, but a rule of evidence. It is held by those courts that such facts are evidence sufficient to prove that the assignment was made with an intent to hinder, delay, and defraud creditors. After some reflection, I think facts are not presented in the bill which will allow me to properly rule upon this point; that the points sought to be presented should be raised by answer, and a reply thereto; hence, this objection to the bill is overruled.

CHAMBERLAIN v. WALTER et al.

(Circuit Court, D. South Carolina. March 13, 1894.)

1. TAXATION—RAILROAD PROPERTY.

Railroad property situated in South Carolina was assessed by the state board of equalization for railroads at 80 per cent. of its real value, under a provision (Gen. St. § 219) that all property should "be valued for taxation at its true value in money," while all other property in the state was assessed by county boards of assessment at from 50 to 60 per cent. of the real value. *Held*, in view of the general mode of assessing property for taxation in the state, upon application of a receiver for instructions, that there was no such evidence of an intention on the part of the board of equalization to violate the constitutional provision (article 9, § 1) in relation to equality of taxation, and a design to put the burden of tax alone on railroads, as would warrant the interference of the court.

2. SAME.

The constitution of South Carolina directs all lands to be assessed every five years, and requires a uniform and equal rate of assessment and taxation; but, in practice, all railroad property, including the land forming part thereof, is assessed annually. *Held*, that a railroad is to be regarded as a unit, of which the land forms a part, and, therefore, that the annual valuation worked no such discrimination against railroads as would constitute a denial of the equal protection of the laws.

Bill by D. H. Chamberlain, receiver of the South Carolina Railway Company, against George H. Walter, Hugh Ferguson, and others, sheriffs and county treasurers of the state of South Carolina, seeking the instructions of the court in respect to the assessment and levy of a tax on the property of the railway company.

Brawley & Barnwell and Mitchell & Smith, for complainant.

O. W. Buchanan, Atty. Gen., Ira B. Jones, and Samuel Lord, for defendants.

SIMONTON, Circuit Judge. This bill is brought by the receiver of the South Carolina Railway Company against certain county treasurers and sheriffs of the state of South Carolina, seeking instructions respecting the assessment and levy of a tax upon the railway property in his hands. This proceeding is ancillary to the case of *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473, in which the complainant herein was appointed receiver. *Davis v. Gray*, 16 Wall. 219. After setting out the sections of the General Statutes of South Carolina prescribing the mode of making returns of railroad property for taxation, and then averring that he had made his return for the tax of 1891, fully conforming in all respects with the requirements of the law, the bill goes on to say that all real property in South Carolina assessed for taxation has been heretofore, and is now, openly and notoriously assessed for taxation at a uniform rate of 50 or 60 per cent. of its actual face value, and that personal property is assessed at the same rate, or less; that he made the return of the property under his charge at the accustomed valuation theretofore placed upon it, at from 60 to 65 per cent. of the same, which was fully equal to, and in reality higher than, the relative value of other property in the state; that this return having been filed with the comptroller general,

and having been submitted by that officer to the state board of equalization for railroads, that board considered the same, and raised the assessment from \$13,000 per mile, as made by complainant, to \$16,000 per mile, and in the case of the Carolina, Cumberland Gap & Chicago Railway property, leased by and so returned by complainant, raised it from \$5,000 to \$10,000 per mile. At the same time the same board raised the assessment of all the other railroad property in this state greatly above the returns made by them, respectively. The bill then charges that this board of equalization for railroads made this increase in the assessment of railroad property well knowing that the valuation fixed in their returns was fully equal to, and the same as, the average and uniform valuation of similar real and personal property in this state by other boards; that, in making their valuation, county auditors and county boards of assessment throughout the state had concurred in establishing a rate of valuation about 50 or 60 per cent. of the actual value, and that this board of equalization for railroads assessed the property at a value fully equal to, or greater than, its actual value, with the intent thereby to cast a great proportion of the burden of taxation on the railroads, and to shield and protect from their just share of taxation other classes of property holders; that the constitution of South Carolina provides that all property subject to taxation shall be taxed in proportion to its value, and directs the general assembly to provide by law for a uniform and equal rate of assessment and taxation, and to prescribe such regulations as shall secure a just valuation for taxation of all property,—real, personal, and possessory.

The bill charges that this board of equalization for railroads has violated this part of the constitution; that by its action the property of all railroads in the state has been denied by the state the equal protection of its laws; and that this railroad property has been assessed and taxed unequally and unjustly, in violation of the fourteenth amendment to the constitution of the United States. The bill also charges that while, under the constitution of this state, lands and the improvements thereon are assessed for taxes every fifth year, the property of railroad companies, consisting largely of land and improvements thereon, is assessed for taxation annually,—in this respect being treated as personal property,—but that, for the purposes of lien and collection of taxes, the acts of assembly deal with it as real estate; that this action on the part of this board is unconstitutional, null, and void, depriving railroad companies of their property without due process of law, and denying to them equal protection of the laws. The bill also charges that the act of the board in raising the assessment is in itself null and void, and the assessment is illegal, because this is not within the powers of the board. It is averred that the complainant has paid the amount of tax lawfully and justly due on a proper assessment. The answer denies that the return made by complainant is true and correct in valuation of the property thereon. It denies that the sum paid is the amount of taxes really and justly

due. It avers that complainant has a plain, adequate, and complete remedy at law.

It is well, at the threshold, to define the limit of the power of this court over the subject-matter of this suit. It cannot review the assessment made by the state officials simply upon the ground that it is excessive. *Stanley v. Supervisors*, 121 U. S. 549, 7 Sup. Ct. 1234. Nor can it make a new assessment, or direct another to be made. *State Railroad Tax Cases*, 92 U. S. 615. Nor can it interfere upon the ground that the tax is illegal. *Williams v. Supervisors*, 122 U. S. 154, 7 Sup. Ct. 1244; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480. Nor can it interfere because the court would prefer, and would have adopted, a different system. *W. U. Tel. Co. v. Attorney General*, 125 U. S. 533, 8 Sup. Ct. 961; *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73. "So long as a state, by its laws prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the constitution of the United States, this court, as between the state and its citizen, can afford him no relief against state taxation, however unjust, oppressive, or onerous" it may be. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Memphis Gas-Light Co. v. Taxing Dist. of Shelby Co.*, 109 U. S. 398, 3 Sup. Ct. 205. All these are questions for the state alone, and are within its police power. But when the overvaluation of property assessed for taxation has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, the courts can give redress to the party aggrieved thereby. *Stanley v. Supervisors*, 121 U. S. 551, 7 Sup. Ct. 1234. It is put clearly and tersely in *Cummings v. Bank*, 101 U. S. 157:

"When a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations."

We see that there is an essential ingredient. Those whose duty it is to make the assessment must adopt a rule or system of valuation with the design that it shall operate unequally, and violate some fundamental principle of the constitution.

What is the rule or system of taxation adopted by the board of equalization for railroads? The general assembly of South Carolina are instructed by the constitution to prescribe such regulations as will secure a just valuation for taxation of all property under a uniform and equal rate of assessment and taxation. Article 9, § 1. The act passed pursuant thereto provides that:

"All property shall be valued for taxation at its true value in money, which in all cases not otherwise provided for by law shall be as follows, to wit: For personal property the usual selling price on the usual terms of similar property at administrator's or executor's sales at the place where the return is made, and for real property the usual selling price on the usual

terms of similar property at sales for partition under the order of court at the place where the return is made. If there be no selling price then what is honestly believed could be obtained for the same at a fair sale under the conditions before mentioned." Gen. St. S. C. § 219.

Apart from the consideration that, even if the assessment fixed by this board on the property of complainant is excessive, this court cannot interfere (*Stanley v. Supervisors*, *supra*), there is no reason to think that the board do not, in the language of the act, "honestly believe that the value fixed by them on this property is its selling price at a fair sale." Indeed, this last conclusion is not denied. The complainant avers that the property was returned by him at 60 to 65 per cent. of its real value, in his estimation. And we can presume that, when it is raised by the board, they acted under the statute. The ground of complaint is that, by uniform and notorious practice, other real and personal property is assessed for taxation at about 50 to 60 per cent. of its value, notwithstanding the act of assembly, and that this action of the board of equalization for railroads, departing from this practice in the case of railroad property, was with the design, intent, and purpose of putting the burden of tax alone on railroads, and not in order to carry out the provision of the act of assembly.

Evidence of this design is deduced from the course pursued with regard to other property in the state, and the practice prevailing of assessing such property below its real value in money,—a practice well known to this board, and departed from by them in assessing the property of railroads. In South Carolina the general mode of assessing property for taxation is as follows: Each county in the state is divided into tax districts,—small territorial subdivisions,—for the sake of convenience. The county auditor appoints for each tax district three freeholders resident therein, as a board of assessors. They meet, organize, elect a chairman, and proceed to assess for taxation all the real and personal property in their tax district. This assessment is sent to the county auditor, by whom it is submitted to the county board of equalization, which consists of all the chairmen of the tax-district boards. This county board meets at the office of the auditor and examines the returns of all the tax-district boards. If any property, real or personal, has been returned below its true value, they raise the assessment. If above such value, they decrease it. They cannot reduce the aggregate below the aggregate of all the returns of the tax-district boards. The chairmen of the county boards constitute the state board of equalization. It, in turn, reviews the action of all the county boards. It has the same powers as to increasing or diminishing values that the county boards have. The auditors of the counties act as clerks of the county boards and the comptroller general attends upon the state board.

With regard to railroad property an entirely different method prevails. The president and secretary of each company are required, annually, to make returns, to the comptroller general, of the railroad property and its value. These returns are submitted by the comptroller general, for consideration and action, to a board con-

sisting of state officers, the attorney general, the comptroller general, the secretary of state, and the state treasurer. Their duties are to "equalize the value of the property of railroad companies by increasing the value of the roads and property of such company as shall in their judgment have been returned at too low a valuation and diminishing the value of such as may have been returned at too high a valuation." Gen. St. § 186. The term here used is "equalize." But as there is no aggregate to be maintained, as in the case of county taxes, this word must be used with reference to the language of the constitution, and must be construed to mean to secure equality. This board is entirely distinct, in personnel and otherwise from the other boards above referred to.

A mass of testimony has been taken, and has been filed with the record, with respect to the mode and practice of assessment by the tax-district and county boards. It would consume too much time to go into this in detail. The result shows that for a long period of time, up to recent date, and perhaps up to this time, the provisions of the act of assembly have not been regarded, and real and personal property have been assessed for taxation below the real value in money. But nowhere does it appear in the testimony that this is the result of preconcert, connivance, or conspiracy between and among the boards, such as appears in *Cummings v. Bank*, supra. There is evidence of coincidence in opinion and action, of concurrence in methods and in general result, but none whatever—that is, of direct evidence—of preconcert in action. Such concert of action may possibly be inferred from similarity in the result; but the evidence shows that, although the boards all assessed real and personal property below its real value in money, the course of the several boards was capricious,—without fixed method or percentage. Although the average of valuation was below the value in money in all the counties concerning which testimony was offered, in some of the counties parcels of land were assessed, some above and some below their true value in money, notably in Richland county. But is this coincidence of action and result on the part of tax-district and county boards conclusive evidence of design to put the burden of taxation on railroad companies? Is it susceptible of other explanation? It would seem that it is the result of a vice in the system of assessment. The tax-district boards make the first assessment. By law they must be freeholders resident in the tax district. They have a direct personal interest in a low assessment, and their environment induces them to make it. When men deal with the interest of the government and of the citizen, all doubts are solved in favor of the citizen. This must be said, however, in explanation, and perhaps in justification, of the action of these boards. In an agricultural community, and in one dependent upon the well-being of the agriculturists, it is impossible to fix the value of lands. A succession of bad crops will make land unsalable. One good crop will create a demand, and a selling price. So what land may bring, if sold, depends, not on its intrinsic value, so much as on the circumstances under which it is sold. Taxes

must be paid without regard to seasons or crops. Hence, the average valuation designated to cover a period of five years. If there be no preponderance of evidence showing design on the part of the tax-district and county assessors to throw the burden on the railroads, is there any evidence from which such design can be inferred on the part of this board of equalization for railroads? The comptroller general (one of this board, and, from his official duties and experience, the leading member of the board, probably directing and controlling its action), in his official report to the legislature in 1891, calls the attention of that body to the low rate of assessment of much of the property in the state, and urges legislation to correct the evil. And when we consider the independent action of this board under a statute imperatively requiring them, in making assessment, to take as a standard the true value of the property in money, and also consider the admission of the bill that the return was about 65 per cent. of the real value, \$13,000 per mile, and that the increase to \$16,000, making it about 80 per cent., we cannot hold that this increase in assessment is so excessive and unjust as necessarily to indicate the design and motive charged.

Another objection to the action of the board of equalization for railroads is that, notwithstanding the fact that a large part of the property of railroad companies is land, they are assessed annually. The state constitution directs that lands shall be assessed every five years, and this practice is observed with respect to all lands except those of railroad companies. This indicates design to oppress railroad companies, and at all events violates the fourteenth amendment. The constitution of South Carolina (article 9, § 1) directs the general assembly to "provide by law for a uniform and equal rate of assessment and taxation." It gives the general assembly full discretion "to prescribe such regulations as shall secure a just valuation for taxation of all property." The general assembly obeyed the direction by requiring all property to be assessed at its true value in money. Exercising its discretion, it prescribed a set of regulations, which, in its judgment, secured a just valuation of railroad property for taxation. A railroad is a unit, every part contributing to its purposes as a whole. If it be a corporation, its corporate purpose is the maintaining a railroad, and all and every part of this property must contribute to this purpose. Its right of eminent domain is limited to this purpose. This unit is made up of lands, personal property, choses in action, easements, all dependent upon and inseparable from each other, deriving their value from this inseparability,—from the fact that they contribute to this unit. They differ from every other species of property, and the discrimination made, as between them and other corporations and individuals, in the methods and instrumentality by which the value of their property is ascertained, is not invalid. *Kentucky Railroad Tax Cases*, 115 U. S. 337, 6 Sup. Ct. 57; *State Railroad Tax Cases*, 92 U. S. 611. The mode prescribed by the legislature of this state is to get at the value of the plant,—that is, of all these elements going to make up the railroad,—and to ascertain what their combined contributions making up this unit are worth. If

they separated the component parts, and attempted to fix separate values upon them, they would enter into an impossible task. The value of the lands of a railroad depend much on the character and condition and completeness of its rolling stock. The utility and consequent value of the rolling stock depend largely upon the facilities at stations and at termini; the amount, location, and character of the land used therefor.

After careful consideration, there appears no evidence of such a design as will alone give this court jurisdiction. Let an order be taken authorizing and instructing the receiver of the South Carolina Railway Company to pay from the funds in his hands as such receiver the remainder of the tax unpaid, and the costs of these proceedings.

COLUMBIA FINANCE & TRUST CO. v. KENTUCKY UNION RY. Co. et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1894.)

No. 128.

1. RAILROAD MORTGAGES—FORECLOSURE—PARTIES—SUBROGATION.

A land company which guaranties the mortgage bonds of a railway company, and afterwards joins the latter in borrowing money with which to pay the interest coupons, does not thereby become subrogated, pro tanto, to the rights of the mortgagee, so as to become an indispensable, or even a proper, party to a subsequent foreclosure suit; for subrogation does not take place until the payment of the whole debt for which the surety is liable.

2. SAME—RAILROAD CHARTER—CONSTRUCTION.

A land company was authorized to guaranty the bonds of a railway company by the following provision contained in the charter of the latter: "And, in order to enable said company to guaranty the punctual payment of the interest and principal of such bonds, it is hereby expressly declared that the guarantors of such bonds shall be entitled to all the benefits of such mortgage or deed of trust made to secure such bonds to the same beneficial extent that the holders of said bonds may be entitled." *Held*, that this was a mere declaration of the principles of subrogation, and could not be construed as placing the guarantor who had made only a partial payment upon an equal footing with mortgage creditors.

3. SAME—AFTER-ACQUIRED PROPERTY—LEASE OF OTHER RAILROADS.

A railroad mortgage covering, among other things, "all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to said railroad," is sufficient to include a subsequently acquired lease of a belt railway whereby the company acquired access to a city at one of its terminals.

4. SAME—FORECLOSURE DECREE—TIME FOR REDEMPTION.

The time to be allowed for payment of a railroad mortgage after the entry of a foreclosure decree is within the discretion of the court, and the allowance of only four months is not an abuse thereof.

5. SAME—SALE—APPRAISEMENT AND REDEMPTION.

When railroad franchises and property, both real and personal, are mortgaged, and are to be sold on foreclosure, they are to be treated as an entirety, and this entirety is not "real estate" within the meaning of the Kentucky statute which requires an appraisement as a prerequisite

to a judicial sale of real estate, and allows one year for redemption when the property does not bring two-thirds of its appraised value (Gen. St. c. 63, art. 8). *Hammock v. Trust Co.*, 105 U. S. 77, followed.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This is an appeal from a decree of foreclosure and sale of the Kentucky Union Railway. That railway has been constructed and is in operation between the city of Lexington, Ky., and the town of Jackson, Breathitt county, Ky., a distance of about 95 miles, a few miles of which were completed by the receiver in the case, under order of court, and with money raised by the issue of receiver's certificates. The complainants in the original bill were J. Kennedy Todd & Co. and the Central Trust Company. The former claimed to be general creditors of the Kentucky Union Railway Company to the amount of \$270,000, and the Central Trust Company is the trustee in the first mortgages executed by the railway company to secure the sum of \$2,500,000 of bonds. The defendants were the railway company and the Columbia Finance & Trust Company, the trustee in the second mortgage. The second mortgage was to secure the sum of \$1,300,000 of bonds, of which \$800,000 were outstanding. Both the first and second mortgage bonds were absolutely guarantied, both principal and interest, by the Kentucky Union Land Company, which company was not made a party to the suit. Upon the allegations of insolvency the court appointed a receiver to take charge of the railway company. During the progress of the cause, many intervening petitions were filed, setting up claims for liens upon the property, but no question arises upon this appeal concerning them. From the final decree of foreclosure and sale the Columbia Finance & Trust Company, trustee in the second mortgage, has prosecuted its appeal without supersedeas, and the Central Trust Company, trustee in the first mortgage, has prosecuted an appeal with supersedeas; the only error assigned in the latter case being also one of those assigned in the former. The appeal of the Central Trust Company was disposed of at a former term by a stipulation entered into by all of the parties interested therein, by which the decree in the matter complained of was by agreement modified. The errors now to be disposed of arise alone upon the appeal of the Columbia Finance & Trust Company.

St. John Boyle, for appellant.

Olin, Rives & Montgomery, Butler, Stillman & Hubbard, and Humphrey & Davie, for J. Kennedy Todd & Co. and Central Trust Company.

William Lindsay, for Passenger & Belt Railway Company.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge (after stating the facts). 1. The first error assigned is in rejecting the amended answer tendered by the Columbia Finance & Trust Company on the 20th day of December, 1892, and in proceeding with the cause without requiring the Ken-

tucky Union Land Company to be made a party thereto. It appears from this answer that the Kentucky Union Land Company guaranteed the payment of the principal and interest of the first mortgage bonds, which guaranty was indorsed thereon; that this guaranty was made under authority of the charter of the Kentucky Union Railway Company. It further appears that when the coupons of this issue of bonds became due on January 1, 1891, the land company and the railway company jointly borrowed on their notes \$60,000, from J. Kennedy Todd & Co., and with the money paid that series of coupons. The insistence of the appellant is that the Kentucky Union Land Company became by said payments entitled to a lien upon the railroad to secure the payment of this sum of \$60,000, which was used for the payment of coupons, and that it was error to proceed without bringing that company before the court, that its lien might be established and enforced.

The unquestioned general rule as to parties in chancery is that all parties who are interested in the controversy should be made parties to the cause in order that there may be an end of litigation. If the Kentucky Union Land Company, by the payment alleged to have been made by it, as guarantor, became thereby entitled to a lien upon the property of the railway company, through subrogation, then it would have been a proper party, as it would have been interested in the property proceeded against. It would, however, in no sense be an indispensable party, because it would not have been directly affected by a decree enforcing the liens held by the holders of the first and second mortgage bonds. The distinction between a person directly interested in a controversy and directly affected by the decree, and one only indirectly affected by the decree, is well stated by Mr. Justice Bradley in the case of *Williams v. Bankhead*, 19 Wall. 571. We do not think that the Kentucky Union Land Company was an indispensable, or even a proper, party. It had made, at most, but a partial payment on account of its liability as guarantor. The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable. Yet this is in effect the result of the contention urged. The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity. *Sheld. Subr.* § 127; *Hollingsworth v. Floyd*, 2 Har. & G. 91; *Insurance Co. v. Dorsey*, 3 Md. Ch. 334.

The creditors' rights in the mortgage must be entirely divested before the surety can be substituted by operation of law, and allowed to stand in the shoes of a creditor. *Magee v. Leggett*, 48 Miss. 139; *Bank v. Benedict*, 15 Conn. 437; *Gannet v. Blodget*, 39 N. H. 152; *Harlan v. Sweeny*, 1 Lea, 682; *Gilliam v. Esselman*, 5 Sneed, 86; *Kyner v. Kyner*, 6 Watts, 221. The provision in the charter of the Kentucky Railway Company upon which appellants insist that they have a statutory right of subrogation was in these words:

"And, in order to enable said company to guaranty the punctual payment of the interest and principal of such bonds, it is hereby expressly declared that the guarantors of such bonds shall be entitled to all the benefits of such mortgage or deed of trust made to secure such bonds to the same beneficial extent that the holders of said bonds may be entitled."

This is no more than a general declaration of the principles of subrogation. There is nothing in this provision which can be reasonably construed as placing the guarantor upon an equal footing with a creditor secured by a mortgage as a result of every partial payment. The case of *Railroad Co. v. Schutte*, 103 U. S. 141, is not controlling. The charter provisions there considered are altogether unlike the provision contained in the charter of the Kentucky Union Railway Company.

2. The second error assigned is that "the court erred in adjudging that the right, title, and interest acquired by the Kentucky Union Railway Company, under the contract lease of the Passenger & Belt Railroad, was included or covered by the mortgage to the Central Trust Company." The property embraced by the contract referred to consisted of about five miles of belt railroad around the city of Lexington, Ky., and certain interests in lands adjacent to the right of way and belonging to the Belt Railroad. It clearly appears that the Kentucky Union Railway Company constructed its line to the boundary of the city of Lexington in such way as that it had no entrance into the city and no terminal facilities, and no connection with other railway lines entering that city. Its main line terminated at the boundary of the city in view of a purpose to obtain connection with other lines and terminal facilities by means of a contract with the Belt Railroad. This line gave to the Kentucky Union Railway Company connection with several other railway lines entering Lexington, and afforded it terminal facilities in the city. The contract of lease was made after the mortgage to the Central Trust Company, and was, indeed, completed under direction of the circuit court after appointment of receivers; that court being of opinion that it was necessary as a means of affording connection with other lines, and proper terminal facilities. That this leasehold passed as after-acquired property by the express terms of the mortgage to the Central Trust Company we have no doubt. The provision in that mortgage describing the property covered by it is as follows:

"All and singular its line of railroad, built and to be built, beginning at a point in Lexington, Fayette county, Kentucky; thence through Fayette and Clark counties to Kentucky Union Junction, on the line of the Elizabethtown, Lexington & Big Sandy Railroad; thence to Clay City; thence

via Three Forks Jackson, in Breathitt county, being a distance of about one hundred miles. And also the lands, real estate, telegraph lines, railroad tracks, side tracks, bridges, viaducts, buildings, depots, station houses, car houses, engine houses, shops, warehouses, turntables, water stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind belonging or in any wise appertaining, or which have been or may be acquired or provided for use upon or in connection with said railroad, and all the lands acquired, or that shall hereafter be acquired, destined for warehouses and other structures for railroad uses at either terminus, as well as along the line of said railroad; and also all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, furniture, and other chattels now or hereafter belonging to or appertaining to said railroad, and all property, both real and personal, of every kind and description, which shall hereafter be acquired for use on said railroad; and all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to the said railroad; together with all and singular the tenements and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof; and also all estate, right, title, and interest whatsoever at law, as well as in equity, of said party of the first part, of, in, and to the same, saving and excepting subscriptions of cash or securities and lands not to be used in the operation of said railroad or in connection therewith."

The terms covering after-acquired property are abundantly sufficient to embrace this lease contract. *Trust Co. v. Kneeland*, 138 U. S. 416, 11 Sup. Ct. 357; *Railroad Co. v. Hamilton*, 134 U. S. 297, 10 Sup. Ct. 546; *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. 495.

3. The third error assigned is as to the decree ordering a sale of the interest of the Kentucky Union Railway Company acquired and held by it under the contract of lease of the property of the Passenger & Belt Railway. By the decree it was ordered that "all right, title, and interest shall pass to and be vested in the purchaser under this decree; subject, however, to all the terms, conditions, and limitations set forth in said contract of lease, as ratified by the circuit court in its decree of April, 1892." The part of the decree assigned as error follows, and is in these words:

"And the purchaser shall assume and perform all the obligations imposed therein upon the Kentucky Union Railway Company; but this provision shall not be held to create any lien for the performance of such obligations upon any of the property herein ordered to be sold, other than the properties acquired under said lease."

From so much of the decree as is set out above the original complainants, *J. Kennedy Todd & Co.* and the Central Trust Company, prosecuted a writ of error with supersedeas. That writ of error has been disposed of at a former day of this term upon a stipulation, signed by all of the parties in interest, assenting to a modification of the decree by striking out the paragraph last set out, and the subject of the third assignment of error relied upon by the appellant, the Columbia Finance & Trust Company, is thereby disposed of.

4. The next assignment of error is as to so much of the decree nisi which ordered a sale of the road unless the decree should be satisfied by paying off the sums adjudged to be due within four months. The complaint is that the time for payment in order to save a sale was unreasonably short. The period allowed for pay-

ment before a decree of foreclosure becomes absolute is within the discretion of the court. *Howell v. Railroad Co.*, 94 U. S. 463. There was no such reasonable exercise of this discretion as to justify this court in maintaining this assignment.

5. The fifth assignment of error is that the circuit court ordered a sale without redemption and without appraisal. This road is wholly situated within the state of Kentucky. The insistence is that the railroad is real estate within the meaning of the statute of the state of Kentucky of April 9, 1878 (chapter 63, art. 8, of the General Statutes), which provides as follows:

"(1) That before any real estate shall be hereafter sold, in pursuance of any order or judgment of a court, the commissioner or officer, whose duty it may be to sell the same, shall cause it to be valued, under oath, by two disinterested intelligent housekeepers of the county, not related to either party. If they disagree, the commissioner or officer shall act as umpire. If a part only of a tract of land is sold, the part sold shall, after the sale, be revalued in like manner. (2) The valuation so made shall be in writing, signed by the persons making it, and returned by such commissioner or officer to the court which made the order or rendered the judgment for the sale of the property, and the same shall be filed among the papers of the cause in which the judgment was rendered or the order made and also spread upon the records of the court. (3) If the real estate which may be sold in pursuance of such judgment or order does not bring two-thirds of such valuation, the defendant and his representatives shall have the right to redeem the same within a year from the day of sale by paying the purchaser or his representatives the original purchase money and ten per centum per annum interest thereon. The defendant redeeming his land shall take receipt from the purchaser and lodge the same with the clerk of the court, and the same shall be entered upon the records of the court. The defendant may tender the redemption to the purchaser, his agent, or attorney, if in the county where the land lies, or in the county in which the judgment is obtained or order of sale made; and if the same is refused, or if the purchaser does not reside in either of said counties, the defendant may, before the expiration of the year, go to the clerk of the court in which the judgment is rendered or the order made and make affidavit of such tender and refusal, or that the purchaser, his agent, or attorney, does not reside in either of said counties. Thereupon he may pay to such clerk the redemption money for the purchaser, and the clerk shall give a receipt therefor and file said affidavit among the papers of the cause. When the right of redemption exists the defendant may remain in possession of the property until it expires. Real estate so sold shall not be conveyed to the purchaser until the right to redeem the same has expired, and if the same be redeemed in accordance with the provisions of this act, such sale thereof, from and after such redemption, or from and after such deposit of the redemption money with the clerk, be null and void."

A state law conferring a right of redemption after a sale by execution, or under a decree to enforce a lien or mortgage, is obligatory upon federal courts sitting in equity as to lands within said state, and decrees of sale should be made so as to conform to the laws of the state so far as may be necessary to give full effect to the right. *Brine v. Insurance Co.*, 96 U. S. 627; *Orvis v. Powell*, 98 U. S. 176; *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. 433. If the statute of Kentucky, above cited, applies to a railroad situated within the state, then the decree does not conform to the law of the state. A like question was decided by the supreme court of the United States in *Hammock v. Trust Co.*, 105 U. S. 77. The question in that case arose under the redemption statutes of the

state of Illinois. The statute of that state provided for the redemption of lands "sold under and by virtue of any decree of a court of equity for a sale of mortgaged lands." It was provided with reference to the latter case "that it should be lawful for the mortgagor of such lands, his executors, administrators, or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree, in the same manner as is prescribed for the redemption of lands sold upon execution upon judgments issued at common law." Upon elaborate consideration it was unanimously decided by that court that a railroad was not within the provision of that statute. The learned counsel for the appellant have undertaken to draw a distinction between the state of the law of Kentucky and that of Illinois, which they have argued is sufficient to distinguish this case from the case of *Hammock v. Trust Co.*, supra. These distinctions are predicated upon the propositions: (1) That under the law of Illinois a railroad property consisted in; (a) its franchises; (b) its movable property, such as rolling stock, supplies, etc., which were under the common law personalty; (c) its right of way, to which was affixed its rails, bridges, culverts, depots, etc., and which was clearly real estate. The conclusion drawn from this common-law division of its property was commented on by the supreme court of the United States as fatal to the insistence that, when a railroad was mortgaged as an entirety, it was redeemable as "real estate," within the meaning of the Illinois statute conferring the right of redemption when real estate was sold to enforce the lien of a mortgage, which, under the law, covered the franchises, personalty, and realty as unitedly constituting a railroad. In contrast it has been insisted that, under the decisions of the highest court of Kentucky, at the time the mortgage to the Central Trust Company was executed in 1888: (a) A railroad was a unit, and that its movable property was so affixed to its real estate as to be held fixtures, and therefore inseparable. To support this proposition the cases of *Phillips v. Winslow*, 18 B. Mon. 448, and *Railroad Co. v. Elizabethtown*, 12 Bush, 233, have been cited. (b) That, in harmony with this, the same court has held that railroad shares descend as realty to the heirs, and are subject to dower. *Price v. Price's Heirs*, 6 Dana, 107, and *Copeland v. Copeland*, 7 Bush, 349. (c) That the franchises of a railway company are not prerogative franchises, and that a railway could be operated without a franchise. *Railroad Co. v. Metcalfe*, 4 Metc. (Ky.) 199. The cases cited do not, in our judgment, support the conclusion sought to be drawn.

Phillips v. Winslow, supra, was a case where a trustee under second mortgage made to secure an issue of bonds, and covering all the property of the company then in existence, as well as all after-acquired property, filed a bill to enjoin certain proceedings at law by judgment creditors, one of whom had levied on certain movable property and was about to sell, while the other had seized and sold, and bought at his own sale under execution, certain cars, car wheels, firewood, and stone coal, being supplies for the operation

of the road. The levy was exclusively upon property acquired after the mortgage under which the plaintiff claimed, but was embraced by the clause covering after-acquired property. After deciding that the property was not subject to seizure by execution, because it was embraced in the mortgage, the court was confronted with the proposition that the plaintiff had an ample remedy at law by replevin or an action for damages. This the court decided upon a consideration of the irreparable character of the damage to creditors having a mortgage upon a railway as a unit which would result to them from such a seizure in view of the unity of railroad property, and the great inconveniences resulting to the public from the interference with the equipment and necessary supplies of a common carrier. The court did not decide that the rolling stock of a railroad passed with the realty as a fixture. It certainly did not decide that cordwood and stone coal were fixtures, and yet the reasoning of the court was applied as much to such supplies as it was to the freight cars and detached car wheels, which were also in the levy. In the subsequent case of *Railroad Co. v. Elizabethtown*, supra, it was expressly ruled that a municipality could not dismember a railroad by a seizure for taxes of the engines and cars of a railway company. It is true that Lindsay, C. J., did, in passing upon this question, observe that in *Phillips v. Winslow* the engines and cars of a railroad "were treated as fixtures." But that case was not, as we have seen, put on any such ground, and indeed no such question arose for decision. Neither that case nor the decision in *Railroad Co. v. Elizabethtown* rested upon any technical consideration of the law of fixtures. The first went off, so far as the point now in question is concerned, upon the question of equitable remedy. The latter was vested upon the high and rational ground that a railroad was an entirety, and, being charged with quasi public duties as a common carrier, could not, from considerations of public policy, be disabled or dismembered by seizure under execution of its necessary equipments or supplies. It is true both cases recognized the unity of a railroad property resulting from its structure and utility. Severance of such a property is destructive of the interests of all concerned, and disables the road in the discharge of its public functions. Neither case held that a railroad property considered as an entirety was technically realty. Neither do the cases which decide that stocks in railway companies descend as realty bear upon the question. In both cases the court recognized that such shares represented both real and personal property, and ruled that this fact did not conflict with their classification as incorporeal hereditaments. On this subject that court, in *Price v. Price's Heirs*, 6 Dana, 107, said:

"The right conferred on each shareholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and, though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament. An annuity, though only chargeable upon the person of the grantor, is an incorporeal hereditament; and, though the owner's security is merely personal, yet he may have a real estate in it. 2 Bl. Comm. 40. Much less can it be doubted that a franchise

created by act of incorporation, unlimited in duration, and springing out of the combined use of lands and personalty, should be denominated and classed as real estate."

These cases do not preclude us from considering the inherent nature of the several kinds of property which constitute that great public work called a railroad. Neither do they serve to throw any valuable light in determining whether such a property, when lawfully mortgaged as an entirety, is "real estate" within the intent of the Kentucky statute conferring the right to redeem real estate when sold to foreclose a mortgage. That statute, in our judgment, did not contemplate either the severance of a railroad, when sold, into its constituent elements, in order that that part which savored of realty might be redeemable; nor did it contemplate that so peculiar and composite a property should be embraced within the term "real estate" as used in that statute. The value of such a property consists in its maintenance as a unit. This unit the state provided might be mortgaged. It would be unprofitable to consider whether an individual, or a group of individuals, could own and operate a railroad without express authority. The franchise to be a railway, to exercise the great power of eminent domain, and to exact tolls for freight and passengers, was a franchise of value, and this, too, the legislature has permitted this company to embrace within its mortgage. Upon it credit has been extended. This is a part of the entirety which the creditors secured by this mortgage, and have a right to bring it to sale, along with the tangible property which it secures and renders valuable. That franchise is not real estate, and is not leviable at law. The controlling reasons which induced the decision in *Hammock v. Trust Co.* sprang from a consideration of the unity of a railroad property. These reasons are as masterful, when we come to construe this Kentucky statute, as they were in the case from Illinois. The distinction between the two statutes, and differences in the general law of Illinois and Kentucky, are not sufficiently marked to justify, certainly not to demand, that this case shall be distinguished from *Hammock v. Trust Co.*

We are the better satisfied with our conclusion when we look at the state of the law of Kentucky at the time the circuit court was called upon to construe this redemption statute: (1) In 1871, long antecedent to this mortgage, the legislature of Kentucky, manifestly induced thereto by the case of *Price v. Price's Heirs*, and the case of *Copeland v. Copeland*, cited above, passed an act declaring railway shares personal property. (2) By section 212 of the new constitution of Kentucky, adopted in 1891, and in force when this decree was entered, it was enacted that the rolling stock of a railroad should "be considered personal property, and liable to execution and sale in the same manner as the personal property of individuals." Clearly this constitutional recognition of the movable property of a railroad as personal property disabled the court from holding that the personal property of this road should be redeemable as "real estate." It would therefore follow that, if any right of redemption exists in the case of the sale of a railroad, it must be limited to so much of the railroad property as was real property

under the law of Kentucky at the time of the sale. The reasons of public inconvenience, and the absolute injury which would result to lien creditors whose liens embraced the whole property arising from such dismemberment and partial right of redemption, would demand another construction of the redemption statute if one was admissible under well-settled rules of law. The decree, as modified by the stipulation before mentioned, must be affirmed. The costs will be equally divided between the appellant and the Passenger & Belt Railroad. This division is made in consequence of the stipulation made upon the appeal of the Central Trust Company, by which the present appellant's third assignment of error was in effect conceded to have been well taken.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court, E. D. Wisconsin. April 6, 1894.)

1. EQUITY JURISDICTION—CONSPIRACIES.

A court of equity having charge of a railroad through its receivers has authority to restrain the formation and execution of a conspiracy among the employes to quit the service in a body with the design and intent of crippling the property in their custody, or embarrassing the operation of the road.

2. CONSPIRACIES—ACT OF CONGRESS.

There is nothing in the act of congress entitled "An act to legalize the incorporation of National Trades Unions" (24 Stat. c. 567), to countenance the idea that it so changes the common law as to authorize combinations and conspiracies of interstate employes to quit the service in a body, with the design and intent of crippling the property in their custody, or embarrassing the operation of the road, with the ulterior purpose of enforcing a demand against the master.

3. SAME—DEFINITION OF STRIKE—INJUNCTION.

A strike is a combination among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of and the least effective of the means to the end; the intimidation of others from engaging in the service, the interference with and the disabling and destruction of property, and resort to actual force and violence when necessary to the accomplishment of the end being the other and more effective means employed. Such a strike is unlawful, and a federal court having charge through its receivers of an interstate railroad had jurisdiction to enjoin the executive heads of the various organizations of railroad employes from ordering a strike upon the road.

This was a petition presented by Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, who were appointed receivers of the property of the Northern Pacific Railroad, in a suit brought against that company and others by the Farmers' Loan & Trust Company, setting forth that their employes are contemplating a strike for the purpose of preventing a proposed reduction of wages, and praying that they be enjoined therefrom. There was also a supplemental petition representing that the threatened strike would be ordered by the executive heads of the various organizations of railway employes, and praying an injunction against them, their agents, and various other parties. Injunctions were accordingly

granted, and the case is now heard on motion of the officers of these organizations to modify the same by striking out certain portions specially objected to.

Charles Quarles, T. W. Spence, and T. W. Harper, for moving parties.

James McNaught, John C. Spooner, and Geo. P. Miller, for receivers.

JENKINS, Circuit Judge. On the 19th day of December, 1893, the receivers of the defendant company presented to the court their verified petition representing that on the 17th day of August, 1893, and within two days after their appointment, and in view of the insolvent condition of the railroad company, they ordered a reduction varying from 10 to 20 per cent. in the salaries of all employes (including the general manager and other general officers of the company) amounting to \$1,200 per annum or more, which reduction was acquiesced in by the employes to whom the same applied. On the 25th of August, 1893, in view of the increasing depression in the transportation business, the consequent falling off of earnings, and the necessity of greater retrenchment in operating expenses, the receivers ordered a further reduction in salaries and wages of employes, amounting to 5 per cent. on all salaries aggregating \$50 a month and under \$75, and to 10 per cent. on all salaries aggregating from \$75 to \$100 per month. This latter order was to take effect immediately, but upon consideration its operation was suspended by the receivers until the entire subject of salaries and wages could be more fully considered, especially with reference to certain schedules covering the pay and employment of certain classes of employes. The receivers informed the court that some of these schedules, which had been in existence for many years, were not justified by conditions now existing; that they had been amended from time to time, and extended so that they had become voluminous, and in some respects obscure, and had produced in operation inequalities and results unjust to the property, and unjust to many employes; that they thereupon revised and rearranged the schedules, and, instead of putting into operation the reduction contemplated by the order of August 25th, they determined and ordered on the 28th of October, 1893 (giving general notice thereof to the employes of the road), that all existing schedules covering the rates of pay of employes should, on the 1st of January then next ensuing, be abrogated, and that certain new schedules prepared by them should take effect on that day; and the general manager was instructed on and after that day to reduce all salaries and wages aggregating \$50 per month and less than \$75 per month 5 per cent., and all salaries and wages aggregating \$75 per month 10 per cent. The revised schedules corrected supposed inequalities between the different classes of employes, and did away with certain obnoxious regulations which were supposed to militate against the proper management of the property. The receivers further rep-

resented to the court that the reduction made in salaries and wages was justified in view of the large shrinkage of business, growing out of the financial revulsion throughout the country; that the rates of compensation provided for were fair and just to the employes to whom they related, in view of the then present conditions. It was made to appear to the court that the gross earnings of the property during the year 1893 were continuing to greatly decrease; that the decrease for the month of September, 1893, as compared with the month of September, 1892, amounted to \$753,000; that the decrease for the month of December, 1893, as compared with the month of December, 1892, would amount to \$730,000, decreasing by more than one-half the entire estimated gross earnings for the month. That by the revised schedules the average reduction in the rates of compensation to the various classes of employes was about as follows: Engineers, 8 per cent.; firemen, 7 per cent.; trainmen and freight conductors, 8 per cent.; passenger conductors, 10 per cent.; telegraphers, 5 per cent. The receivers further advised the court that many of their employes claimed that the schedules and rates in force when the receivers took possession constituted contracts between the several employes and the receivers, terminable only by the consent of the employes, in which view the receivers could not concur; and that discontent and opposition to the enforcement of the schedule were rife among the employes, based upon the assumption that no power existed in the receivers to change the schedule. The receivers further advised the court that some of the employes threatened that, in the event that the revised schedules should be put into operation, they would suddenly quit the service of the receivers, and would compel by threats and force and violence other employes to quit the service; that they would prevent, by an organized effort, and by force and intimidation, others from taking service under the receivers in the place of those who might leave such service; and that they would thereby, as the means of forcing the receivers to abandon the proposed revised schedules, disable the receivers from operating the road, and from discharging their duty to the public as common carrier. The receivers further represented to the court that some of the employes threatened, if the revised schedules should be put in operation, to disable locomotives and cars so that the same could not be safely used at all without expensive repairs; that they would take possession of the cars, engines, shops, roadbed, and other property in possession of the receivers, and that they would destroy and prevent the use of the property, and would so conduct themselves with regard thereto as to hinder and embarrass the receivers in the management of the property, in the operation of the trains thereover, and would bring about incalculable loss to the trust property, and inflict great inconvenience and hardship upon the public. The receivers further represented to the court that, unless the parties were restrained and prohibited by order of the court, they would carry out such threats, and the receivers would be prevented from operating the road, from carrying the mails

of the United States thereover, from performing the duties of a common carrier thereon, and that great loss of property and jeopardy to life would ensue; that the parties referred to (whose names the receivers were unable to state) were contriving secretly to perpetrate the acts of violence and wrong described, and to interfere with the possession and operation by the court, through the receivers, of the property; that such combination included not only dissatisfied employes of the receivers, but others not in the service of the receivers, who, from a spirit of sympathy or mischief, threaten to join the employes in perpetrating the wrongful acts and things stated; and that they would so do unless restrained by the court. The receivers thereupon asked, among other things, for an order authorizing them to put in operation and maintain on and after January 1st, then proximo, the revised schedules in such petition described, and that a writ of injunction might issue as prayed for in the petition.

Upon consideration of the petition the court on that day entered its order authorizing the receivers to adopt the revised schedules, and directing the issue of a writ of injunction as prayed for in the petition, and directing its delivery to the marshal for execution, ordering him to protect the receivers of the Northern Pacific Railroad in their possession of the property of the railroad, and in their operation thereof; and directing the receivers to file, in the courts wherein they had been appointed receivers of said property upon ancillary bills, petitions similar to that on which the order was based, to the end that the power of each court might be seasonably invoked for the protection of the receivers in the possession and management of the property within its territorial jurisdiction. The writ in question was directed to the officers, agents, and employes of the receivers, engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and to all persons generally. The restraining clause of the writ is as follows:

"Now, therefore, in consideration thereof, and of the matters in said petition set forth, you, the officers, agents, and employes of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby charged and commanded that you, and each and every one of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars, or other property of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars, or property of the said receivers, or in their custody, and from interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the said receivers, and from interfering in any manner, by force, threat, or otherwise, with men employed by the said

receivers to take the place of those who quit the service of said receivers, or from interfering with or obstructing in any wise the operation of the railroad, or any portion thereof, or the running of engines and trains thereon and thereafter, as usual, and from any interference with the telegraph lines of said receivers or along the lines of railways operated by said receivers, or the operation thereof, and *from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property, or to prevent or hinder the operation of said railroad,* and generally from interfering with the officers and agents of said receivers, or their employes, in any manner, by actual violence, or by intimidation, threats, or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said receivers, whether belonging to the receivers or shippers or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of said receivers, or any portion thereof, by said receivers, or by interfering in any manner by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said receivers, until the further order of this court."

On the 22d day of December, 1893, the receivers presented to the court their supplemental petition, setting forth that the employes affected by the new schedules referred to in the former petition, consisted of engineers, conductors, firemen, trainmen, switchmen, operators, and shopmen; that each of said classes of employes had appointed a committee to confer with the operating officers of the receivers, at St. Paul, with reference to the proposed change in the schedules, and stating the names of the members of those several committees; that such committees had confederated and agreed to co-operate and report to the various classes of employes along the line whom such committee especially represented a joint recommendation,—that is to say, should said committees agree to report and recommend a strike along the line of the railroad, then the separate committees mentioned representing the different classes of employes along the line should report and recommend separately to the employes represented by such committee to strike. The petition further represented to the court that a subcommittee of 32 persons had been appointed by the joint committee to confer with the operating officers of the receivers, and to make report and recommendation to the joint committee; and that, should such subcommittee recommend a strike, the general and joint committee would report or recommend a strike, which the separate committees in turn would recommend or report to the different orders or classes of labor to which they belonged upon the lines of the railroad. The receivers further represented that the subcommittee of said general committee intended and was about to recommend and advise the general joint committee to recommend that the employes of the road should strike on or about January 1, 1894, and that the general joint committee and the said several separate committees were about to recommend to the several classes of labor in the employment of the receivers to strike on or about that day. And the receivers further informed the court that, if such committees should recommend

a strike, the individual employés along the line of the road would on the day recommended join in a general strike, unless the members of the committee were enjoined by the court from issuing any order or recommendation to strike; that the employés of the railroad held themselves bound to obey the order or recommendation of the committee; that almost all of the employés of the road belonged to one of the labor organizations of the engineers, conductors, firemen, trainmen, switchmen, operators, or shopmen, and also to national labor organizations comprising the employés in similar lines on almost all the other lines of railroad in the United States, namely, the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, and the Brotherhood of Railway Trainmen. The petition then proceeds to give the names of the executive heads of those organizations, and asserts that the employés will not strike unless such strike is ordered by one or more of the executive heads of the national labor organizations named; and that, without an order from the executive head, no assistance would be given to the employés by the national organizations to which they belonged if they should attempt to strike. The petition further alleged that the railway in question was engaged in interstate commerce, and that a strike along the line of the road would not only cause irreparable damage to the trust property, but to a large portion of the country traversed by the Northern Pacific Railroad, because not reached by any other line of road or telegraph line or express company. That there were many communities along the line of the railroad whose entire commercial facilities were furnished by the three departments of the railroad operated by the receivers,—the railroad, the telegraph, and the express; and that all classes of business men in large portions of the country traversed by the railroad operated by the receivers were dependent, to a very large extent, upon these three departments of service, and that large sections of country are dependent upon the railroad trains operated by the receivers for their necessary daily supply of fuel, provisions, etc. The petition asked for an order granting a writ of injunction restraining these committees and the heads of the national organizations mentioned from ordering or recommending or advising a strike.

Upon consideration of this petition an order was made directing a writ of injunction to issue as prayed in the original petition, and as prayed in the supplemental petition, with a similar direction with respect to the presentation of the order and writ to those courts in which ancillary bills had been filed for like orders from those courts. The writ of injunction issued upon this order was directed to the various persons named, and to their agents, sub-agents, representatives, and employés, and to the officers, agents, and employés of the receivers, and to the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employés of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employés of said receivers or not, and to all persons generally. It embodied the provisions of the first writ, with the following additional clause:

"And from combining or conspiring together or with others, either jointly or severally, or as committees, or as officers of any so-called 'labor organization,' with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time; and from ordering, recommending, advising, or approving by communication or instruction or otherwise, the employes of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers to strike or join in a strike on January 1, 1894, or at any other time, until the further order of this court."

On the 15th day of February, 1894, P. M. Arthur, grand chief engineer and chief executive officer of the Brotherhood of Locomotive Engineers; E. E. Clark, grand chief conductor and chief executive officer of the Order of Railway Conductors; F. P. Sargent, grand chief fireman and chief executive officer of the Brotherhood of Locomotive Firemen; D. G. Ramsey, grand chief telegrapher and chief executive officer of the Order of Railway Telegraphers; S. E. Wilkinson, grand master and chief executive officer of the Brotherhood of Railway Trainmen; and John Wilson, grand master and chief executive officer of the Switchmen's Mutual Aid Association,—in behalf of themselves and of their respective organizations and associations, and the members thereof, and in behalf of such of the employes of the receivers as are members of the said associations and organizations, moved the court to modify the writs of injunction by expunging and striking from the writs the parts italicized. The motion was based upon the petition and supplemental petition, and upon the orders of the court directing the issuance of the writs; and at the hearing the constitutions, statutes, and rules of order of the various organizations referred to were presented and considered in argument.

In the discussion of the important and interesting questions presented by this motion it is not within the province of the court to assume part in the contest between capital and labor, which it is asserted is here involved. It may be that the aggregated power of combined capital is fraught with danger to the republic. It may be that the aggregated power of combined labor is perilous to the peace of society, and to the rights of property. It doubtless is true that in the contest the rights of both have been invaded, and that each has wrongs to be redressed. If danger to the state exists from the combination of either capital or labor, requiring additional restraint or modification of existing laws, it is within the peculiar province of the legislature to determine the necessary remedy, and to declare the general policy of the state touching the relations between capital and labor. With that the judicial power of the government is not concerned. But it is the duty of the courts to restrain those warring factions, so far as their action may infringe the declared law of the land, that society may not be disrupted, or its peace invaded, and that individual and corporate rights may not be infringed. It therefore becomes the duty of the court to inquire whether, in respect of the things complained of, there has been threatened violation of the law of the land, and to determine the appropriate remedy, taking care, however, to apply

the remedy without usurpation of jurisdiction, or, as remarked by Lord Chancellor Bacon, "to contain jurisdiction within the ancient mere-stones without removing the mark;" and having also constantly in mind the maxim that the province of the court is "*dicere et non dare legem*." In this spirit, as I trust, I proceed to the consideration of the questions involved, taking occasion to express my obligation to counsel, whose able presentation of the law has much relieved the labor of the court, if it could not lighten its responsibility.

If the combination and conspiracy alleged, and the acts threatened to be done in pursuance thereof, are unlawful, it cannot, I think, be successfully denied that restraint by injunction is the appropriate remedy. It may be true that a right of action at law would arise upon consummation of the threatened injury, but manifestly such remedy would be inadequate. The threatened interference with the operations of the railway, if carried into effect, would result in paralysis of its business, stopping the commerce ebbing and flowing through seven states of the Union, working incalculable injury to the property, and causing great public privation. Pecuniary compensation would be wholly inadequate. The injury would be irreparable. Compensation could be obtained only through a multiplicity of suits against 12,000 men, scattered along the line of this railway for a distance of 4,400 miles. It is the peculiar function of equity in such case, where the injury would result not alone in severe private, but in great public, wrong, to restrain the commission of the threatened acts, and not to send a party to seek uncertain and inadequate remedy at law. That jurisdiction rests upon settled and unassailable ground. It is not longer open to controversy that a court of equity may restrain threatened trespass involving the immediate or ultimate destruction of property, working irreparable injury, and for which there would be no adequate compensation at law. It will, in extreme cases, where the peril is imminent, and the danger great, issue mandatory injunctions requiring a particular service to be performed, or a particular direction to be given, or a particular order to be revoked, in prevention of a threatened trespass upon property or upon public rights. I need not enlarge upon this subject. The jurisdiction is beyond question, is plenary and comprehensive. Some of the authorities are assembled by Judge Taft in the case of *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 730,—a case in which the court restrained Mr. Arthur, chief of the Brotherhood of Locomotive Engineers, from giving the order and signal for a strike which was intended to result in injury to the complainant's rights. See, also, *Blindell v. Hagan*, 54 Fed. 40, affirmed on appeal 6 C. C. A. 86, 56 Fed. 696; *Coeur d'Alene Consolidated & Min. Co. v. Miners' Union*, 51 Fed. 260. It would be anomalous, indeed, if the court, holding this property in possession in trust, could not protect it from injury, and could not restrain interference which would render abortive all efforts to perform the public duties charged upon this railway.

It was suggested by counsel that, as improper interference with this property during its possession by the court is a contempt, punishment therefor would furnish ample remedy; and that, therefore, an injunction would not lie. This is clearly an erroneous view. Punishment for contempt is not compensation for injury. The pecuniary penalty for contumacy does not go to the owner of the property injured. Such contempt is deemed a public wrong, and the fine inures to the government. The injunction goes in prevention of wrong to property and injury to the public welfare; the fine, in punishment of contumacy. The authority to issue the writ is not impaired by the fact that, independently of the writ, punishment could be visited upon the wrongdoer for interference with property in the possession of the court. The writ reaches the inchoate conspiracy to injure, and prevents the contemplated wrong. The proceeding in contempt is *ex post facto*, punishing for a wrong effected.

Asserting, then, as undoubted, the right of the court by its writ to restrain unlawful interference with the operation of this railway, I turn my attention to the objections urged to particular paragraphs of the writs. It is contended that the restraint imposed by that part of the original writ to which objection is made by this motion is in derogation of common right, and an unlawful restraint upon the individual to work for whomsoever he may choose, to determine the conditions upon which he will labor, and to abandon such employment whenever he may desire. In the determination of this question it is needful to look to the conditions which gave rise to the issuance of the writ. Here was a railway some 4,400 miles in length, traversing some seven states of the Union, engaged in interstate commerce, carrying the mails of the United States. This vast property was within the custody of the court, through its receivers, in trust to operate it, to discharge the public duties imposed upon it, to keep it a going concern until the time should come to hand it over to its rightful owners with all public duties discharged, and with its franchise rights and privileges unimpaired. The receivers employed in the operation of this property some 12,000 men. These men are, *pro hac vice*, officers of the court, and responsible to the court for their conduct. In *re Higgins*, 27 Fed. 443. The petition represented to the court—and the facts are confessed by this motion—that some of the men threatened to suddenly quit the service of the receivers, and to compel, by threats and force and violence, other employés, who were willing to continue in the service, to quit their employment; that by organized effort, and by force and intimidation, they would prevent others from taking service under the receivers in place of those who might leave such service, and would thereby, as a means of forcing the receivers to submit to the terms demanded, disable the receivers from operating the road and discharging their duty to the public as a common carrier, and would so conduct themselves by disabling locomotives and cars, and taking possession of the property of the receivers, as to destroy and prevent its use, and hinder and embarrass the receivers in its management, thereby causing incalculable

loss to the trust property, and inflicting great inconvenience and hardship upon the public. The restraining portion of the writ complained of, and now under consideration, prohibited these men from combining and conspiring to quit this service with the object and intent of crippling the property of the receivers and embarrassing the operation of the road, and from carrying that conspiracy into effect. The writ was in prevention of the mischief asserted. In no respect, as I conceive, does that portion of the writ interfere with individual liberty. None will dispute the general proposition of the right of every one to choose his employer, and to determine the times and conditions of service, or his right to abandon such service,—to use the expression of Judge Pardee in *Re Higgins*, supra,—“peaceably and decently.” But it does not follow that one has the absolute right to abandon a service which he has undertaken, without regard to time and conditions. It is absurd to say that one may do as he will without respect to the rights of others. It is not infringement upon individual liberty to compel recognition of the rights of others. Liberty and license must not be confounded. Liberty is not the exercise of unbridled will, but consists in freedom of action, having due regard to the rights of others. There would seem to exist in some minds a lamentable misapprehension of the terms “liberty” and “right.” It would seem by some to be supposed that in this land one has the constitutional right to do as one may please, and that any restraint upon the will is an infringement upon freedom of action. Rights are not absolute, but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. It was stated at the argument that this was not a fair illustration of the proposition, because human life was involved. I cannot perceive that the aptness of the illustration is weakened because of that fact. Whether the effect be the destruction of life or the destruction of property, the principle is the same. It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the occasion. Ordinarily, the abandonment of service

by an individual is accompanied with so little of inconvenience, and with such slight resulting loss, that it is a matter of but little moment when or how he may quit the service. But, for all that, the principle remains, recognized by every just mind, that the quitting must be timely and decent, in view of existing conditions; and this, I take it, was Judge Pardee's meaning by the expression, "peaceably and decently." He had occasion only to deal with the particular facts he was considering, but the principle asserted is universal in its application. If what I have stated be correct as to individual action, the principle applies with greater force to the case of a combination of a large number of employés to abandon service suddenly, and without reasonable notice, with the result of crippling the operation of the railway and injuring the public. The effect in this particular instance would have proven disastrous. These labor organizations are said to represent three-fourths of all the employés upon the railways within the United States,—an army of many hundred thousands of men. The skilled labor necessary to the safe operation of a railway could not be readily supplied along 4,000 miles of railway. The difficulty of obtaining substitutes in the place of those who should leave the service would be intensified by the fact, asserted and conceded at the argument, that no member of these large organizations would dare to accept service in the place of those who should leave, because such acceptance would be followed by expulsion from their order, and by social ostracism by their fellows. If this conspiracy had proven effective by failure on the part of the court to issue its preventive writ, this vast property would have been paralyzed in its operation, the wheels of an active commerce would have ceased to revolve, many portions of seven states would have been shut off in the midst of winter from necessary supply of clothing, food, and fuel, the mails of the United States would have been stopped, and the general business of seven states, and the commerce of the whole country passing over this railway, would have been suspended for an indefinite time. All these hardships and inconveniences, it is said, must be submitted to, that certain of these men, discontented with the conditions of their service, may combine and conspire, with the object and intent of crippling the property, to suddenly cease the performance of their duties. It is said that to restrain them from so doing is abridgment of liberty and infringement of constitutional right. I do not so apprehend the law. I freely concede the right of the individual to abandon service at a proper time, and in a decent manner. I concede the right of all the employés of this road, acting in concert, to abandon their service at a proper time, and in a decent manner; but I do not concede their right to abandon such service suddenly, and without reasonable notice.

The railway is a great public highway. Its primary duty is to the public. In the interest of the public it must be kept a going concern, although it prove unremunerative to the shareholders. Bondholders and shareholders invest their money in view of the public nature of the enterprise. Their rights and interests are subordinated to the public duty charged upon the road.

And so, also, employes, in entering the service, assume obligations coextensive in kind with that of the corporation. They may, indeed, sever their relation in a proper and decent manner, but they may not legally resort to obstructive methods to compass their demands. Their rights—as the rights of bondholder and shareholder—are subordinate to the rights of the public, and must yield to the public welfare. This public consideration permeates and controls the whole subject. The reason is forcibly stated by Judge Ricks in the case of Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 746, 752, holding that the duties of an employé of a public corporation are such that he cannot always choose his own time for quitting the service, in the following language:

"Holding to that employer so engaged in this great public undertaking the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew if it failed to comply with the law in any respect, severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employes upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts or omissions on their part. One of these implied conditions on their behalf was that they would not leave its service, or refuse to perform their duties, under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss or injury, or visit upon it severe penalties. In ordinary conditions, as between employer and employé, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employé has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employes of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."

In the case under consideration the receivers sought to change the terms and conditions of service. The employes had, of course, the right to decline service upon the terms proposed. Notwithstanding the public character of the service, upon notification of their declination at a time prior to January 1, 1894, reasonable in view of the service in which they were engaged, they had the undoubted right to abandon their employment upon that day. That, however, is not the case presented to and dealt with by the court. Nor does the rectitude of the writ of injunction rest upon any mere right of the employes in good faith to abandon their employment. The restraint imposed was with reference to

combining and conspiring to abandon the service with the object and intent of crippling the property. Its office was to restrain the carrying into effect of the conspiracy.

Was such a conspiracy unlawful? So long ago as 1821 Judge Gibson,—that judge “of great and enduring reputation,”—in the case of *Com. v. Carlisle*, Brightley, N. P. 36 (the case of a combination of employers to depress the wages of journeymen by artificial means), declared that “a combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates.” He clearly asserts the principle upon which combinations of men may become unlawful as follows:

“It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence.”

The doctrine thus declared is fully established. *State v. Buchanan*, 5 Har. & J. 317; *State v. DeWitt*, 2 Hill (S. C.) 282; *State v. Norton*, 23 N. J. Law, 33; *State v. Donaldson*, 32 N. J. Law, 151; *State v. Burnham*, 15 N. H. 396; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith v. People*, 25 Ill. 17; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; In re *Higgins*, 27 Fed. 443; *Coeur d'Alene Consolidated & Min. Co. v. Miners' Union*, 51 Fed. 260; *U. S. v. Workington's Amalgamated Council*, 54 Fed. 994. The reason is that the confederacy of numbers to effect an injurious object creates new and additional power to injure, and congregated numbers supply in law the place of actual violence. *State v. Simpson*, 1 Dev. 504. And therefore, in conspiracy, the unlawful thing proposed, whether as a means or an end, need not be such as would be indictable if proposed to be done by an individual. 2 Bish. Cr. Law (7th Ed.) § 181. I think the conclusion well summed up by Mr. Wright in his work on “The Law of Criminal Conspiracies,” that a combination of men by concerted action, to accomplish some object not criminal, by means which are not criminal, but where mischief to the public is involved; or where neither the object nor the means are criminal, but where injury and oppression are the result,—is a conspiracy condemned by law. That this is the general law of the land, is recognized in those states which, by statute in respect to labor organizations, have changed the general rule. Thus the state of New Jersey passed a statute to this effect:

“It shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations.”

The supreme court of that state, in the case of *Mayer v. Association*, 47 N. J. Eq. 519, 531, 20 Atl. 492, declared that by that stat-

ute "the policy of the law with respect to such combinations was revolutionized, and what before that time would have been held to have been an unlawful combination and conspiracy, became in this state a lawful association, and acts which had been the subject of indictment became inoffensive to any provision of our law." And to the same effect is the case of *Com. v. Sheriff*, 15 Phila. 393, under the statute of Pennsylvania of June 14, 1872, and the supplemental act of April 20, 1876.

It becomes necessary, then, to consider whether there is any statute, national or state, applicable to the railway in question, which can be deemed to be a modification of the general law of the land. It was asserted at the argument with great confidence that the act of congress entitled "An act to legalize incorporation of national trades' unions" (24 Stat. c. 567) had entirely changed the common law. I think the confidence of counsel in the assertion of the proposition was born of zeal, not of judgment. The statute provides for the formation of national trades' unions, with power to establish constitution, rules, and by-laws to carry out its lawful objects, and defines the term "national trades' union" to be "any association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which workmen may lawfully combine, having in view their mutual protection or benefit." The most that can be claimed for this statute is that it removes the common-law disability of combination to raise the price of labor, and to establish the conditions of labor. It contains no suggestion of any right to combine or conspire with a view to injure or oppress or interfere with the rights of others. The organization of labor for the purpose specified in the statute is lawful and commendable, but the statute does not sanction the use of a lawful organization for an unlawful purpose. Nor does it permit such organization to invade the rights of others. Under this act, labor may organize to regulate wages, the hours of labor, and the conditions of labor, and for the protection of individual rights in the prosecution of labor; but such lawful organization cannot be employed to injure property, or for the oppression of others, or to harm the public welfare. There is nothing in the statute which sanctions that which the law, as above declared, condemns.

The statutes of Wisconsin (Sanb. & B. Rev. St. § 4466a) render it unlawful for "two or more persons to combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act." By

section 4466c it is rendered unlawful for any person, by threats, intimidation, force, or coercion of any kind, to hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as wage worker, or to attempt to so hinder or prevent. By section 4466d a punishment is provided for any one who, individually or in association with others, shall willfully injure or interfere with or prevent the running or operation or shall destroy any locomotive engine or cars or machinery. These statutes are declaratory of the common law, and wholly condemn all conspiracies to injure or oppress, or to interfere with the rights of others. Their efficacy is in no degree impaired by any statutory recognition of the right of organization for the purpose of promoting the welfare of labor. I have been referred to no statute in any state traversed by the Northern Pacific Railroad, and have been able to find none, which in any way changes the law in this regard. I think no state has gone so far in modification of the general rule as have the states of New Jersey and Pennsylvania. But there, as elsewhere, all labor organizations must be for lawful objects, to be accomplished by lawful means. If the ostensible purpose be legal, and the means for its accomplishment legal, still, if the real and secret purpose be illegal,—as for example, that purpose be of extortion or of injury to another,—the wrong cannot be shielded under the guise of a lawful organization. And where the object is to be accomplished by violence, intimidation, and the destruction of property, by coercion and by injury to the public, the organization, although formed for an ostensible legal object, is diverted to illegal purposes, and is to that extent unlawful.

Applying the principles of law, as I thus find them established, to the case in hand as presented by the original petition for the writ, it is clear that the facts charged presented to the court the case of an unlawful conspiracy. If it be conceded that the entire force of 12,000 men employed upon this railway had the legal right to abandon the service in a body, that right must be asserted and exercised in good faith. The abandonment of service must be actual, not pretentious. The combination cannot be justified on the plea of the lawful exercise of a right when the threatened abandonment of service is a mere pretext, the real intent and design being to cripple the property, and to hinder and prevent the operation of the road; and such was the conspiracy declared to the court,—not denied, but confessed, by the present motion. It was a conspiracy to compel by intimidation the receivers of the railway against their will to accede to the demands of the conspirators, and, therein failing, to cripple this property, and prevent the operation of the road, the necessary result of which would be to inflict great loss upon the public. The conspiracy disclosed was a conspiracy to extort, and, failing to extort, to injure; the pretentious exercise of the right to abandon service being one of the means to effect the object of the conspiracy. If the right to quit service in a body be conceded, the case presented is the ostensible exercise of a lawful right, not in good faith, but for an unlawful purpose, to wit, the

intimidation and oppression of others, and the injury to property in their keeping, tending to the prejudice of the public. Such a conspiracy is unlawful. It may also be properly said that the conspiracy was as needless as its results would have been disastrous. This vast property was in the custody of the court, through its receivers. By the schedules which for some years had been in force in the operation of this road, as well as by the new schedules proposed to be adopted by the receivers, a thorough civil service had been established in the management of this railway, recognizing by systematic promotion length of service and skillful and honest performance of labor. The service contemplated was continuous and permanent. No man could be discharged except for cause, of which he was to be informed. The right of a hearing upon such charge was secured to him, with right of successive appeals to the superior officers of the road. The employé, however, had the right to abandon his employment at any time. Thus capital and labor co-operated to assure employment, the reward of skill and faithfulness, and protection from discharge from service, except for justifiable cause. This operated to render the service efficient, conserving the interests of both capital and labor, and advancing the public welfare. It was natural, and to be expected, that in consequence of financial disaster there would arise the question of the reduction of wages. An employé, deeming himself wronged by the action of the receivers in respect thereto, had peaceful remedy. The court was at all times open to him to listen to his complaint, and to redress it, if it should appear to be well-founded. Upon such application the receivers would be bound to obey the order of the court in the premises. The employé, nevertheless, not content with the judgment of the court, would have the right to abandon his employment. The case furnishes, as was suggested by counsel, an exceptional instance, where one party to a proceeding in a judicial tribunal is bound by the decision and the other is not. There was, therefore, neither justification nor excuse for a conspiracy to hinder and prevent the operation of this railway, nor necessity for combination for the assertion of any legal right. But, if there were no remedy for the employé except abandonment of service, the law will not sanction a conspiracy, the purpose of which is to extort from the receivers or from the court concessions which they could not properly yield, and, failing to procure them, to hinder and prevent, by the means declared, the operation of this railway, to the injury of the trust, and to the oppression of the public. Such was the combination and conspiracy here disclosed. It was to the prevention of the injury thus contemplated that this writ was directed. Its issuance, in my judgment, is justified by the law.

The second branch of the motion has reference to the writ of injunction issued upon the supplemental petition of the receivers, restraining any combination or conspiracy having for its purpose the inauguration of a strike upon the lines of the railway operated by the receivers, and from ordering, advising, or approving, by communication or instruction or otherwise, the employés of

the receivers to join in a strike. This part of the motion presents the issue whether a strike is lawful. The answer must largely depend upon the proper definition of the term. It has been variously defined. By Worcester, "To cease from work in order to extort higher wages as workmen;" by Webster, "To quit work in a body, or by combination in order to compel their employers to raise their wages;" the Encyclopedic Dictionary, "The act of workmen in any trade or branch of industry when they leave their work with the object of compelling the master to concede certain demands made by them,—as an advance of wages, the withdrawal of a notice of reduction of wages, a shortening of the hours of work, the withdrawal of any obnoxious rule or regulation, or the like;" the Imperial Dictionary, "To quit work in order to compel an increase or prevent a reduction of wages;" the Century Dictionary, "To press a claim or demand by coercive or threatening action of some kind; in common usage, to quit work along with others, in order to compel an employer to accede to some demand, as for increase of pay, or to protest against something, as a reduction of wages; as to strike for higher pay, or shorter hours of work." Bouvier defines it: "A combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time." The definition sanctioned by the court of appeals of New York in *Railway Co. v. Bowns*, 58 N. Y. 581, and embodied by Mr. Anderson in his *Law Dictionary*, is: "A combination among laborers, or those employed by others, to compel an increase of wages, change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character or the number of men employed, or the like." Mr. Black, in his *Law Dictionary*, defines it to be: "The act of a party of workmen employed by the same master, in stopping work all together at a preconcerted time, and refusing to continue, until higher wages or shorter time or some other concession is granted to them by the employer." Whichever definition may be preferred,—and possibly no one of them is precisely accurate,—there are running through all of them two controlling ideas: First, by compulsion to extort from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment. The stoppage of work is designed to be temporary, continuing only until the accomplishment of the design, and upon its accomplishment the resumption of employment. The cessation of labor is not a bona fide dissolution of contractual relations and an abandonment of the employment, but is designed as a means of coercion to accomplish the desired result. The cessation of labor is prearranged by the body of men through their organizations, and is to take effect simultaneously at a stated time, for the purpose of preventing the master from continuing his business, and to compel him to submit to the dictation of his servants. The definition of the term proffered to the court at the argument, recognized by the

labor organizations of the country, was this: "A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of the employment are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place; also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employés to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions." This latter definition recognizes the idea of cessation of labor, but not an abandonment of employment. It suggests that the latter may result at the option of the master. It does not, in terms, declare a combination to extort, or to oppress, or to interfere in any way with the business of the employer, except as injury might result as an incident to the cessation of service. If the latter be the correct definition of a strike, society has been needlessly alarmed. I doubt if, in the light of the history of strikes, the child would be recognized by this baptismal name. One who has read the history of the strike at Homestead, with its cruel murders and barbarous torture; one who has read of the various strikes on railways, when cars were fired, rails torn up, engines demolished, and life destroyed; one who has read of the not infrequent summoning of the militia by the authorities of the state to put down riot and turbulence,—the universal concomitants of a strike,—would hardly yield assent to the definition suggested as even faintly conveying the true idea of a strike, as known of all men. The only force suggested is the force of inertia, the compulsion wrought by cessation from labor. Such a strike would be a harmless affair, and generally inoperative to effect the end designed. It could be availing only by the combination of the entire labor force of the country, in the nature of things impracticable. Unless, by other coercive measures, the employer is prevented from obtaining men in the place of those who should cease to work, a strike would be a mere weapon of straw. That is well understood by these organizations. While, according to the definition, the employé knows "full well that the master may immediately hire another to fill his place," he also knows full well that that must, at all odds, be prevented if the strike is to be made successful. Consequently the organizations provide, as confessed at the argument, for the expulsion and social ostracism of all members of the organizations who should not abandon work when the order to strike is given, or who should seek to fill the place of a striking member. Thus one of the most effective engines of compulsion is brought to bear upon unwilling members to effect the design of the combination. With respect to laborers not members and willing to work, other and not less effective means of intimidation must be and are employed in prevention of labor. The history of strikes declares that this intimidation has always taken the shape of threats and personal violence. Constructive violence has failed in large measure to pre-

vent the continuance of operation of business by the master. Naturally, therefore, we find resort to actual violence, the destruction of property, the disabling of railway trains, and the like.

Of the ideal strike, in the definition proposed at the argument, the only criticism to be indulged is that it is ideal, and never existed in fact. Undoubtedly, in the absence of restrictive contract, workmen have a right by concerted action to cease work to procure better terms of service, no compulsion being used except that incident to the cessation; subject, however, to the qualification, at least with respect to those employments that directly concern the public welfare, that reasonable notice of the quitting should be given. But such is not the strike of history. The definition suggested is misleading and pretentious. To my thinking, a much more exact definition of a strike is this: A combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of intelligence. From first to last, from the earliest recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connellsville, Pa., occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can come only through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed. I know of no peaceable strike. I think no strike was ever heard of that was or could be successful unaccompanied by intimidation and

violence. Counsel at the argument could recall but one which he was willing to indorse as peaceable. That was the strike upon the Lehigh Valley Railroad during the year 1893. The history of that occurrence does not carry out the declaration of counsel. There, as I understand, the running of trains was constantly interfered with, engines and cars disabled and wrecks caused by the violence of the strikers. The president of the company reported to his board of directors that the loss to freight and equipment by reason of the strike—which continued for less than three weeks—was \$77,000, of which amount \$46,000 was for damage done to locomotives alone. And that strike was not successful, the violence being insufficient. The history and legality of strikes has been well told by Mr. Justice Brewer, of the supreme court of the United States, in an admirable address before the New York Bar Association in January, 1893, in language that should be taken to heart by every one who has regard to the safety and peace of society, and the protection of our institutions.

"The common rule," says Mr. Justice Brewer, "as to strikes is this: Not merely do the employes quit the employment, and thus handicap the employer in the use of his property, and perhaps in the discharge of duties which he owes to the public, but they also forcibly prevent others from taking their places. It is useless to say that they only advise; no man is misled. When a thousand laborers gather around a railroad track, and say to those who seek employment that they had better not, and when that advice is supplemented every little while by a terrible assault on one who disregards it, every one knows that something more than advice is intended. It is coercion, force; it is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding. It is a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him,—the full and undisturbed use and enjoyment of his own. It is not to be wondered at that deeds of violence and cruelty attend such demonstrations as these; nor will it do to pretend that the wrongdoers are not the striking laborers, but lawless strangers who gather to look on. Were they strangers who made the history of the Homestead strike one of awful horror? Were they women from afar who so maltreated the surrendered guards, or were they the very ones who sought to compel the owners of the property to do their bidding? Even if it be true that at such places the lawless will gather, who is responsible for their gathering? Weihe, the head of a reputable labor organization, may open the door to lawlessness, but Beekman, the anarchist and assassin, will be the first to pass through; and thus it will be, always and everywhere. * * * This is the struggle of irresponsible persons and organizations to control labor. It is not in the interests of liberty; it is not in the interest of individual or personal rights. It is an attempt to give to the many a control over the few,—a step towards despotism. Let the movement succeed, let it once be known that the individual is not free to contract for his personal services, that labor is to be farmed out by organizations, as to-day by the Chinese companies, and the next step will be a direct effort on the part of the many to seize the property of the few."

No word of mine could give added strength to the thought suggested. The strike has become a serious evil, destructive to property, destructive to individual right, injurious to the conspirators themselves, and subversive of republican institutions. Certainly no court should give encouragement to any combination thus destructive of the very fabric of our government, tending to the disruption of society, and the obliteration of legal and natural rights.

Whatever other doctrine may be asserted by reckless agitators, it must ever remain the duty of the courts, in the protection of society, and in the execution of the laws of the land, to condemn, prevent, and punish all such unlawful conspiracies and combinations. Of this duty it was forcibly said by Judge Baker, of the district of Indiana, under like circumstances, in the *Lake Erie & Western Cases*, 61 Fed. 494:

"It may do for men that are reckless of the welfare of human society, who care nothing for its peace and good order, to imperil life, property, and liberty, and the perpetuity of our institutions by teaching such doctrines; but the judge who tolerates it ought to be stripped of his gown, and be driven from the sacred temple of justice."

The wrongs of labor are not to be righted by war upon society, by turbulence and disorder, by oppression and force. Such action alienates sympathy, and provokes resentment. In this land, only by peaceable means in the courts, and through the lawmaking power, can wrongs be redressed, and justice be established. Let combined labor deal with combined capital, but only in ways sanctioned by the law. When this lesson is learned, and becomes the rule of conduct, labor will acquire in a decade greater privileges and surer protection from wrong than could be extorted by a century of violence.

By the act of congress of July 2, 1890 (26 Stat. c. 647), every combination in restraint of trade or commerce among the several states is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Billings in the case of *U. S. v. Workmen's Amalgamated Council*, 54 Fed. 994. On the other hand, Judge Putman, in *U. S. v. Patterson*, 55 Fed. 605, is inclined to the view that the statute has no relation to labor organizations. I do not find it needful to enter into this field of discussion, or to express an opinion upon the subject, being content to rest my conclusion upon the grounds discussed.

One clause of the supplemental injunction has been characterized as wholly unwarranted. That clause is: "And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad on January 1, 1894, or at any other time." In fairness, this clause must be read in the light of the statements of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations, and that the men would obey such orders instead of following the direction of the court. The clause is specially directed to the chiefs of the several labor organizations. The use of the words, "order, recommend, approve, or advise," was to meet the various forms of expression under which by the constitution or by-laws of these organizations the command was cloaked,—as, for instance, in the one organization the chief head "advises" a strike, in another he "approves" a strike, in another he "recommends" the quitting of employment. Whatever terms may be employed, the effect is the

same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear, that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joinder in a strike. It is said, however, that the clause restrains an individual from friendly advice to the employes as a body or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ.

In all other respects the motion will be denied.

REYNOLDS et al. v. WATKINS et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1894.)

No. 115.

1. APPEAL—ADEQUATE REMEDY AT LAW.

Where the objection that there is an adequate remedy at law is taken for the first time on appeal, the court is not obliged to entertain the same, where the subject-matter of the suit is of a class over which a court of chancery has jurisdiction.

2. INTERPRETATION OF DEED—FAMILY HOME.

A purchaser of real estate took a deed to himself, for the use and benefit of his wife and children, the sole object being to provide a family home. He subsequently obtained a divorce, the decree providing that he should be discharged from any apparent trust growing out of the deed. *Held*, that the decree was conclusive that the children were not tenants in common; that the beneficial interest of the wife and children ceased when they left the home; and that, therefore, a subsequent sale by the father to pay off mechanics' liens for improvements, of which sale he obtained confirmation by a chancery court on publication against his children, who were then nonresident minors, divested any possible interest remaining in them, even if the publication was defective.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This was a bill in equity, brought by Francis T. Reynolds, Rowena Reynolds, and Alma Reynolds against Anna N. Watkins and

others, to assert an alleged interest in certain real estate. There was a decree below dismissing the bill, and complainants appeal.

John D. Little, A. G. Wimbish, W. H. Bogle, and Lewis Shepherd, for appellants.

Clark & Brown, Wheeler & McDermott, and White & Martin, for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge. The complainants are the sole surviving children of a marriage between John F. and Elizabeth J. J. Reynolds. They claim that, under a certain deed made by one Joseph Ruohs in 1869, they have an interest in certain valuable property situated in the city of Chattanooga, Tenn., and now in the adverse possession of the defendants. No question of jurisdiction was raised in the circuit court, but it is now, for the first time, insisted that complainants had a plain and adequate remedy at law, and that, therefore, a court of equity will not entertain this suit. An objection that the remedy at law was plain and adequate should be taken at the earliest opportunity. Yet neither consent nor negligence will confer jurisdiction in equity where none really exists, and the court may at any stage of a cause entertain such objection, or dismiss a bill *mero motu*. Yet there are cases where, if the objection of want of jurisdiction because of an adequate remedy at law be not taken in the circuit court, and be for the first time presented upon appeal, this court will not feel itself obliged to entertain an objection coming so late, especially if the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. Looking to the whole of the original bill, including the transcripts of two suits in equity involving and affecting the title and interest of complainants, and filed as exhibits to the bill, we are of opinion that the interest of the complainants was so essentially of an equitable character as to constitute a controversy over which a court of equity may well assume jurisdiction. The foundation of the interest asserted by complainants is a deed made by Joseph Ruohs and John F. Reynolds, father of complainants. That deed was in these words:

"In consideration of sixteen hundred dollars, of which sum one thousand dollars is paid in hand, and three notes of this date bearing interest from date, each for two hundred dollars,—one due six months after date, and one due at twelve months after date, and one due fifteen months after date,—I, Joseph Ruohs, have this day bargained and sold, and do hereby transfer and convey, unto John F. Reynolds, in trust, for the sole and exclusive use and benefit of Elizabeth J. J. Reynolds and her children, the following described lot or parcel of land in Chattanooga, Hamilton county, Tenn.: Lot number twenty-two (22) Oak street, fronting one hundred feet on Oak street, and running back, of uniform width, to McCallie street, situate in McCallie's addition, and being the lot conveyed to Henry K. White and Elizabeth B. White, and conveyed by them to Joseph Ruohs. To have and to hold said property or lot to the said John F. Reynolds, in trust, for the sole and exclusive

use and benefit of the said Elizabeth J. J. Reynolds, and his heirs, forever, free from the contracts and liabilities of her present or any future husband. I further covenant that I am lawfully seised of said lot, have the right to convey it, and that it is unincumbered; and I further bind myself to warrant and forever defend the title to said lot to the said trustee, forever, against the lawful claims of all persons whatever. It is further provided and stipulated that said trustee may sell and convey said lot, for the purpose of changing the investment, upon the written request of said E. J. J. Reynolds, and a lien is retained upon said lot for the aforesaid unpaid purchase money.

"This June 1, 1869.

"[Seal.]

Joseph Ruohs.

"Attest:

"J. K. Kuan.

"D. M. Key."

The children of Elizabeth Reynolds, then living, were four in number. One died subsequently,—a minor, unmarried, and intestate. The other three are the complainants.

Did Mrs. Reynolds obtain any legal estate by that deed? What were the rights and interests of complainants thereunder? Were those rights legal or equitable? Did they become tenants in common with their mother, as now insisted? These questions, we think, were all answered in a most conclusive way by the chancery court of Hamilton county, Tenn., in 1872. Their father in that year filed an original bill in equity against their mother, Elizabeth Reynolds, and against themselves. The object of the bill was to obtain a divorce from Mrs. Reynolds upon the ground that she had abandoned her husband, home, and family, and was living in adulterous cohabitation with a lover in a distant western state. He also sought to have the court construe the Ruohs deed, and determine his rights and interest thereunder, and the rights and interests of Mrs. Reynolds and her children. He set out that he had paid the entire consideration for the conveyance, and had, with the approval of his wife, built on and improved the property as a home and residence; that he had personally paid for much of the improvement; and that much remained unpaid, for which mechanics' and furnishers' liens existed. He claimed that the whole arrangement was solely for the purpose of providing a home for himself, his wife and children, so long as they chose to avail themselves of it, and so long as the family relation existed. Publication was duly made for Mrs. Reynolds, as a nonresident. Her children, the complainants, were regularly served with process, and answered by guardian ad litem. Evidence was taken, and upon the hearing the court decreed: (1) That the bonds of matrimony were dissolved. (2) As to the rights of Mrs. Reynolds and her children under the Ruohs deed, the court said:

"That said Elizabeth J. J. Reynolds never had any real interest in either the purchase money or the lot; that the whole transaction—the deed and property—has been all the time under the control and power of complainant, and that the language in which the deed to said lot is couched was an ex parte arrangement of complainant, and that the object and purpose of the said deed being so drawn was to provide a family home and residence for the use and enjoyment of complainant and said Elizabeth J. J. and their children whilst the relations of husband and wife, mother and child, and father and child existed, and to be so used and enjoyed; and that said Elizabeth J. J. should

not continue to have or possess any interest in said property beyond the period of duration of the existence of such relation, and actual use and occupation of the same as a wife and mother, as aforesaid. And the court being of opinion that upon the abandonment of complainant and her said children, and elopement in adultery, by said Elizabeth J. J. Reynolds, as hereinbefore shown, that the said Elizabeth J. J. forfeited, or ceased to have, any other or further interest in said property, as such conduct, from the proof in the cause, terminated the limitation or duration of the said estate in trust for her, as appearing on the face of said deed, it is therefore, upon that branch of complainant's bill, decreed by the court that the limitation of all such estate, in equity or otherwise, as said Elizabeth J. J. Reynolds had or took under said deed of conveyance from Joseph Ruohs, No. 22, in Chattanooga, Hamilton county, Tennessee, on Oak and McCallie streets, executed on the 1st day of June, 1869, ceased to exist, and all such interest is forfeited, and that the apparent relationship of trustee and cestui que trust growing out of said deed be, and the same is hereby, declared at an end, and complainant denuded and discharged of any such apparent trust. And it further appearing that complainant has improved said lot by erecting a valuable family residence, at a cost of about three thousand dollars, the said house and lot will be used and enjoyed by him in such manner, for the benefit of himself and said children, as, in his judgment, he may decide right and proper, without being in any way accountable or liable to said Elizabeth J. J. Reynolds, or any one claiming under her."

That decree stands unreversed, and is not attacked by the present bill. With respect to that decree the contention of complainants, in their pleadings, is that it "does not purport to divest and vest title in said property, excepting as to the interest of said Elizabeth J. J. Reynolds, nor does it purport to construe or reform said deed in any way, or in any manner alter or disturb the interests in said property, as acquired thereunder by said children." To this we cannot agree. The court did construe the deed. It could only declare the extinguishment of Mrs. Reynold's interest thereunder by construing the legal and equitable rights of the beneficiaries. Looking to the circumstances under which that conveyance was made, and looking to the language in which the purposes of the conveyance were declared, the court held that "the object and purpose of the deed was to provide a family home * * * for the use and enjoyment of the said Elizabeth and their children whilst the relationship of husband and wife, mother and child, and father and child existed, and to be so used and enjoyed." This being the purpose of the deed, the court held that Mrs. Reynolds' rights and interest had terminated by the abandonment of the home, and of her relations to the family, and had thereby ceased to have any interest or rights under the deed. In view of this, the court further decreed "that the apparent relation of trustee and cestui que trust, growing out of said deed, be, and the same is hereby, declared at an end, and complainant denuded and discharged of any such apparent trust." If that decree settled anything, it was that Mrs. Reynolds and her children were not tenants in common under the Ruohs deed. Whatever their rights, they were not legal rights, and their estate not a legal estate. After that decree, it was no longer essential that Mrs. Reynolds should join her husband in a conveyance, or that his conveyance should be upon her request. It was, in substance, a case where a father bought property, and took a deed to himself for the use and benefit of his wife and children, the sole object being to

provide a family home. If the conveyance had been to Mrs. Reynolds, with the same purposes declared in favor of her children, the children would, under the well-settled law of Tennessee, have acquired no legal interest. The case of *Moore v. Simmons*, 2 Head, 545, is in point. That was a case of a deed by a father of property to a trustee for the use and benefit of several daughters of the grantor. With regard to one of them (Mrs. Simmons), the conveyance recited that the trustee was to hold the property "for the sole and proper use of Sally Simmons and her children, * * * not to be subject to the control or debts of any other person, either her husband or otherwise; the same being intended to be held in trust by said trustees for the use and benefit of the children of the said Simpson Shaw [grantor and father of Sally Simmons] and their heirs." A creditor of one of the children of Sally Simmons sought to subject the supposed interest of such child to the payment of his debt, claiming that the mother and children were tenants in common, in reality. The court said:

"We think this construction, though plausible, cannot be maintained. Taking the whole instrument together, and in view of the considerations by which it was prompted, we entertain no doubt but that the intention was to give the entire estate to the daughter, to her separate use, by which she would be enabled to support herself and children, as a family. If that were not so, but a joint interest was vested in the children, the object intended could be defeated by any creditor of the children, as is now attempted. If he intended to give the property to the latter, would he not have protected it in them, as he did that of their mother against creditors? Surely, the same reason existed for doing so. Another absurd consequence, subversive of the apparent intention, would result from that construction: If any interest passed to the children, it must be a present one, and, as such, might be demanded by a guardian, or by any child on coming of age, or marrying, with an account, perhaps, and thus defeat the prominent object, of keeping all together for the support of the family, as a unit."

In the case under consideration there was no direct conveyance of the title to the wife and children, nor, under the construction put on the deed in *Moore v. Simmons*, was the legal title charged with a trust in their favor, in such way as to vest any interest in the corpus, either in praesenti or in remainder. It fell directly under cases of the class in which the legal title vests in the grantee subject to a participation by the wife and children in the use and enjoyment of the premises as a home, while members of the family, in the grantee's lifetime. *Allen v. Westbrook*, 16 Lea, 255, and *Bunch v. Hardy*, 3 Lea, 549, are cases of trusts of like character, in which a like construction was reached. Reading the decree of 1872 in the light of these Tennessee cases, it is plain that the chancellor was of opinion that the legal title was in John F. Reynolds, subject to a participation by wife and children in the enjoyment of the property as a family home so long as he should live, and so long as they continued to be members of the family. In this view, the beneficial interest of the wife ceased when she became forisfamiliarized; and the interest of the children ceased when they departed from under the parental roof, and, in any event, upon the death of the grantee, in whom was the legal title. Whether that decree was erroneous in the matter of the construction placed upon the Ruohs

deed is now a matter of no practical interest. The decree stands unreversed, and is conclusive upon complainants, they having been parties to the cause. Subsequent to that decree, suits were brought, charging the property, under mechanics' liens for improvements put thereon by John F. Reynolds. Under decree obtained, the property was exposed to sale, and bid in by one J. C. Woodruff, for the benefit of John F. Reynolds. To meet these claims, Reynolds sold the property to William Hewitt, under whom defendants claim. Reynolds made to Hewitt a bond conditioned to make deed by a day named. Thereafter, Reynolds, under legal advice, sought to have this sale by him confirmed by the state chancery court. For this purpose he filed his original bill, in which he set out the facts as to the first suit, in which the deed to himself from Ruohs had been construed, and the subsequent facts, as above detailed. The bill then recited that: "It may be, and he is advised that he could, under said decree, and facts surrounding the case, sell said property, and pass a good title. * * * But that he is further advised that it is more safe and proper to report his said sale, * * * and have the same sanctioned and approved, * * * and direction given touching the proceeds of sale, as right and justice may require."

To that bill the purchaser, William Hewitt, was made a party defendant by actual service of process. The complainants in the present suit were also made parties defendant by publication, they being then nonresidents of the state, and minors. The regularity and validity of this publication is the principal matter of contention presented by the present bill, and has been the occasion of able and elaborate argument upon each side. A guardian ad litem was appointed, who answered and defended for the minors thus made defendants. Proof was taken. Upon final hearing the court ratified and confirmed the sale made to Hewitt, and divested all title and interest out of the complainant, John F. Reynolds, and out of the defendants, the children of his former wife, Elizabeth J. J. Reynolds, (they being the complainants in the present case), and vested title in the purchaser, "William Hewitt, his heirs and assigns, forever." Hewitt took possession in 1874, and has since sold and conveyed to the defendants now before the court. That two of the complainants are barred by the Tennessee statute of limitation of seven years is not seriously disputed. Complainant Francis T. Reynolds is now 32 years of age, and complainant Rowena is 29. Section 3461, Code Tenn (Mill & V. Ed.), bars all rights of action for the recovery of any interest in real estate, legal or equitable, unless suit shall be brought within seven years after adverse possession. By section 3451 the rights of minors are saved, by extending to them a right of action for three years after removal of such disability. This suit has not been brought within the time allowed for persons laboring under the disability of nonage at time adverse possession begun. Complainant Alma was only 23 when this bill was filed. She is, consequently, not barred. If it be assumed that the right of complainant Alma to participate, after the decree of 1872, in the use and enjoyment of this home, so long as she continued a member of the family, existed, yet that right was lost by the sale and convey-

ance of the property to meet liabilities charged upon it in improvements. If her father had made a sale for the purpose of paying off these liabilities, or to make a reinvestment, his deed would have carried a perfect fee, discharged from, and unaffected by, any trust in her behalf. If we treat the decree of 1874 as void and inoperative, as to her, for defective publication, or any other cause, still it would stand as a valid decree, as between John F. Reynolds and William Hewitt. The latter was regularly a party defendant. He was not an indispensable party, but he was a proper party, in view of his purchase from Reynolds, and the assignment to him of Woodruff's bid. The decree, as between them, operated to divest title out of John F. Reynolds, and to vest it in William Hewitt. He was not, in equity, charged with any duty as to the reinvestment of the surplus of purchase money after paying off the lien debts. The remedy as to this surplus, if any they have, is against their father, and not against the property, upon which no lien rests after payment of the purchase money. The result is that it is unnecessary to consider the many interesting questions which were discussed, involving the validity of the decree confirming the sale to Hewitt. The decree of the circuit court must, upon the grounds we have stated, be affirmed.

SYMMES et al. v. UNION TRUST CO. OF NEW YORK et al.

(Circuit Court, D. Nevada. March 5, 1894.)

No. 527.

1. CORPORATIONS—TRUSTEES—BREACH OF TRUST—FORECLOSURE OF MORTGAGE—ASSESSMENT OF STOCK.

The failure of the trustees of a corporation to levy an assessment on the stock for the purpose of paying a mortgage, and thereby preventing a foreclosure and reorganization, and a consequent extinguishment of the interest of the nonassenting stockholders, is not such neglect of duty as will enable dissenting stockholders to overturn the reorganization after it is accomplished; it appearing that the shares, on their face, purport to be unassessable, that the trustees are advised by competent attorneys that an assessment would be of doubtful legality, and that, if made, it would work injustice to many stockholders who have previously paid in money under a different plan.

2. SAME—REORGANIZATION—DISSENTING STOCKHOLDERS.

Under equity rule 94, one who purchases shares of stock in a corporation after a plan of reorganization has been adopted and partially carried out is not in a position to maintain a suit to set the same aside on the ground of fraud and neglect of duty by its trustees and other parties.

3. SAME—ESTOPPEL.

Stockholders who have had full knowledge of a plan of reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, are estopped, after the reorganization is complete, to maintain a suit, as owners of the stock on which they did not subscribe, to overthrow the same on the ground of fraud and conspiracy.

4. SAME—FRAUD—CONSTRUCTIVE TRUSTS.

Acts of the president and trustees of a corporation in promoting a plan of reorganization whereby a hostile foreclosure, which would extinguish the interest of all stockholders, is prevented, and a friendly foreclosure

substituted, which preserves to the subscribing stockholders an interest in the property, are not constructively fraudulent, and give rise to no constructive trust in favor of the old organization, when there is no actual fraudulent intent, and all parties interested are consulted, and all reasonable notice given to the widely-scattered stockholders; and this is true although a large personal profit, in the shape of a contingent fee, accrues to the president of the corporation, who is the principal promoter of the plan of reorganization.

This is a suit in equity, brought by three stockholders of the Sutro Tunnel Company, a California corporation, viz.: Frank J. Symmes, as owner of 5,000 shares of stock; Joseph Aron, as owner of 10,000 shares; and F. H. Wheelan, as the owner of 250 shares, —suing for themselves and other stockholders of said corporation, —against the Union Trust Company, a New York corporation, the Comstock Tunnel Company, a New York corporation; the Sutro Tunnel Company, a California corporation, Theodore Sutro, and 28 other individuals, comprising, respectively, (1) the trustees of the Sutro Tunnel Company; (2) the members of the executive committee of stockholders in New York; (3) the members of the reorganization committee of stockholders in New York; (4) the individuals and firms who signed what is known as the "syndicate agreement."

The bill, among other things, charges fraud, conspiracy, and a violation of trust and confidence upon the part of the officers and trustees of the Sutro Tunnel Company, with other respondents, to defraud said corporation and its stockholders of their legal rights. The pleadings are too lengthy to attempt any detailed statement of the various allegations contained therein. The contest arises out of the transactions carried on by the respondents in their efforts to procure a settlement and adjustment of a foreclosure suit brought by McCalmont Bros. & Co. against the Sutro Tunnel Company, and the final action taken in regard thereto, the precise nature of which will sufficiently appear from the facts hereinafter stated. The general character of the suit will be understood by quoting simply the prayer of the bill, which contains forty specific allegations, and one general averment in the answer.

The prayer of the bill is: "To the end, therefore, that the said defendants may answer (but not under oath, such oath being hereby expressly waived, according to the practice of this court) all and singular the premises, and that a full accounting may be had in equity of all the indebtedness of the said Sutro Tunnel Company, and fully of all receipts and expenditures, debits and credits, which ought in equity to be considered upon such accounting; and that the said Union Trust Company be adjudged by the decree of this court to have procured the legal title to the property of said Sutro Tunnel Company in fraud of the rights of these complainants and of the said Sutro Tunnel Company; and that the conveyance thereof to said Union Trust Company be adjudged to be a cloud upon the title of said Sutro Tunnel Company to its property and franchises, which ought in equity to be removed; and that the said Union Trust Company or the said Comstock Tunnel Company holds the said conveyance and title as the constructive trustee of said Sutro Tunnel Company, and as being in equity a mortgage to secure the payment of the just indebtedness of said Sutro Tunnel Company, to be ascertained upon the said accounting, and to be evidenced by bonds of the said Sutro Tunnel Company, to be issued in accordance with the terms of said agreement of November, 1887; and that these complainants and other stockholders of said Sutro Tunnel Company who have not subscribed to said bonds be adjudged to retain and hold all their rights as stockholders of said Sutro Tunnel Company in the property thereof, subject to the payment of said indebtedness secured by the said mortgage; and that the said Union Trust Company or the said

Comstock Tunnel Company, or either of them, who may hold the legal title to the property of said Sutro Tunnel Company, be decreed to reconvey the same to the Sutro Tunnel Company; and that the trustees of said Sutro Tunnel Company be ordered to issue the bonds of said company and a new mortgage upon its property, as provided by the terms of said agreement of November, 1887; and that if the said Union Trust Company has not conveyed the said property to the said Comstock Tunnel Company, that it be enjoined from so conveying the same pending this suit; and that it be particularly restrained from paying out of the proceeds or income of said Sutro Tunnel property or franchises the sum of \$100,000, or any other sum, to Theodore Sutro, or from paying therefrom any part of the sums agreed to be paid by the members of said syndicate, either to themselves or others, as commissions or compensation under the terms of said syndicate agreement; and that said Union Trust Company be further restrained from enforcing its judgment for a deficiency against said Sutro Tunnel Company, or any part thereof; and that your orators may recover their costs herein expended against all of the defendants herein, and may have such further or other relief as the circumstances of this case may require, and as to this honorable court, sitting as a court of equity, shall seem meet and agreeable to equity and good conscience."

The answer of the Union Trust Company and all other respondents served with process, except the Sutro Tunnel Company, contains 75 allegations of admissions and denials, one of which is here quoted: "And, further answering, these defendants deny, and each denies, that the complainants, or any of them, are entitled to any relief whatsoever, in this or any court whatsoever, in the premises, and say: That complainants, and each of them, had full knowledge and notice of all of the transactions in this answer set forth, and of the intention to consummate them at the time and before any of said transactions occurred. That the said complainants, and each of them, had full and ample opportunity to subscribe for the said bonds, and had the same opportunity to subscribe therefor that the stockholders of said Sutro Tunnel Company who did subscribe therefor had; and that neither these complainants, nor any of them, nor any of the stockholders of said Sutro Tunnel Company who did not subscribe to the said bonds, made or attempted to make any objection, or took or attempted to take any exception to any of the acts or transactions herein set forth; and that neither these complainants, nor any of them, nor any of the stockholders of said Sutro Tunnel Company who did not subscribe for the said bonds, ought in equity, or otherwise, now to be permitted to make any objection or to take any exception thereto, or in any way to affect or invalidate the said acts and transactions; and that the said complainants, and each of them, and all of the stockholders of the said Sutro Tunnel Company, whether they subscribed to the said bonds or not, had at all times full and free access to all of the books papers, instruments, and records of said Sutro Tunnel Company, among which were included full minutes of all proceedings of its board of trustees, entered at the time of such proceedings, and the originals or true copies of the said syndicate agreement, and all papers pertaining thereto, filed among said records on or about said August 10, 1888, when said syndicate agreement was approved as aforesaid and showing, in detail, all of the transactions in this answer set forth, in so far as they had any relation to the said Sutro Tunnel Company or its stockholders as such; and that the said trustees of said Sutro Tunnel Company, and the officers thereof, and each of them, and particularly the said Theodore Sutro, and also the members of said executive and reorganization committees, were at all times ready and willing to give to any and all of the stockholders of the said Sutro Tunnel Company any and all information in the premises that they, or any of them, might desire, and did so whenever thereto requested. That all the transactions and acts of the trustees of said Sutro Tunnel Company in this answer set forth were had and done in good faith, and in the exercise of the best judgment and discretion of said trustees and of the officers of said company; and that said acts and transactions were the only feasible and possible means whereby the property of said Sutro Tunnel Company could at all be saved in the interest of any of the stockhold-

ers of said Sutro Tunnel Company whatsoever, and by which the foreclosure in the sole interest of said McCalmont Brothers & Company, which would have resulted in the exclusion of every shareholder of the Sutro Tunnel Company, could be prevented; and that a large majority of the stockholders of said Sutro Tunnel Company having come forward, together with said syndicate, and having, by their own efforts, and with their own funds, purchased the said McCalmont mortgage, it would not be just nor fair nor equitable that the stockholders of said Sutro Tunnel Company who failed or refused to come forward or to join in the said efforts or to advance any part of said money (the many notices, requests, and appeals on the part of said Theodore Sutro and the trustees of said Sutro Tunnel Company and said executive and reorganization committees, extending over a period of more than eighteen months, hereinbefore set forth, to the contrary notwithstanding), should share in the benefits resulting from the purchase of said mortgage and the success of said reorganization."

The Sutro Tunnel Company filed a separate answer by Pelham W. Ames, secretary.

If difficult to make a condensed statement of the pleadings, covering 182 pages of printed matter, within the limits of an ordinary opinion, what shall be said of the facts when the testimony, independent of exhibits of almost equal length, consists of about 6,000 type-written pages and the printed briefs of counsel over 800 pages? The case cannot be thoroughly understood without full knowledge of all the conditions and causes which led to the acts of parties of which complaint is made. The order in which the transactions occurred is important in determining whether the acts were consistent with fair dealing, or whether the transactions which took place, and the conduct of the parties, were fraudulent in fact, or constitute what is known as "constructive fraud." The importance of all the questions involved in the case, and the thoroughness with which they have been argued, demand from the court more than an ordinary statement. A complete statement of the facts is not essential, but a skeleton history, in chronological order, will here be given.

The Sutro Tunnel Company, at the time of the transactions involved in this suit, consisted of 2,000,000 shares of stock of the par value of \$10 per share. On the 4th of January, 1877, it executed a mortgage or trust deed upon its property situate in Storey county, Nev., to McCalmont Bros. & Co., of London, England, to secure the payment, on the 1st of January, 1881, of the sum of \$124,321.10, for which amount it was then indebted, and for all further advances that might thereafter be made, with interest thereon at 12 per cent. per annum, payable semiannually. Further advances were from time to time made, and on the 28th of March, 1878, the amount due aggregated the sum of \$433,965.10. A supplemental agreement was then made, whereby the Sutro Tunnel Company agreed to pay said sum and all further advances that might be made, with interest, on January 1, 1891; the interest to be paid in half-yearly payments, and, if not so paid, the principal and interest to become immediately due. On March 28, 1886, a bill was filed in this court for the foreclosure of said mortgage. A receiver of the mortgaged property was appointed, and the suit was pending until October 1, 1888, when a decree of foreclosure was entered as of August 13, 1888, for \$1,420,209.46, and costs of suit, taxed at \$2,075.

At the time of the commencement, and during the pendency, of the suit, it was the general understanding of the stockholders, trustees, officers, and attorneys of the corporation that there was no legal defense that could be interposed to the suit. Many efforts were made to postpone and delay the time of trial, and divers and sundry attempts were unsuccessfully made to procure a compromise, settlement, or amicable adjustment of the suit upon such terms and conditions as would have enabled the corporation to save its property. It is charged in the bill that Theodore Sutro, when president of, and attorney for, the Sutro Tunnel Company, in utter disregard of his duty to the corporation and to its stockholders, entered into an agreement with certain of the other respondents to bring about a sale and transfer of the property of the Sutro Tunnel Company to the Union Trust Company, to be held by it for the benefit of a large number of the stockholders of the Sutro

tunnel Company and a few outside parties; that this agreement was carried out; that in consideration of such agreement he received a large pecuniary consideration, which he concealed from the trustees and stockholders of the Sutro Tunnel Company.

The alleged fraudulent acts of Sutro constitute the foundation on which this suit is based. It is therefore important to ascertain how he became connected with the transactions, and what he did in relation to the various plans that were devised for the purpose of raising money to meet the demands of the McCalmont mortgage. His first appearance was in consultation as an attorney with respondents Thayer and Baltzer and one other stockholder, who called upon him shortly after the commencement of the foreclosure suit to ascertain if anything could be done to save the property of the corporation. He promised to look into the matter, and in the fall of 1886 informed them that he could not undertake to do anything in the matter without specific authority and a direct understanding as to his compensation. On the 18th of December, 1886, respondents Thayer, Baltzer, Stursberg, Palmer, and Lowengard, and other stockholders, representing 65,360 shares of the Sutro Tunnel Company, united in signing a letter to Mr. Sutro, requesting him to act as their attorney, and, if possible, to obtain an extension of time for them to intervene in the foreclosure suit, agreeing, if he was successful, to pay him a reasonable compensation for his services. An advertisement was thereafter published in seventeen New York, three Boston, two Philadelphia, one Baltimore, and one Chicago daily papers, from the 8th to the 12th of January, 1887, as follows:

"Sutro Tunnel Company. Preparatory steps having been taken towards saving the stock of the Sutro Tunnel Company from extinction by the pending foreclosure proceedings against said company, all those owning or controlling stock therein are invited to attend a meeting to be held at the office of the Farmers' Loan and Trust Co., No. 20 William St., New York City, at 12 o'clock noon on Wednesday, the 12th inst., to devise means for concerted action. A full attendance is of the greatest importance.

"Committee of Stockholders.

"New York, Jan. 8, 1887."

At this meeting, which for convenience, after due notice, was held at Mr. Baltzer's office, a general committee of stockholders, consisting of Baltzer, Thayer, and Lowengard, was appointed, with full power to act, and Theodore Sutro was retained as attorney for the stockholders. A petition for intervention was drawn up, which, in substance, avers that McCalmont Bros. & Co. controlled a majority of the stock of the Sutro Tunnel Company, and elected a majority of the trustees, who are under their control; that said trustees have ostensibly undertaken to defend the foreclosure suit, and have filed an answer consisting only of general denials; that affirmative and meritorious defenses exist in favor of petitioners which have not been set up; that the defense to the suit is not being conducted in good faith; that there is great danger that the rights of petitioners will not be adequately protected or maintained, etc. This petition was signed by stockholders representing 165,000 shares of stock, and was filed in this court on January 31, 1887. Mr. Samuel M. Wilson and respondent Edmund Tauszky were retained with Mr. Sutro, and argued in favor of the intervention on February 10, 1887, and obtained leave of the court to have until March 2d to file their closing briefs. On the 15th of February the board of trustees of the Sutro Tunnel Company met and adopted the following resolutions: "Resolved, that it is the desire and intention of this board to give to the stockholders of this company every facility for defending the action now pending for the foreclosure of the mortgage held by Messrs. McCalmont Bros. & Co., and to that end to consent to the intervention of certain stockholders who have petitioned the court to be allowed to do so, and that the attorney of the corporation be advised of this resolution of this board. Resolved, that a committee of two members of this board, to be appointed by the chair, be authorized and directed to inform the attorneys of the stockholders who have petitioned to be allowed to intervene in said action that the board is willing to assist them in every proper way to present any defense which

they may desire to make to such action." Two days thereafter these resolutions were rescinded, and others adopted, denying that a majority of the board were under the control of the McCalmonts and declaring that the trustees wished to protect the rights of all the stockholders, and authorized the attorney of the corporation to consent to the intervention, and invite the attorneys for the stockholders to assist him in defending the foreclosure suit. On the 24th of February, Sutro left New York, and arrived in San Francisco March 2d. He immediately took active steps in endeavoring to secure sufficient proxies to enable him to control the election of the board of trustees at the annual meeting of the stockholders, to be held March 11th. He met with much difficulty in obtaining the consent of men to serve as trustees, the reason assigned for refusal being that the corporation was wholly insolvent. The annual meeting was adjourned until March 28th. At the adjourned meeting, 1,398,829 shares of stock were represented. Of this number, Mr. Sutro and Mr. Tauszky had proxies for 1,023,734 shares, and Mr. Haven, the attorney for the corporation and for the receiver, had 369,500 shares. Five trustees were elected on the proxies held by Sutro and Tauszky, viz.: Moritz Meyer, Frederick Roedig, M. S. Wilson, David Cahn, and John Landers, and William Johns, the receiver, and Pelham W. Ames, on the proxies controlled by Haven. Certain amendments to the by-laws were proposed and carried. A branch office was established in the city of New York. The offices of assistant secretary and attorney and counselor for the corporation were created, and an order passed for holding monthly meetings of the board of trustees. The following, among other, officers of the corporation were elected at a meeting held March 30th: Moritz Meyer, president; Pelham W. Ames, secretary; H. H. Thayer, assistant secretary, New York; Theodore Sutro, attorney and counselor; Union Trust Company of New York, registrars of stock in New York. Mr. Sutro was present at this meeting, and stated that he did not expect to be fully remunerated at once; that he was willing to accept a contingent fee; that if he should be successful he anticipated a reasonable compensation in the future, but he thought he should be allowed a reasonable sum for expenses. It was then voted that he should have the sum of \$1,000, and should receive \$400 per month on account from April 1, 1887. The question of his ultimate compensation was discussed by the board, but it was deemed advisable not to make any agreement of record at that time. On the 26th of April a written agreement was entered into by four of the trustees, viz. Meyer, Landers, Wilson, and Roedig, as parties of the first part, and Theodore Sutro, party of the second part, which, after reciting at length the existing condition of the affairs of the Sutro Tunnel Company, contained the following covenants: "First. The said party of the second part hereby promises and agrees to devote all his time, energy, and attention to the interests of said company and of its stockholders, both in his capacity as attorney and counselor of the company and as its general adviser, and also as its agent and representative in endeavoring to secure the said contemplated loan with a view of extricating the company from its present legal complications and financial embarrassment, and for said purposes to spend his time either in New York, California, Nevada, or elsewhere, as circumstances may require. Second. The said parties of the first part hereby promise, agree, and undertake, on behalf of said company, that in case said party of the second part shall be finally successful in settling the said foreclosure suit, or in obtaining a discontinuance thereof, or a final adjudication thereof in favor of said company, the said company shall, by vote of the said parties of the first part as trustees thereof, pay to the said party of the second part, for and as his compensation, a sum of money equivalent to five cents a share on the capital stock of said company, consisting of two million shares, namely, the sum of one hundred thousand dollars, less whatever sum or sums may in the mean time be allowed or paid to said party of the second part on account of his said services. Nothing herein shall be construed so as to make the undersigned individually liable in any respect, the covenants and promises aforesaid being made only in their character as trustees of such company."

The other trustees had full knowledge of this agreement, and each admitted that the amount named was reasonable, but for personal reasons, then satisfactorily explained, declined to sign it. At a meeting of the board held April 27th the trustees ratified the acts of Sutro in employing Messrs. Willson and Tauszky as attorneys. They also passed the following resolution: "Whereas, this board deems it necessary that this company should take immediate measures to raise a sum of money, not exceeding \$2,000,000, in order to place this company upon a sound financial basis, and for the purpose of developing its property and general interests, and as it may be advisable for the company to issue mortgage bonds for said purpose, now, therefore, resolved, that Theodore Sutro be appointed the true and lawful attorney in fact for this company, for it, and in its name and stead, to contract for the issuance of coupon or other bonds of said corporation in a sum not exceeding \$2,000,000, and at a rate of interest not exceeding six per cent. per annum, to be secured by mortgage upon all its lands and other properties of every kind for a time not exceeding thirty years, and upon such terms and conditions as he shall deem to be for the best interests of the corporation, and to enter into, on behalf of the corporation, and as its act and deed, all agreements and contracts which may be necessary or advisable in the premises,"—and authorize the president and secretary to execute a power of attorney authorizing Sutro to act for the corporation, as requested by Mr. Sutro. Sutro was voted \$2,500 to enable him to proceed under the power of attorney. During Sutro's stay in California he was diligent and zealous in his efforts to procure an extension of time to appear and defend the McCalmont suit, and had numerous consultations with opposing counsel on that subject, and discussed the probabilities of finally agreeing upon an amicable settlement of the suit. He also secured the aid of Mr. Ames, the secretary of the corporation, to try and bring about the desired results. Telegrams were sent to parties in New York and London, but all his efforts proved unavailing. On the 21st of March the court denied leave to stockholders to intervene. The case was to be tried April 4th. At that time Mr. Sutro appeared and obtained leave to amend the answer, and an extension of time was given for the taking of additional evidence. An order was also made, by consent, that the receiver should pay to the McCalmonts the amount of money in his hands, less the sum of \$25,000, and to pay each month thereafter the net amount of the receipts, without prejudice to the defense in said suit. Continued efforts were made to bring about a settlement. Sutro wrote letters to Alexander & Green, the counsel who had full charge and control of the case for the McCalmonts. These negotiations, letters, and telegrams continued for several months. On July 6, 1887, Mr. Sutro received a reply from Alexander & Green, as follows: "In answer to your letter to us, dated May 21, 1887, we beg to say that the complainants are willing to accept the following proposition made by you on behalf of your client, the Sutro Tunnel Company, the defendant herein, namely: That the tunnel company pay in cash, before the 1st day of January, 1888, the entire amount of the principal of the advances made by the complainants, together with interest thereon from the respective dates of each advance at and after the rate of 6 per cent. until the time of payment, less such sums as have already been paid, or may hereafter be paid, over by the receiver under the order of the court dated April 4, 1887, to the complainants herein; and that the cause shall continue uninterruptedly in its regular order, except that the actual trial of the cause and the issues therein shall not be moved at any term prior to January, 1888; and that if the company shall fail to pay the amount of the principal of the advances of the complainants, with interest at 6 per cent., less any deductions from the amount paid by the receiver, as aforesaid, on or before January 1, 1888, our clients shall be released from their acceptance of the proposition of settlement, and the stipulation signed in this cause shall become immediately null and void; and upon the further understanding that, in case of your failure to carry out the proposed settlement, the rights of the complainants shall not in any way be prejudiced, nor their standing in the litigation in any way affected, by reason of their

having accepted your proposition, or by reason of the signing of the stipulation herein."

The substance of this agreement was telegraphed to the board of trustees on the 13th of July. Several of the trustees and stockholders expressed their approval of the terms. On the 16th of July the executive committee of the stockholders in New York addressed to Theodore Sutro, attorney, etc., the following letter:

"Dear Sir: The stockholders of the Sutro Tunnel Company being anxious to learn the result of your investigations into its property and affairs, and what has been accomplished on their behalf in the pending foreclosure proceedings, and also your opinion as to the best course to be pursued by them, we would respectfully request you to prepare and issue, at your earliest convenience, a detailed report about these matters.

"Yours, truly,

H. R. Baltzer, Chairman,
"H. H. Thayer, Secy. & Treas.,
"Otto Lowengard,

"Executive Committee of the Stockholders."

In reply Mr. Sutro made a lengthy report, which was published in book form, consisting of 198 pages, containing, in detail, everything he had done, and setting forth in glowing colors the present and prospective value of the property owned by the corporation, and making an appeal to the stockholders to come forward and save the property for their own benefit and advantage by complying with his proposed plan to settle the litigation. The report shows: That the main tunnel was begun October 19, 1869, and had cost, up to the time of its completion, to the Comstock lode on September 1, 1878, in round figures, \$3,500,000, and that, with interest added since the beginning of the work and expenses since February, 1882, it was safe to assume that the entire cost of the main and lateral tunnels and other appurtenant property belonging to the company would amount to \$10,000,000. That the main objects of the Sutro tunnel were to drain the mines on the Comstock lode, to give ventilation, to transport ore through it from the mines to the mills (and incidentally to transport waste rock to and beyond the mouth of the tunnel, and to transport men, material, and machinery to and from the mines), and to explore, through a vast network of underground tunnels and drifts, the whole mineral belt from the mouth of the tunnel to and about and beyond the Comstock lode. That the title to this property, its rights and franchises, was derived—First, from the legislature of the state of Nevada (St. Nev. 1864-65, p. 128); and, second, from the congress of the United States (14 Stat. 242). That the first payment of royalty was made in September, 1879, and that yearly payments have since been made as follows:

From September, 1879, to March 1, 1880.....	\$ 35,732 79
" " " " March 1, 1880, " " " " 1881.....	45,498 23
" " " " " " " " 1882.....	19,177 38
" " " " " " " " 1883.....	47,627 84
" " " " " " " " 1884.....	71,515 75
" " " " " " " " 1885.....	125,622 81
" " " " " " " " 1886.....	174,183 11
" " " " " " " " 1887.....	254,009 29
Total	\$773,367 20

The prospective income is estimated at \$250,000 per year, and "likely, in the course of time, to approximate two or three times, or even ten times, said sum." The amount of the McCalmont claim for principal, and simple and compound interest, is figured up as making a total of \$2,023,833.44, and it is stated that the costs and expenses of the receiver, and of a sale of the property, if decree should be enforced, would bring it up to \$2,300,000. The stockholders are informed that by making a cash payment of about \$1,000,000 they can accomplish the extinguishment of this debt. In the appeal to the stockholders, Mr. Sutro, among other things, said: "The best policy, unquestionably, is to settle this litigation upon the basis at which we have

now arrived. Among the plans which have been discussed for the purpose of raising money for such settlement, one was that of levying an assessment. That would be the simplest process, as it would free the company at once from debt. But, aside from other considerations against it, the Sutro Tunnel Company has never, since its existence, levied any assessment, and, in my opinion, it would be fairer not to compel the stockholders to put additional money into this enterprise without some immediate return or ample security. Moreover, I do not consider it advisable to imitate the baneful example of mining companies by establishing a precedent for levying assessments on Sutro Tunnel shares. The best plan, and the most advantageous to the stockholders, would undoubtedly be to give them the opportunity to become the creditors themselves by advancing to the company, in some proportion to the number of shares held by each, a sufficient sum of money, so that the sum total advanced by all the stockholders may be equal to what shall be required, not only for the purpose of settling the mortgage claim in suit, but of developing the company's property and resources to the fullest extent; in return for such advance made by each stockholder, the company to execute an income or other bond equivalent to the amount of each loan." And the report closes with this statement: "We think that we have done our part. The stockholders are now in a position readily to save their property. They, alone, will be to blame, should they fail to do their duty." Two thousand copies of this report were printed, and a copy was sent to every stockholder whose address could be ascertained, and to all the principal bankers, brokers, newspapers, and libraries throughout the principal cities of the United States and Europe. Advertisements were published in seventeen New York, one Chicago, one St. Louis, one Boston, one Philadelphia, and one Baltimore daily papers, requesting stockholders to send in their names to H. H. Thayer, in order that they might obtain a copy of Sutro's exhaustive report. During the summer and fall of 1887, Mr. Sutro carried on a voluminous correspondence with Mr. Ames, the secretary, and other of the trustees and prominent stockholders, as to the best method of raising money. On August 26th, Sutro wrote to Ames that he had commenced negotiations with bankers in New York, "with the idea of possibly forming some kind of a syndicate to assist in placing the loan, and have met with a fair degree of success, although so far no definite result has been reached." He subsequently wrote Mr. Ames that he must consider all letters addressed to him in his official capacity as secretary as intended for the whole board. During the months of September, October, and November, Mr. Sutro interviewed many of the prominent bankers, brokers, stockholders, and merchants in New York, and wrote several letters to others elsewhere, in relation to his plans for obtaining financial assistance, informing all parties that no definite plans had been agreed upon, but that a guaranty syndicate seemed to him to be the most feasible, and kept up his correspondence with the board of trustees, informing it of everything he was doing, and asked for broader powers to be given him, so as to enable him to meet emergencies that might arise. Additional powers were given him by a resolution passed by the board at a special meeting held October 17th. This, however, was not deemed sufficient, and Mr. Thayer, the assistant secretary, sent a telegram to the board that Mr. Sutro should be given the widest latitude and fullest discretion, and that restrictions might cause fatal delay at a critical period, and requested the board to make the fewest possible. This correspondence resulted in the passage of the following resolution by the board on October 20th: "Resolved, that full power and authority be, and is hereby, given to said Theodore Sutro to contract for and on behalf and in the name of this company for the issuance or execution by this company of any form of bonds and security, or either, of whatsoever kind or nature, and in whatever denominations, and in whatsoever amount, not exceeding in the aggregate the sum of three million dollars upon their face, and payable at such time or times that said Sutro may deem advisable or necessary, and to contract for any rate of interest to be paid upon said bonds, security, or loan, not exceeding six (6) per cent. per annum on the face value of such bonds or security, or on the amount of such loan, that to him may appear necessary or advisable, and to enter into and execute, for and on behalf of this company, and in its name, place, and stead, any

and all contracts, agreements, and guaranties for the sale of the bonds of this company, at such price or prices as he may determine upon, and also to enter into and execute any and all other contracts and agreements that he may deem necessary or advisable in the premises." Execution of such power of attorney was authorized and duly executed, and on the same day the board, after reciting the former resolution, "resolved, that it is the sense of this board that said Sutro do not make any contracts for the sale of any bonds to be issued by virtue of said power at a price lower than on the basis of fifty cents on the dollar for four per cent. bonds payable in thirty years."

During this time Sutro continued his correspondence with Ladenberg, Thalmann & Co. and other parties, but they all declined to act upon the plans suggested by Mr. Sutro, upon the ground that the risk was too great and the security not good enough. After this, Mr. Sutro formulated a plan calling upon stockholders to advance the money pro rata. Thirty-five stockholders were invited to attend a meeting in New York. Nine attended, and appointed an advisory committee of four members. A general plan was agreed upon, to be perfected by the executive committee. Numerous meetings were held, which finally culminated in the adoption of a circular to the stockholders of the Sutro Tunnel Company, which was promulgated by the executive committee on the 15th of November, 1887, and which, after commending and approving the report of Sutro resolved, among other things: "That the following plan of reorganization, without foreclosure if possible, be, and the same is hereby adopted, viz.: An assessment of 50 cents per share is hereby levied and called for, in return for the payment of which stockholders shall receive first mortgage, thirty-year, nonaccumulative, 4 per cent., income bonds of the Sutro Tunnel Company at the rate of fifty per cent. of their face value, the bonds to be issued in denominations of \$1,000 and \$500, and fractional scrip to be issued for smaller amounts; principal and semiannual interest to be payable in New York or San Francisco, as may be determined; the authorized issue of these bonds to be \$3,000,000, to be secured by a first mortgage on the entire property of the company; the Union Trust Company of New York to act as trustee under the mortgage, but not more of such bonds to be issued at the present time than shall be absolutely necessary for realizing sufficient for settling the pending foreclosure suit and attendant expenses, and satisfying and canceling the existing and only mortgage on the property; the remaining bonds to be kept as a reserve fund, to be sold from time to time, if necessary, upon a unanimous vote of the board of trustees of the Sutro Tunnel Company, and the proceeds used for improving or extending the property in some of the particulars mentioned in the said report of Mr. Sutro to the stockholders, in the event that the surplus of the net income of the Sutro Tunnel Company, after all payments hereinafter mentioned, shall not be sufficient for such improvements or extensions. * * * Resolved, that copies of these resolutions be sent at once by the secretary of this committee to the attorney and to the trustees of the Sutro Tunnel Company for their approval and guidance, as presenting the plan desired by the shareholders."

A circular was prepared by Mr. Sutro, signed, "Sutro Tunnel Co.," and issued at the same time, appealing to stockholders to subscribe liberally for the bonds upon the plan adopted by the executive committee. These documents were extensively circulated among the stockholders. Five hundred copies were sent to Mr. Ames for distribution by the board. On November 22d, Sutro wrote Ames: That there was no time to communicate with the board, and that he therefore consented to the plan explained in the circular. That subscriptions were already coming in. That immediate action was required. That there were no hopes of obtaining any further time from Alexander & Green. That he had made arrangements with the Union Trust Company to handle the bonds on the following terms: "\$1 per \$1,000 for accepting trust and countersigning bonds, and fee of counsel, not to exceed \$50, for examining mortgage, and $\frac{1}{2}$ per cent. on amount of subscriptions paid in, as compensation for issuing receipts and applying proceeds. Interest will be allowed on money paid in at 2 per cent. per annum. If an extension of time beyond January 1st, 1888, is granted, the rate of interest is to be that allowed on accounts subject to 5 days' notice. If the plan fails, and the money be re-

turned to subscribers, the trust company will charge no commission and allow no interest." That large shareholders desired him to retain Evarts, Choate & Beaman, as their names as counsel in examining the bonds and mortgage would give confidence to bondholders that their rights would be looked after, as contradistinguished from those of the corporation, and asked that all his acts in the premises be ratified by the board of trustees. Such action was taken by the board, and Sutro was notified thereof by telegram on November 29th, accompanied by a request that subscriptions be also taken in San Francisco. A notice of the plan of November 15th was published in the daily papers hereinbefore mentioned, and one Washington, one Denver, and one London daily paper, and a similar advertisement was published by order of the board in San Francisco and Virginia City daily papers until December 15th. Mr. Sutro was personally very active in endeavoring to get subscribers to this plan; but it soon became evident to him, as well as others, that the necessary amount of money could not possibly be raised by January 1, 1888. Early in December he commenced corresponding with Alexander & Green with a view of obtaining an extension of time. On December 21st they informed him that no further extension could be given. In the mean time, notice was extensively given by publication in the newspapers that the time for receiving subscriptions would be extended until December 29th. The subscriptions and payments, to and including December 31, 1887, were as follows:

Form.	Face Value.	Annual Subscriptions.	Payments Made.
A	\$738,601	\$364,300 50	\$78,606 10
B	72,740	36,370 00	8,294 00
Total	<u>\$801,341</u>	<u>\$400,670 50</u>	<u>\$86,900 10</u>

During the year 1887, under the order of this court, the receiver had paid to McCalmont Bros. & Co. a total of \$258,000. The net amount required to settle with McCalmonts, January 1, 1888, after deducting possible payments on hand, is figured at \$944,569.73. Deducting amount subscribed, \$400,670.50, left a deficiency of \$543,899.23. The failure to meet the payment as per previous agreement of settlement released McCalmont Bros. & Co., and they therefore had the right to insist upon a trial of the foreclosure suit. The amount due on the mortgage, January 1, 1888, was \$1,438,487.92. Notwithstanding this gloomy financial showing, Mr. Sutro, with unabated zeal, determined to continue his efforts to raise the amount of money necessary to make a settlement, as previously agreed upon, because, as he states, it would be some time before the trial of the suit could be reached, and because Messrs. Alexander & Green had verbally said to him that, if he brought the cash before the day of trial, they might accept it. On January 6, 1888, Mr. Sutro wrote a letter to Messrs. Zadig, Wollberg & Co., stock brokers in San Francisco (by mistake dated January 14, 1888), informing them of the progress made in raising money from the stockholders, stating that sufficient had been subscribed to make about \$400,000 in cash; that about \$600,000 more was needed,—and, among other things, said: "I have no doubt, also, that all the shareholders will eventually come in and subscribe for the bonds, but the two million shares are literally scattered all over the world, and it would take too long to go ahead on this plan under the existing circumstances. I am therefore now, as in fact I have been for the last six months, at various periods, trying to get up a guaranty syndicate who will guaranty, on certain conditions, that the balance of the bonds will be placed. If I can present such a guaranty, within a reasonable time, to the McCalmonts, I have no doubt that they will give me sufficient time within which to pay over the actual cash on the basis of settlement heretofore arrived at." In this letter Mr. Sutro asked the firm if they would not assist in the formation of such a syndicate. This letter was shown to Mr. Landers, vice president of the Sutro Tunnel Company, and he took a copy thereof on the 14th of January. On January 9th the trustees sent Mr. Sutro the following telegram: "We are dissatisfied with present aspect of affairs, and Mr. Ames leaves for New York in a day or two, in our behalf, to consult with you. Suspend all action until his arrival." Sutro replied: "I am sure that much more important Pelham

W. Ames remain at office of the company, San Fran., Cal., for the time being. What is object,—consultation? Is there anything the matter? Everything possible being done here in full accord with committee. Will telegraph if Pelham W. Ames' presence necessary. I cannot delay negotiations now pending. Wrote yesterday." The chairman of the executive committee added: "Executive committee most decidedly indorses contents foregoing telegram." Then came a reply telegram from Vice President Landers: "Theo. Sutro must comply with instructions of board of trustees of the Sutro Tunnel Co. by telegraph, and negotiations must be delayed temporarily, Pelham W. Ames leaves tomorrow."

Telegrams came, and answers went, thick and fast, and the contents of some were considered as a deathblow to any further subscriptions. Confusion reigned supreme, the price of the shares of stock decreased, and great dissatisfaction existed among the stockholders. There was great danger of an open rupture, which would result disastrously to all concerned. Ames arrived in New York, and at once proposed to take matters into his own hands, and make a proposition to the McCalmonts through Kidder, Peabody & Co. Sutro expressed his displeasure at this unjustifiable interference with his plans. Finally they mutually agreed upon a course of action which resulted in Sutro making a proposition to Alexander & Green that was signed and approved by Ames, which, if carried out, would extend the time of payment until January 1, 1891. This proposition was immediately rejected. Mr. Ames' efforts met with failure, and he thereupon sent a telegram to the vice president that "Sutro and committee are doing as much as possible to raise money. Think I cannot disturb them unless I can devise another plan. I cannot devise any." Notwithstanding this candid statement, the board advised him to make another effort, which he did, and telegraphed results as follows: "Kidder, Peabody & Co. say they will not entertain any proposition unless made by Theodore Sutro, as attorney for the company, and in writing." The next day he reiterates his former statements that Sutro and the committee are doing their best; that "their idea is to substitute a friendly, instead of a hostile, plaintiff foreclosure suit;" and he adds that he "can do nothing except through Sutro, as he is the attorney of record." He also advised that certain sums of money be remitted to Sutro without delay. On February 6th, the sum of \$2,500, previously asked for by Mr. Ames, was sent to Sutro by the trustees. Ames returned from New York with resolutions of the committee of stockholders requesting the withdrawal of the suspension of Sutro's powers, and, after he had fully explained the condition of affairs as he found them, the board, on February 15th, passed a resolution withdrawing the telegram suspending further action upon the part of Sutro. In the meantime, McCalmont Bros. & Co. had served notice that on February 20th they would move the court to fix a day for the trial of the foreclosure suit. On February 15th, Sutro issued and distributed a circular to the stockholders, notifying them of this action upon the part of the McCalmonts, and setting forth the danger of extinction of the stock unless immediate steps were taken, and the required subscriptions at once raised. Among other things he said: "Are the stockholders willing to lose the opportunity of protecting, for one million dollars, a property which has cost ten millions, and has now an income of about one thousand dollars per day, when they can save it, and impart a substantial value to their shares, by loaning their own company 50 cents per share, and receiving in return first mortgage security on this valuable property at the rate of \$1 per share?" The next day he wrote to Alexander & Green, requesting an extension of time, which was promptly refused. On February 20th the foreclosure suit was set for trial on March 27th, and thereafter was by the court continued until May 8th, to be heard before Judges Sawyer and Sabin in San Francisco. On February 25th, the board learning that Vice President Landers was about to visit New York, passed a resolution "that Messrs. Landers and Sutro consult with each other with a view to extricate the corporation from its present embarrassments." Shortly after the arrival of Mr. Landers in New York, difficulties sprung up between him and Sutro, Sutro claiming that Landers was seriously interfering with his plans, and he vigorously protested against the action taken by Landers. In a let-

ter written to Landers March 13th, Sutro said: "I therefore desire herewith to enter my written protest against either you, or any one else, through, with or for you, interfering in the work devolving, as aforesaid, solely upon me. If you, either as a shareholder or trustee of the company, desire to make any suggestions to me in regard to what individuals to see, or what plans to adopt, I will be happy to hear such suggestions, but I protest against your doing anything in the premises without my previous concurrence. As the agreement for my ultimate compensation was made conditional upon noninterference with my work as well as upon eventual success, and as I have discharged my part of the agreement to the utmost extent up to the present time, and shall so continue hereafter, I shall treat any interference as a condition broken; and I hereby notify you that, in case of failure in what I have undertaken to complete, I shall hold you and everyone so interfering, as aforesaid, personally responsible for damages,—on my own behalf to the extent of the compensation of which I originally entered upon my labors, and on behalf of the stockholders of the company whom I represent for the full loss accruing to them. * * * The various negotiations, transactions, and steps which are requisite for a successful discharge of my duties must necessarily be, to a large extent, confidential, and not open to general discussion; and in fact many of them are under the seal of secrecy. The whole work upon which I have entered is one of extreme difficulty and delicacy, and can only be successfully performed by one person, and only if that person be neither worried nor annoyed, nor his time taken up with counteracting cross purposes and interferences, emanating from his own clients or of their said trustees." On February 28th, Sutro wrote Ames, among other things: "So much, however, has been stirred up since January 1st, against my strong protest, tending to show the probability that foreclosure cannot conveniently take place in the interest of such shareholders as have subscribed or will subscribe, that it is almost impossible now to devise any means by which to influence further subscriptions; and if the Sutro Tunnel Co. goes to the wall, and every share of stock is wiped out in the interest of the McCalmonts, I, for one, shall wash my hands of all responsibility. I am now driven in the very direction which I, myself, most of all desire to avert, but which the interferences in my plans have forced upon me as a last resort, namely, to still struggle to get together some kind of a syndicate. But even that last hope is now much less likely of meeting with success than it would have been had I not been compelled to lose so much valuable time since January 1st." During the months of January, February, and April, 1888, Mr. Sutro interviewed a number of bankers, the mine owners upon the Comstock, and millionaires throughout the country, with a view of obtaining financial help, but only succeeded in getting the consent of Seligman & Co., of New York, to consider the matter. S. M. Wilson was in New York in April. Sutro fully explained to him the situation of affairs. Mr. Wilson gave it as his opinion that the McCalmont claim could not possibly be defeated; that no longer extension of time was likely to be granted; and that, as an attorney for the Sutro Tunnel Company, he advised continued efforts to have the transfer of the mortgage made from a hostile plaintiff to a party who would protect the interest of the stockholders.

On March 5th, Mr. Sutro made another proposition to Alexander & Green, in which he recites at great length the condition of affairs, and outlined a new plan of issuing bonds. In due time the answer came that his proposed plan could not be entertained. His suggestions were not agreed to, but he was informed that if he was able to pay \$250,000 in cash, and give a sufficient guaranty that the balance would be paid on or before January 1, 1889, it would be submitted, and might have a favorable consideration from the McCalmonts. On April 27th, the executive committee held a meeting, and passed certain resolutions declaring that it had been utterly impossible to obtain the necessary funds to settle the foreclosure suit, or to form a syndicate guarantying or advancing sufficient funds until the present time; that it is believed that a settlement may be effected if the money can be raised before foreclosure; that the final hearing of the suit has been peremptorily set down for May 8th, and that no further postponement thereof can be obtained,—and ordered notice to be given as follows: "To Subscribing Stock-

holders of the Sutro Tunnel Company: Pursuant to our notice of January 12, 1888, the balance of your subscription is hereby called to be paid to the Union Trust Company, No. 73 Broadway, New York, between May 2d and May 5th next, inclusive, and you are requested to deposit your stock with said trust company, together with your temporary receipt. By such payment and deposit you will be considered as assenting to the plan of reorganization described in circulars of November 15, 1887, and April 27, 1888, which latter circular may be had by applying to room No. 123, New York Produce Exchange. Subscriptions at the rate of fifty cents are now closed." This notice was extensively advertised in various daily newspapers. The circular referred to in the notice set forth the condition of affairs, stated what would be done when the syndicate was formed, requested further subscriptions, and closed with the statement that "a compliance with the terms of this circular will be regarded as your assent to the reorganization plan, with foreclosure if necessary, and also to all the other terms of this circular, and of the circular of November 15, 1887." This circular, with a form of authorization to the Union Trust Company changing their subscriptions, was sent to every subscribing stockholder. It does not affirmatively appear that any of the circulars were sent to the trustees in their official capacity, or that any communication was sent to them by Mr. Sutro in regard thereto. It does, however, appear that their term of office was soon to expire. The annual meeting of stockholders for the election of a board of trustees was held May 3d. Prior to that meeting, Mr. Sutro, in connection with the committee of stockholders in New York, secured sufficient proxies to control the election, and he decided to make a radical change in the board. At the meeting there were stockholders personally present representing 35,973 shares. Mr. Lillenthal held the Sutro proxies, representing 1,117,889 shares, and Mr. Landers had proxies for 26,210 shares. The following trustees were elected, viz.: Theodore Sutro, Horace H. Thayer, P. N. Lillenthal, George E. Butler, Milton B. Clapp, Frederick A. Benjamin, and Edmund Tauszky. Theodore Sutro was elected president and attorney and counselor, Pelham W. Ames was re-elected secretary. On May 7th the executive committee held a meeting, and prepared and adopted the following letter to Theodore Sutro: "Dear Sir: The understanding on the part of our committee of the terms upon which you undertook to defend the rights of the Sutro Tunnel stockholders in the pending foreclosure suit threatening their existence as such was that you were to receive a fee contingent upon your final success. Before you left New York for San Francisco, in February, 1887, we understood that the amount of said fee was to be one hundred thousand dollars (\$100,000), and was not to be dependent in any way upon your securing a reduction of the claim of the McCalmont mortgage or of your raising funds to satisfy said claim, but was based simply upon the condition precedent of your final success in preventing the foreclosure of said mortgage by and in the interest of the present mortgagees, and which would result in the exclusion of all the stockholders of the Sutro Tunnel Company. In presenting you this written statement of the understanding between us we desire to take the opportunity to place upon record, as well as to convey to you, an expression of our estimate and appreciation of your services in behalf of your clients, the stockholders whom we represent. We feel that these services have been arduous, exceptional, extraordinary, and distinguished, combining at once, as they have, services legal, literary, financial, and practical, requiring abilities of a superior order. Since the time when you were with difficulty persuaded to take general charge of the interests of the stockholders of the Sutro Tunnel Company and their rights in the foreclosure proceedings,—almost a year and a half ago,—you have given thereto incessant thought, untiring industry, and energy, unwavering fidelity and devotion, and a fertility of resource which have brought new life and bright prospects to financial interests which were almost universally looked upon as beyond all hope of redemption. In view of the magnitude of these interests and of the results obtained, the obligation of your clients to you can hardly, in our opinion, be estimated at its true value." The executive committee also agreed to pay Seligman & Seligman, attorneys, the sum of \$25,000 as a contingent fee for their services in relation to the syndicate. On May

8th, at a meeting of the executive committee, Messrs. Baltzer and Lowengard were nominated and appointed as the two members of this committee to serve, in accordance with the terms of the syndicate agreement, upon the reorganization committee provided for in said agreement. When the foreclosure suit was called for hearing, May 8th, after some discussion between counsel, it was mutually agreed to submit the case on briefs; the complainants to have 30 days to present the opening, the respondents to have 30 days to reply, and complainants 30 days thereafter to file closing brief. The order was so made. The syndicate agreement, which was signed and executed on June 12, 1888, reads as follows:

"Whereas, there is now pending against the Sutro Tunnel Company, a corporation organized under the laws of the state of California, a certain suit in equity in the United States circuit court for the district of Nevada, brought by McCalmont Bros. & Co., of London, to foreclose a certain mortgage upon the property of said corporation; and whereas, a certain agreement of settlement arrived at before January 1, 1888, whereby, before said date, the said mortgage claim could be settled upon payment by the said Sutro Tunnel Company to the said McCalmont Bros. & Co. of a certain sum in cash, the terms of said agreement being contained in certain letters, copies of which are set forth on pages 144 to 151, and 158 to 163, of a certain printed report by Theodore Sutro to the stockholders, which report is dated July, 1887; and whereas, said McCalmont Bros. & Co., the complainants in said suit, have, notwithstanding the expiration of said limit of time for making the aforesaid settlement, expressed their willingness to accept the same basis of settlement of their claim, and have, upon the application of the parties hereto, and in consideration of immediate cash payment, agreed to sell, assign, and transfer their said mortgage for a still lower sum than that arrived at in the aforesaid proposed settlement; and whereas, the said foreclosure suit is now about to be finally submitted for the decision of the court, and may result in a decree in favor of said complainants at an early day; and whereas, the Sutro Tunnel Company has heretofore, in conjunction with a committee of stockholders called 'executive committee' endeavored to raise the necessary sum to settle said mortgage claim, on the aforesaid basis of settlement arrived at before January last, by offering its certain bonds to its stockholders, as more fully set forth in the printed circular hereunto annexed, marked 'Schedule A,' but has failed to raise the required sum, owing to the fact that the greater part of its shareholders have not subscribed for said bonds on said plan; and whereas, about \$450,000 cash have heretofore been subscribed for, and twenty per cent. thereof paid at the Union Trust Company of New York, on the plan set forth in said printed circular, A, hereunto annexed, and of said sum over \$400,000 paid in full on the modified plan set forth in the printed circular hereunto annexed, marked 'Schedule B,' and it is believed that all of said subscriptions will shortly be made good, and the balance thereof paid in on said modified plan: Now, therefore, we, the undersigned, hereinafter called the syndicate, do hereby, each for himself, and not one for the other, covenant and agree to and with each other, and to and with Herman R. Baltzer, Otto Lowengard, Theodore Seligman, P. C. A. M. Van Weel, and Gordon MacDonald, hereinafter called the 'reorganization committee,' that we, the undersigned, do hereby form and constitute ourselves a syndicate, and do hereby guaranty payment for the bonds hereinafter mentioned to the Union Trust Company of New York, at the rate of fifty per cent. of their face value, and to the extent of the several sums set opposite our respective signatures, for the uses and purposes, and upon the terms and conditions, hereinafter set forth, namely: First. The members of the syndicate shall not be bound to their subscriptions hereto unless the Sutro Tunnel Company shall agree to do all acts, and execute all instruments, necessary and proper to the complete carrying out on its part of this agreement, nor unless the sum total of such subscriptions hereto shall amount to the sum of \$550,000, nor unless said McCalmont Bros. & Co., the complainants in said foreclosure suit, will, upon payment to them in cash of the balance due them upon the said reduced basis of settlement hereinafter mentioned, assign and transfer the mortgage and deed of trust and cause or causes of action for which the said foreclosure suit is brought, and

all other claims, demands, or causes of action, contracts, agreements, stipulations, or other obligations, if any, in their favor, against the Sutro Tunnel Company in any wise connected with said mortgage and deed of trust or said foreclosure suit to the said reorganization committee, or to such person or persons as may be appointed by said committee, to be held by said committee or its appointee for the uses and purposes and trusts hereinafter set forth; said committee or its appointee to be substituted as complainant in the pending foreclosure suit. Second. An opportunity shall at the earliest convenient date, upon proper notices, be given to the shareholders of the Sutro Tunnel Company who have not yet assented to the plans of reorganization set forth herein, and in the said annexed circulars, to assent, and pay to the Union Trust Company, in trust, an assessment at the rate of 55 cents per share; the number of said notices, and the limit of time stated in each notice, to be in the discretion of the reorganization committee: provided, however, the opportunity thus to be given to shareholders shall not absolutely cease until the expiration of not less than thirty days after the first publication of the first of said notices. Should the reorganization committee, upon the expiration of said period, grant further opportunities to shareholders to assent, it may, in its discretion, advance the rate of the assessment. It is understood and agreed that in the event of any of the present subscribing shareholders not assenting also to the plan of reorganization as herein and in annexed circular B set forth, or in the event of their assenting thereto and not paying in full the respective amounts heretofore subscribed by them, then the syndicate shall have the first option of purchasing at 50 per cent. of their face value, the bonds not paid for by said shareholders. Each assenting shareholder shall, upon payment of his assessment, present his certificate of stock to the Union Trust Co. for deposit, and shall be entitled to receive proper certificates or receipts therefor. Third. In case said assessment shall be paid upon all shares of stock of the Sutro Tunnel Co. by shareholders, or upon a sufficient number of shares, so that the syndicate shall, in their opinion, be sufficiently reimbursed for, and relieved of, their said guaranty, then said mortgage so to be assigned by said McCalmont Bros. & Co. shall be satisfied and discharged of record, and the foreclosure proceedings against the Sutro Tunnel Company under the said McCalmont mortgage shall be discontinued; and in that case the reorganization of the Sutro Tunnel Company shall be completed substantially on the plan set forth in the annexed circular marked 'A,' and in that event the syndicate shall receive from the Sutro Tunnel Company, in consideration of the aforesaid guaranty, and the aforesaid further reduction obtained from McCalmont Bros. & Co. for immediate cash payment, by way of commission, fifty thousand (\$50,000) dollars cash, and income bonds, of the description contained in said annexed circular A, to the amount of 200,000 dollars face value. The 5 or more cents which, as aforesaid, shall be paid in by assenting shareholders, over and above 50 cents per share, shall be applied on account of said commission to the syndicate, said cash to be deemed equivalent to double its amount in bonds; and the shareholders of the Sutro Tunnel Company shall receive similar bonds at the rate of one dollar face value for every 50 or more cents per share paid in, as the case may be. Fourth. In case said assessments shall not be paid upon all shares of stock of the Sutro Tunnel Company, or shall not be paid upon a sufficient number of shares, so that the syndicate shall, in their opinion, not be sufficiently reimbursed for, and relieved of, their said guaranty, then the said person or persons to whom said McCalmont Bros. & Co. shall assign their said claim in trust as aforesaid shall, upon the request of the reorganization committee, proceed with the foreclosure of said mortgage so to be assigned, sold, and transferred in trust; and in case of a decree against, and sale of, the property of the Sutro Tunnel Company, and if no competition shall arise at said foreclosure sale, said property shall be bid in by the reorganization committee for as low a sum as practicable for the benefit of the syndicate and such shareholders as shall have paid the aforesaid assessments. Thereupon a new company, with the same number of shares as the present company, shall be formed, and shares of stock and bonds of the same description contained in said annexed circular marked 'A' shall be issued in such new company, and distributed as follows: To each shareholder who shall have assented by paying in said assess-

ment (50 or more cents per share, as the case may be) there shall be issued the same number of shares as those on which he shall have assented as aforesaid, and also income bonds of the description contained in annexed circular, A, at the rate of \$1 face value for every such share of assenting stock. To the syndicate there shall be issued the same number of shares as the number of nonassenting shares, and also income bonds, of the aforesaid description, sufficient to represent the said nonassenting shares at the rate of \$1 face value for every such share of nonassenting stock; and the syndicate shall also receive, by way of commission for the guaranty herein made, and for the other considerations heretofore mentioned, the following, namely: Fifty thousand dollars cash, and income bonds of the aforesaid description of a face value of 200,000 dollars; the 5 or more cents which, as aforesaid, shall be paid in by assenting shareholders, over and above 50 cents per share, shall be applied on account of said commission to the syndicate, said cash to be deemed equivalent to double its amount in bonds. Fifth. In case competition in bidding should arise at said foreclosure sale, the reorganization committee shall, if necessary, bid as high for the property of the company as the full amount of any decree which may be obtained, with the addition of all taxable costs and disbursements, or may bid such higher figure as said committee may hereafter determine. But if the property shall be bid in by other parties, so that a reorganization of the company should become impossible, then the sum realized from said sale shall be applied in the first instance to paying all legal and other attendant expenses and disbursements of the litigation and foreclosure, and of the proposed reorganization herein-after mentioned in article 7th, and to paying the aforesaid cash and bond commission to the syndicate, the bonds to be paid for at the rate of 50 per cent. of their face value. The balance realized from said foreclosure sale shall be applied to the satisfaction of the decree, for its full amount, for the sole benefit of the syndicate and of assenting shareholders, in proportion to the number of bonds of the two million dollar issue to which they severally would have been entitled had the reorganization plan herein set forth been fully carried out; and after such payments, as aforesaid, the balance, if any, of the proceeds of said foreclosure sale, shall be distributed among all the shareholders of the Sutro Tunnel Company in proportion to the number of shares held by each. Sixth. In case subscriptions heretofore received from income bonds of the foregoing description from nonshareholders of the Sutro Tunnel Company shall be accepted under the plan set forth in annexed circular A, then bonds for such subscriptions by nonshareholders shall be issued out of the said bond commission by the syndicate, at the rate of 50 per cent. of the face value of said bonds. Seventh. It is understood and agreed that the moneys which, under this agreement, shall be paid to the Union Trust Company by the syndicate and by subscribers to the said bonds, shall be applied towards obtaining an assignment and transfer from said McCalmont Bros. & Co., for the purposes hereinbefore mentioned, of the mortgage held by them and now in suit, and that any surplus cash remaining in the hands of the reorganization committee after such payment to said McCalmont Bros. & Co. of the requisite sum, and after buying the property at foreclosure sale, in case that should become necessary or advisable, shall be applied in equal proportions to the following payments, namely: Towards paying to Theodore Sutro the sum mentioned in a certain letter addressed to him by the present executive committee of the stockholders, dated the 7th day of May, 1888, and, as appears from said letter, heretofore agreed upon as a contingent fee to be paid him as compensation for his services on behalf of the shareholders of the Sutro Tunnel Company, as chief counsel, manager, and promoter, in saving the company's property from foreclosure and sale by and in the interest of the present complainants, and which would result in the exclusion of all the shareholders of the Sutro Tunnel Company, and towards paying to Seligman & Seligman, of the city of New York, as a contingent fee, the sum mentioned and agreed upon in a certain letter addressed to them by said executive committee, dated the 7th day of May, 1888, for their services in promoting and organizing a syndicate, and their services in connection therewith, and towards paying the remaining legal and other expenses of the litigation, and of the proposed reorganization of the Sutro Tunnel Company, including the cash commission to the syndicate, and the

compensation to the executive and reorganization committees mentioned in certain letters dated the 12th day of June, 1888, addressed by said committees to the Suto Tunnel Company. The balance, if any, of said fees and other attendant expenses and commissions shall be paid by the present company, or by such company as may be formed after foreclosure, in equal proportions, in cash, out of the first net earnings, after having set aside the necessary sum for paying the next due interest coupon on its bonds. Eighth. The aforesaid reorganization committee shall consist of five members, namely, Herman R. Baltzer and Otto Lowengard, who have been chosen by the aforesaid executive committee of shareholders, and Theodore Seligman, P. C. A. M. Van Weel, and Gordon MacDonald, who have been chosen by the syndicate. Said reorganization committee shall represent the assenting shareholders and the syndicate as attorneys in fact, to sign all agreements and instruments necessary and proper to be executed in the premises, to issue all notices of the foregoing plan, and otherwise to act for and on behalf of the assenting shareholders and of the syndicate in all matters necessary and proper to be done under the terms of this agreement. Said reorganization committee shall have general charge and discretion, on behalf of the syndicate and assenting shareholders, in regard to all matters connected with the proposed reorganization, and shall act upon a vote of the majority of all its members. In case of the resignation, death, or permanent incapacity of any member of said reorganization committee, the place of such member, if one of the two appointed by said executive committee, shall be filled by said executive committee, and, if one of the three members appointed by the syndicate, shall be filled by the syndicate. Ninth. As soon as the aggregate of the several sums subscribed hereto shall amount to \$550,000, the members of the syndicate shall pay the amount of their several subscriptions in cash, as required, and called by the reorganization committee. In case the full amount of the guaranty hereby made, or any part thereof, shall be made good through cash payments by shareholders of the Suto Tunnel Company, on the plan of the said assessments, as hereinbefore provided, or through bond subscriptions and cash payments by others, then said cash, as soon as received, shall be returned to the several members of the syndicate. Tenth. Interest at the rate of six per cent. per annum shall be allowed on all sums paid in cash by the syndicate from the date of payment until said cash shall be returned to the syndicate, or interest shall begin to run on the new bonds delivered to it. Eleventh. The net profit in cash or securities, or both, resulting to the syndicate in the premises, shall be divided among the members thereof in proportion to their respective subscriptions hereto. Twelfth. Any of the matters hereinbefore mentioned as to be decided by the syndicate, as such, shall be decided by a vote of a majority in interest of all the members of the syndicate. In witness whereof the members of the syndicate and of the reorganization committee have hereunto set their hands and seals, and the members of the syndicate the amount of their respective subscriptions opposite their several signatures, at the city of New York, the 12th day of June, 1888.

	Amount cash.
"J. & W. Seligman & Co.....	\$135,000
"Robert Fleming (Dundee, by J. and W. Seligman & Co., Attorneys)	105,000
"P. C. A. M. Van Weel.....	100,000
"Geo. W. Stern.....	110,000
"H. Stursberg.....	25,000
"Ladenberg, Thalman & Co.....	25,000
"H. P. Goldschmidt & Co.....	15,000
"Maitland Phelps.....	10,000
"E. W. Clark & Co.....	10,000
"J. & W. Seligman & Co.....	15,000
"H. R. Baltzer.	
"Otto Lowengard.	
"Theodore Seligman.	
"P. C. A. M. Van Weel.	
"Gordon MacDonald.	

"We, the executive committee of the shareholders of the Sutro Tunnel Company, for ourselves and such stockholders as we represent, hereby assent to all the terms and conditions of the foregoing syndicate agreement.

"New York, June 12, 1888. H. R. Baltzer, Chairman.

"Otto Lowengard.

"H. H. Thayer, Secretary and Treasurer."

On the same day (June 12th) the executive committee met and approved the syndicate agreement. The members of the committee also agreed to accept, for their agreed compensation of \$15,000, the sum of \$5,000 in cash, and for the balance to purchase certificates issued by the Union Trust Company at the price of 65 cents. The members of the reorganization committee, Seligman & Seligman, and Sutro, attorneys, agreed to similar terms; and with reference to Mr. Sutro it was agreed, in consideration of such change in his compensation, that he should be "retained as president of such new company at a monthly salary of not less than five hundred dollars." These propositions were agreed to by Mr. Sutro, "without prejudice, however, to any rights or defenses of the Sutro Tunnel Company in the pending foreclosure suit against it." The facts are that Mr. Sutro received in cash the sum of \$40,000; he received bonds at \$92,000, face value, at 50 per cent., \$46,000; he received 92,000 shares of stock at 15 cents per share, \$13,800; and a further cash payment of \$200,—making a total of \$100,000. On the 21st of June, the syndicate paid to the Union Trust Company the sum of \$550,000. The amount previously paid in by the subscribing stockholders was \$397,890.50, making a total in the hands of the Union Trust Company of \$947,890.50. The Union Trust Company on the same day (June 21st) paid to the representatives of McCalmont Bros. & Co. the sum of \$800,000, and the mortgage was thereupon assigned and transferred to the Union Trust Company, which then had a balance on hand of \$147,890.50, which was transferred to the credit of the reorganization committee. It should be stated in this connection that the payments made by the receiver had reduced the amount due the McCalmonts in their offer of settlement to the sum of \$800,000, and that that sum was the amount due, independent of all sums of money paid by the receiver. On June 22d, Mr. Peckham, of counsel for the Union Trust Company, notified the trustees of the assignment of the mortgage. On July 12th, Mr. Sutro arrived in San Francisco. On July 14th, the Union Trust Company was substituted, in place of McCalmont Bros. & Co., as complainant in the foreclosure suit. The time for the Sutro Tunnel Company to file its brief had been previously extended until July 23d. On July 21st, Mr. Sutro telegraphed to Mr. Seligman, attorney for the reorganization committee, for further time, and received a telegram in reply: "Time file brief extended 30th; time stockholders subscribe present price will not be extended unless company allows decree full amount claimed be entered without delay." Mr. Sutro testified that he was in San Francisco from July 12th to October 18th, and during that time the matter of the approval of the syndicate agreement and consent to a decree in the foreclosure suit "were fully discussed and considered at great length, and almost daily, from the time of my arrival in San Francisco until these events of the approval of the syndicate agreement and the consent to the entry of the decree actually took place, both at interviews with Mr. S. M. Wilson, Mr. Edmund Tauszky, and also especially with a Mr. Jarboe, of Messrs. Jarboe, Harrison & Goodfellow, a firm of attorneys in San Francisco, and also with Mr. Philip N. Lillenthal, the vice president of the company, and also with other members of the board, and were also fully discussed and considered at meetings of the board of trustees (the dates of which appear in the records of the company prior to the taking place of these events of the approval of the syndicate agreement and consent to the decree. The discussions and consideration of these matters between Messrs. Jarboe, Lillenthal, and myself were very long, and the matters considered from every point of view, in so far as the interests of the Sutro Tunnel Company were concerned. More especially were, in these discussions, the interests and rights of the stockholders considered who had not, as yet, contributed their proportion to the sum required of them under the subscription plan. I may

say, in general, in answer to this question, that these various matters about which I have spoken were most carefully and elaborately considered and discussed, and constantly kept in view, at every interview and at every meeting of the board at which I was present at that period. I may say that the one point was always uppermost in these discussions, namely, what, under the circumstances, the board of trustees had best do to give a further chance to the Sutro Tunnel Company, and all its stockholders, to retain their property." Upon cross-examination, when questioned with reference to the employment of Mr. Jarboe, he testified: "I found, after talking to Mr. Lillienthal, that he was a man of exceptionally strong character and independent views, and he told me that he would only do what he thought was absolutely right and proper, and from every point of view, legal and otherwise, for the utmost interest of the Sutro Tunnel Company, and that he did not care whether J. & W. Seligman & Co. or any other people had gone into the syndicate; that he was a trustee of the Sutro Tunnel Company, and vice president of the company, and he would not, under any circumstances, consent to any such action unless he, at all events, was convinced, after the most careful consultation with his own counsel, and wholly independent of the counsel for the Sutro Tunnel Company, that it would be proper for him, after such advice, and in pursuance of such advice, to consent to the entry of a decree or to the approval of any syndicate agreement, or to any of the measures which came up in the course of my discussions with him after my arrival in San Francisco. I told him that I did not think it was necessary to enlist the services of Mr. Jarboe, because I took exactly the same position which he did, and would under no circumstances ask him or advise him or any one to do anything which I was not absolutely and bona fide convinced was for the absolute good, and the only hope and chance, for the Sutro Tunnel Company or its stockholders to retain the property; but that, as a matter of course, I did not stand in the way of getting all possible light on the subject, and that, if he wanted to retain Mr. Jarboe, or any attorney in San Francisco, I would be only too glad to advise with him further, or to have him advise with him independently of myself, and as often, and to any extent, that he might see fit; and in that way Mr. Jarboe was consulted about the matter by Mr. Lillienthal." The board of trustees of the Sutro Tunnel Company held meetings every day from August 6th to 10th, both days inclusive. At the meeting on the 6th, Mr. Sutro was present, and made a report, as attorney for the company, as to the status of the foreclosure suit, and among other correspondence between Mr. Sutro and Messrs. Haggin & Dibble, of counsel for complainants in the foreclosure suit, presented the following letters, viz.: First, a letter from Sutro, dated August 2d, as follows: "In answer to your favor of this morning, I desire to make the following proposition of settlement herein, subject to ratification and confirmation by the board of trustees of the Sutro Tunnel Company, and without prejudice to the rights of the defendant, should this proposition not be accepted, viz.: That the defendant consent to the entry of a decree in favor of complainants, pursuant to the terms of the mortgage in suit, on the following conditions: First, that the complainant waive all demands for interest upon interest; second, that all moneys heretofore paid by the defendant, whether on account of interest upon interest or otherwise, and also all moneys paid by the receiver herein under the order of court, up to the entry of the decree, be credited to the defendant; third, that if the defendant shall pay to the complainant, within ninety days after entry of the decree, the amount paid to the former complainants for the mortgage in suit, with the addition of such interest on said amount, attendant expenses and commissions, as may be approved by the board of trustees of the defendant, the judgment shall be satisfied of record, and, if the property of the defendant shall have been sold within said period, and shall have been bid in by the complainant, said complainant shall reconvey the same to the defendant upon like payment by the defendant; fourth, that within said period of ninety days there be given to such stockholders as have not yet subscribed for the bonds of the Sutro Tunnel Company, heretofore authorized to be issued, an opportunity to do so upon due notice, in order to raise the money with which to make the aforesaid payment, and that payment by means

of said subscriptions to said bonds shall be deemed payment by the defendant." To which Messrs. Haggin & Dibble replied, on August 4th, as follows: "We have this day (at 3:45 p. m.) received the following telegram from Wheeler H. Peckham, Esq., counsel for the Union Trust Co.: 'Sutro's offer declined. If company consent to decree with compound interest, complainant will credit all money heretofore paid by company or receiver; will accept face of decree with interest within ninety days before [from] entry of decree, without the eighteen per cent. penalty; will give stockholders ninety days' further time to assent at slightly higher rate. If this offer is not forthwith accepted, stockholders will not be given further right to assent, or, if given, it will be at much higher rate, and complainant must press for a decree forthwith, which please do;'" and it was "therefore resolved that this board does not deem it to the interest of the company to accept the proposition contained in the last of the foregoing letters from the solicitors of the complainant, and rejects the same, but that it will entertain the above proposition made by the attorney of the company, but defers present consideration thereof; resolved, that the attorney of the company is hereby instructed to communicate the substance of the foregoing preamble and resolutions to the solicitors for the complainant."

The records of the board do not show that any reference was made to the syndicate agreement at this meeting, but on the next day the record shows that a letter from Messrs. Haggin & Dibble had been received, in reply to the decision of the board, the day before, "which substantially assents to Mr. Sutro's previous proposal, except that they ask that the syndicate agreement be ratified, and that the price at which stockholders will be allowed to subscribe is stated." At the meeting held August 9th, the following letter was read, placed on file, and spread upon the minutes of the board:

"San Francisco, August 6, 1888.

"To the Board of Trustees of the Sutro Tunnel Company—Gentlemen: In accordance with your request for our written opinion and advice on the following matters we herewith state: First. That in our opinion the levying of an assessment upon the shares of the stock of the Sutro Tunnel Company issued as unassessable would be of doubtful validity. We therefore advise against such course. Second. That in our opinion the proposed settlement of the foreclosure suit pending against the company set forth in the annexed preambles and resolutions is for the best interests of the company and its stockholders. We therefore advise the board to make such settlement. Yours, truly,

S. M. Wilson,

"Theodore Sutro,

"Edmund Tauszky,

"Of Counsel for the Company."

Whereupon, the following resolutions were adopted: "Whereas, the attorney of this company has laid before this board certain correspondence between himself and the solicitors of the Union Trust Company of New York, the present complainant in the pending foreclosure suit against the company, looking to a settlement thereof; and whereas, this board deems it for the best interests of this company and its stockholders, and is advised by its counsel, to wit, by S. M. Wilson, Theodore Sutro, and Edmund Tauszky, to make such settlement on the following conditions, viz.: That this company consent to the entry of a decree in favor of said complainant, pursuant to the terms of the mortgage in suit, provided—First, that the complainant waive all claims for interest upon interest; second, that all moneys heretofore paid by this company, whether on account of interest upon interest or otherwise, and also all moneys paid by the receiver herein, under order of court, up to the entry of the decree, be credited to this company on account of the sum due in pursuance of the terms of the mortgage: Now, therefore, resolved, that this board hereby consents that a decree shall be entered in accordance with said terms, and the attorneys of the company are hereby directed to consent to such entry."

At the meeting held on the 10th of August the letter of Mr. Peckham, dated June 22, 1888, notifying the company of the assignment of the McCalmont mortgage to the Union Trust Company, was read and spread upon the min-

utes, together with various other letters and documents relating to the matter. The board, after reciting the facts that Sutro, under his power of attorney, consented to the syndicate agreement in so far as it relates to non-foreclosure; that the Union Trust Company had advanced the necessary funds, not subscribed by the stockholders, with which to effect the transfer of the mortgage to the Union Trust Company; and that "one of the conditions of the proposed settlement of the pending foreclosure suit against the Sutro Tunnel Company is that this board should ratify and approve the aforesaid syndicate agreement: Now, therefore, resolved, that the said syndicate agreement is hereby ratified and approved in so far as it relates to nonforeclosure of the property of this company." At the date of this ratification the subscriptions and payments of the stockholders were as follows:

Rate.	Form.	Number of shares.	Payments.
50c.	A	878,772	\$439,386
	B		5,342
55c.		377,807	207,793 85
Totals		1,256,579	\$652,521 85
Deduct 5c. penalty			18,890 35
			\$633,631 50

On the same day (August 10, 1888) a stipulation was entered into that a decree be entered in the foreclosure suit in favor of the Union Trust Company for \$1,419,544.22, that being the full amount due on the mortgage after deducting all sums of money paid thereon by the Sutro Tunnel Company and by the receiver. The order of the court for a decree of foreclosure in pursuance of this stipulation was made on the 13th of August, though not entered until October 1, 1888. The interest from the 10th to 13th of August was added, and the decree was for \$1,420,209.46, and declared to be a lien upon the mortgaged property, which was ordered to be sold by the United States marshal, who was appointed master for that purpose. On October 1st, Mr. Sutro prepared the following advertisement: "The Sutro Tunnel Company hereby gives notice to such of its stockholders as have not yet subscribed to its bonds that judgment has been entered in the long-pending suit for foreclosure of mortgage in favor of the complainant. One condition of said judgment, however, is that all the shareholders who have not yet subscribed to the new bonds of the company shall have 90 days from October 1, 1888, to save their interest by paying, for the first 30 days, 55 cents, and, for the next succeeding 60 days, 60 cents, per share, on all shares owned by them, for which they will receive the new bonds of the company at the rate of \$1 for each 55 or 60 cents so subscribed. Any shareholder who does not subscribe for these bonds within this period of 90 days must necessarily lose his interest in the property of the company. All subscriptions, together with the shares, properly indorsed, must be sent to the Union Trust Company, No. 73 Broadway, New York. For circulars and further information apply to the offices of the company, 320 Sansome street, San Francisco, and Room 123, Produce Exchange, New York,"—which was by the order of the board of trustees published in the New York, San Francisco, and Virginia City papers, once a week, for three weeks. The next day Mr. Sutro issued a circular to the stockholders, explaining more in detail the condition of affairs, giving a statement of the receipts and disbursements of the company for a number of years, and closing with the suggestion that the "new bonds will be a desirable investment." The trustees ordered 3,000 circulars to be printed, and a copy sent to each stockholder, who had not subscribed to bonds, whose address was known, and to be generally circulated by the president, which was done. On October 3d, the reorganization committee issued a circular to the stockholders, embodying substantially the same terms stated in the advertisement of Sutro, and the same statements as contained in the Sutro circular, and closing as follows: "By complying with the terms of this circular you will be regarded as having assented to all the terms and conditions of the said circulars of the executive committee dated, respectively, November 15, 1887, and April 27, 1888." This circular was ex-

tensively advertised. The final results of the subscriptions show that the total amount paid in was \$750,741.25, which, after making the reductions on account of penalties, etc., left the amount \$723,998.50. The total number of shares of the Sutro Tunnel Company represented in the subscriptions was 1,447,997, leaving the number of shares that did not subscribe at 552,003.

On January 14, 1889, due and proper notice having been previously given, the master sold the property of the Sutro Tunnel Company, under the decree of the court, to the Union Trust Company for \$1,325,000, that being the highest bid therefor. The master in due time made his report, and the court ordered that the report and sale "be absolute and binding forever, and that they stand as in all things ratified and confirmed." The master was ordered to execute a deed to the purchaser, which was accordingly done, on the 2d day of August, 1889. On August 31, 1889, the Comstock Tunnel Company was incorporated, under the laws of the state of New York, with a capital stock of \$4,000,000, divided into 2,000,000, shares of the par value of \$2 each. On October 10th, Mr. Theodore Sutro was elected president, and H. H. Thayer secretary and treasurer, of this corporation. On October 19th, the Union Trust Company deeded to the Comstock Tunnel Company all the property purchased by it at the foreclosure sale, and the Comstock Tunnel Company executed a mortgage to the Union Trust Company to secure the payment of the bonds of the company to an amount not exceeding \$3,000,000. The Comstock Tunnel Company issued \$2,139,000 face-value bonds, which were distributed as follows:

To subscribing stockholders	\$1,448,012
To subscribers who were not stockholders.....	10,594
To the syndicate.....	538,394
To Theodore Sutro	92,000
To Seligman & Seligman.....	25,000
To H. H. Thayer	5,000
To Otto Lowengard	5,000
To Gordon MacDonald	5,000
To P. C. A. M. Van Weel.....	5,000
To H. R. Baltzer	5,000

Total bond issue, face value..... \$2,139,000

On December 12, 1889, a decree for the deficiency in the foreclosure suit, amounting to \$101,365.13, was regularly entered. The property of the Sutro Tunnel Company, consisting of certain real estate not included in the mortgage, was subsequently sold under a judgment obtained by the state of Nevada for delinquent taxes, to the Comstock Tunnel Company for \$789.97.

R. E. Houghton (Wm. F. Herrin and H. L. Gear, of counsel), for complainants.

Edmund Tauszky and W. E. F. Deal (Pierson & Mitchell and Pillsbury & Blanding, of counsel), for respondents.

HAWLEY, District Judge (after stating the facts as above). The legal questions involved in this case may be classified under four heads: (1) Jurisdiction; (2) failure of trustees to levy an assessment; (3) position of complainants, and their participation in the plans formulated by Sutro; (4) questions relating to charges of fraud, conspiracy, and violations of trust and confidence.

1. Respondents contend that this court has no jurisdiction of this case (1) because none of the complainants or respondents are residents or citizens of the state of Nevada, and there are aliens, and also citizens of the same state, on both sides of the controversy; and (2) that the doctrine of ancillary jurisdiction is not applicable to the facts of this case. After the filing of the an-

swers, the respondents moved the court to dismiss the bill upon the same grounds. This motion was heard before the circuit judge, and by him denied in a brief opinion, as follows:

"This is a motion to dismiss the bill for want of jurisdiction, on the ground that some of the complainants and respondents are citizens of the same state, and some of the parties on both sides are aliens. The bill is filed, however, to set aside a decree, in the same court, of foreclosure of a mortgage and sale, and confirmation of the sale, of the Sutro tunnel, on the ground of various frauds alleged, by means of which the proceedings are said to have been accomplished. I think that this is but an appendage of, or a suit supplementary and ancillary to, the prior suit. It is but a renewal and continuation of the prior litigation. It is within the cases of *Dewey v. Gas Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583; *Johnson v. Christian*, 125 U. S. 643, 8 Sup. Ct. 989, 1135; *Railroad Co. v. Soutter*, 2 Wall. 440, 510; and *Jones v. Andrews*, 10 Wall. 327. Indeed, the suit could not well be effectually prosecuted in any other court. The court has jurisdiction under these authorities. Let the motion to dismiss be denied."

I therefore decline to review this question.

2. The first question presented by respondents relates to the failure of the trustees of the Sutro Tunnel Company to levy an assessment upon its shares of stock. It is charged in complainants' bill that the trustees wholly disregarded their duty to raise, by lawful assessment upon the shares of the company, the sum required to complete the payment for the McCalmont mortgage, and, in violation of their duty, consented to the guaranty of its bonds by the syndicate, and authorized Theodore Sutro, at his instigation and request, to stipulate with the Union Trust Company for the entry of the decree of foreclosure, and for the sale of all the property of the Sutro Tunnel Company. After setting out at length the provisions in the syndicate agreement that if the necessary amount of money was raised by the subscriptions of the stockholders, or if the Sutro Tunnel Company should pay to the Union Trust Company, "within ninety days after the actual entry of the decree, the amount paid to the former complainants for the mortgage in suit, less the amount which should have been paid over by the receiver up to the expiration of said 90 days, * * * that then the said judgment and decree should be discharged and satisfied of record," etc., the bill further avers "that the said board of trustees allowed the said ninety days to elapse without levying any assessment upon the stock of said Sutro Tunnel Company to repay the amount advanced by said syndicate for the purchase of said mortgage, and allowed the said property of said Sutro Tunnel Company to be sold under said decree, and allowed the time for redemption under said decree to expire, and allowed the sale of said property to be confirmed, without redeeming the said mortgage, pursuant to said stipulation or otherwise, or lawfully providing any means for said redemption, as it might and ought to have done by assessment upon the stock of said company."

It is difficult to see why the charge of neglect of duty in this respect should be made against the trustees in office in 1888, in-

stead of the previous boards. Was it not as much the duty of the trustees in office in 1886 or in 1887, as it was of the board in 1888, to levy an assessment? The truth is that, independent of the legal questions involved, it was the honest opinion and judgment of the different boards of trustees, as well as of many, if not all, of the stockholders, that any attempt to raise the amount of money required to pay the McCalmont mortgage would have been prejudicial. All the facts tend to show that it would have been absolutely useless to attempt to raise the money in that way. The trustees of the Sutro Tunnel Company were not in a position on August 10, 1888, to apply the money subscribed and paid by the stockholders prior to that time, and to have levied an assessment for the balance of the amount necessary to purchase the McCalmont mortgage, as complainants claim they should have done. The trustees had no power, authority, or control of the money which was paid by the subscribing stockholders upon a specific plan for a specific purpose. This money could only be used as provided by the terms of their subscription. But, if such a course could have been pursued, it would have been grossly unjust to the subscribing stockholders. The assessment, if then levied, would necessarily have been against all the shares equally, whether held by subscribing or nonsubscribing stockholders, and the subscribing stockholders would have had a just cause of complaint, upon the ground that such an assessment, under all the circumstances, would have been unfair and inequitable. The McCalmont mortgage contained a provision that "the debt contracted by these presents on behalf of the company, and all further advances on the security thereof, are subject to the express stipulation (which is hereby made) that the stockholders shall not be held liable, in respect thereof, in their individual capacity." With the exception of about 30,000 shares, each certificate of stock of the Sutro Tunnel Company bore upon its face the word "Unassessable." The by-laws of the corporation were amended in 1880, and it was therein provided that the shares "were unassessable." No stockholder had at any time demanded the levying of an assessment for the purpose of enabling the corporation to pay the McCalmont mortgage; but the question as to the propriety and legality of levying an assessment for that purpose had at different times been suggested to the attorneys for the corporation, who had expressed the opinion that, to say the least, the levying of an assessment was of doubtful validity. It is not deemed necessary to judicially determine whether an assessment, if levied, could have been legally enforced. It may, for the purposes of this opinion, be conceded that it could. *Cook, Stocks & S. § 242; Railroad Co. v. Spreckles*, 65 Cal. 193.¹ But, under all the facts and circumstances of this case, the failure of the trustees, in 1888, to levy an assessment, does not tend to establish any fraud, conspiracy, or willful neglect of duty upon their part, which would authorize a court of equity to set aside the proceedings

¹ 3 Pac. 661, 802.

and decree in the foreclosure suit. The most that could possibly be said against the trustees would be that they erred in not attempting to raise the money by an assessment. But trustees are not liable for mistakes of judgment. Morawetz, in his work on Private Corporations (section 553), says:

"The directors of a corporation are intrusted with wide discretionary powers. They are bound to exercise these powers with the utmost good faith in the interest of the corporation, and to give the latter the benefit of their best judgment; but they are not liable for innocent mistakes. Directors merely undertake to make honest use of such judgment as they possess. They do not insure the correctness of their judgment, and they cannot be charged with the consequences of an honest error of judgment or accidental mistake in the exercise of their discretionary powers."

In *Leslie v. Lorillard*, 110 N. Y. 532, 18 N. E. 363, the court said:

"In actions by stockholders which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive, and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those entrusted with corporate management are largely discretionary."

See, also, *Association v. Childs*, 82 Wis. 476, 52 N. W. 600; *Watts' Appeal*, 78 Pa. St. 370, 391; *Green's Brice*, *Ultra Vires*, 407. Especially is this true in all cases where the trustees act under advice of counsel. *Spering's Appeal*, 71 Pa. St. 11, 21.

3. In reference to the acts and conduct of complainants, and their participation and acquiescence in the various transactions, it must be remembered that the doctrine of *ultra vires* has two separate and distinct phases,—one, when the public or creditors are concerned, which has no application to this case; the other, where the question is between the stockholders and the corporation, or between it and its stockholders and third parties dealing with it and through it with them. It is this branch with which we have to deal. In *Kent v. Mining Co.*, 78 N. Y. 185, the court said:

"When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent, or his intelligent, though tacit, consent, to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts."

It therefore becomes important to inquire, not only as to the character of the relief sought, but also to ascertain complainants' relations to the various transactions set out in the statement of facts. It would perhaps be difficult to explain what the result would be if the relief asked for by complainants should be granted. It might, and probably would, lead to confusion worse confounded, and liti-

gation more extended and disastrous. It is certain, however, that the relief they ask for is absolutely destructive of nearly everything that has been done by Sutro and the syndicate, and all of their various transactions are claimed to be in fraud of complainants' rights, and the court is asked to set them aside, regardless of consequences. This is to be done apparently for the benefit of all parties holding nonsubscribing shares of stock in the Sutro Tunnel Company; but it is claimed by respondents to be simply for the benefit of complainants, who, according to the averments in the bill, own 15,250 shares. Sutro, the members of the executive and reorganization committees, and the firm of Seligman & Seligman, attorneys, would, according to the contention of complainants, be compelled to return to the Sutro Tunnel Company the money and stock which they received as fees for their services. The syndicate would also have to account for the money paid by the Sutro Tunnel Company to the McCalmonts on the mortgage before it was transferred to the Union Trust Company, although it never received any part or portion of said money. For obvious reasons, the court declines to make any suggestion or conjecture as to what would become of the interests in the property held by the outsiders or the subscribing stockholders in the syndicate, or to speculate as to whether the nonsubscribing stockholders, who are not parties to this suit, could be compelled to participate in the future proceedings if the decree is set aside. It is enough to say, for the purpose of illustrating the question under consideration, that there is no direct offer upon the part of complainants to pay any money that might be found due, upon an accounting, from the nonsubscribing shares of stock which they hold. Equity appeals to the discretion of the court for justice. It has frequently been said that nothing can call forth the activity of a court of equity but "conscience, good faith, and reasonable diligence." Have complainants brought either of these ingredients into this case? Stockholders who seek protection against the acts of a corporation which are not directly prohibited by law, although in excess of its powers, must be diligent in order that the court may undo the wrong to them without doing equal or greater wrong to other persons. The jurisdiction of the court is purely equitable, and it must necessarily be governed by equitable principles. Parties who come into court asking equity must do, or offer to do, equity. As was said by Lord Justice Turner in *Great Western Ry. Co. v. Oxford, W. & W. Ry. Co.* 3 De Gex, M. & G. 359:

"If parties cannot come into equity without submitting to do equity, a fortiori they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done."

Are complainants in a position to complain of the acts and conduct of the board of trustees of the Sutro Tunnel Company, of Theodore Sutro, of the syndicate, of the executive and reorganization committees, or of the sale and disposition made of the property of the Sutro Tunnel Company? In giving the general history of the various transactions in which Mr. Sutro is the central figure, the

part taken by the complainants does not, perhaps, prominently appear. But a history of this case would be incomplete without a brief reference to their acts and active participation in the premises. In fact, the legal aspects of the case (to be hereafter considered) cannot be fairly determined without a clear and full understanding as to their conduct, as well as that of the respondents. If they favored, encouraged, and aided the various plans proposed by Sutro, and assisted in carrying them out, or, with full knowledge of all the facts, ratified and acquiesced therein, then the question arises whether they are not precluded from attempting to destroy the results which they, in common with other stockholders, assisted in creating. If it be true, as claimed by respondents, that the complaining stockholders are bringing this suit in their own individual interests, and that they participated in all the acts complained of, with knowledge of the facts, then they would be barred of any remedy. Cook, Stocks & S. § 730. If they actively participated in any fraud or conspiracy, if any is shown, with the respondents, then, whatever the rights of innocent stockholders may be, the complainants would not be entitled to any relief. The truth is that the persons who were actually defrauded by the transactions, if any fraud, actual or constructive, took place, would be the few stockholders who took no part in the proceedings, or had no knowledge thereof. As to the stockholders who took part in the fraudulent transactions, if there were any, they are particeps criminis, and are not entitled to any relief. As was said in U. S. v. Union Pac. R. Co., 98 U. S. 569:

"It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If the innocent stockholders are not parties here * * * they would get no relief by the suit."

But it is important, in determining the questions involved in this case, to know in what manner the complainants considered the conduct of respondents, as well as themselves, when the transactions complained of were in process of being carried out. It is essential to know who it is that makes the charges of fraud, conspiracy, and violations of trust and confidence, and to ascertain whether they knew of all the transactions complained of, and openly participated therein, or remained quiet, and made no objection until after they found out that the results attained were not such as they anticipated they would be.

Do they come into a court of equity with clean hands? Is it true that they have been on both sides of this controversy, waiting and watching to finally espouse the cause of the one with which, in their opinion, the greatest profit lies? Can it be said of them, as charged by the respondents' counsel, that, like their prototype in the old play written by Marlowe:

"And thus far roundly goes the business. Thus, loving neither, I will live with both, making a profit of my policy; and he from whom my most advantage comes shall be my friend."

Would they not repel any charge of fraud on their part? Would they not vigorously complain if any of the acts of fraud which they

allege against respondents should be charged against them? Who are they, what have they done, and what are their rights in the premises? Equity rule 94 provides:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Complainant Wheelan was not a stockholder during the time of the transactions complained of. He first bought 250 shares of the Sutro Tunnel stock, November 10, 1888, and subsequently, during the same month, bought 500 shares more. He is not, therefore, in a position, under the rule, to be a complainant in this case.

In *Hollins v. Railroad Co.*, 9 N. Y. Supp. 909, the court held that, where a plan for the reorganization of a railroad company is not prohibited by law, one who purchases stock, after the plan is adopted, from a stockholder who voted for such plan, cannot insist that it is ultra vires, and that he is not "in such a position as to ask a court of equity to enjoin the officers of the corporation or the corporation defendant, from doing what his predecessors, as owners of the stock, expressly authorized and directed the officers of the company to do." Complainants Symmes and Aron were stockholders at the time of the transactions of which they complain; and it is alleged in the bill:

"That this suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance; * * * that the managing trustees of said Sutro Tunnel Company are defendants herein, and are parties to the fraudulent combination and conspiracy hereinafter complained of by your orators; and that any demand upon them to institute this or any action in the name of said Sutro Tunnel Company, to accomplish the objects herein sought to be secured, would be wholly fruitless and unavailing. And your orators aver, upon and according to their information and belief, that the majority of the shareholders of said Sutro Tunnel Company have become shareholders in the Comstock Tunnel Company, a corporation defendant, and that they expect to receive bonds of said Comstock Tunnel Company in lieu of the bonds of the Sutro Tunnel Company to which they have subscribed; and that it is impossible to secure a vote of a majority of the shareholders of said Sutro Tunnel Company to remove said trustees, or to appoint new trustees of said Sutro Tunnel Company, or any trustees who would institute any action to obtain the relief prayed for by your orators; that the said majority of said shareholders, having subscribed to bonds of the Sutro Tunnel Company, have been led by the defendants who have engaged in said fraudulent combination and conspiracy, and as the result thereof, to believe that the said Sutro Tunnel Company has lost all title to its property and franchises under the foreclosure sale hereinafter described, and that the same was transferred to and purchased by the Union Trust Company in trust for the exclusive benefit of the members of the syndicate hereinafter described, and of the shareholders who were subscribers to the bonds of said Sutro Tunnel Company, to the exclusion of all other shareholders of said Sutro Tunnel Company; and

that the said majority of said shareholders will not coöperate with said Sutro Tunnel Company to secure its interests in any manner, unless this court shall first grant the relief sought by your orators in this suit."

These averments, having been sworn to, will be deemed sufficient to comply with the rule as to complainants Symmes and Aron.

Mr. Symmes first appears upon the books as a stockholder in the Sutro Tunnel Company on December 31, 1887, as the owner of 4,000 shares, which were purchased by him from the office of the company in New York. On November 10, 1888, he procured 50 shares more, and on July 23, 1890, 100 shares more were issued to him in San Francisco. On the hearing before the examiner he produced certificates for 3,600 shares of stock issued in the names of other parties, and testified that he held these shares of stock before this suit was commenced, and acquired most of the stock in the spring and summer of 1887, and had a small portion of the stock a year or two before. On the 30th of December, 1887, he subscribed for \$1,000 bonds, face value, on the A form, on 1,000 shares of stock, pursuant to the plan of the committee of November 15, 1887; and on November 27, 1888, subscribed on 3,650 shares of stock, at the rate of 55 cents per share, on the plan of April 27, 1888. In May, 1888, he had an interview with Mr. Sutro in New York, when he was fully informed of everything that had been done up to that time, and was then advised that it would be necessary to organize a syndicate, and perhaps pay it a large commission for subscribing the amount necessary to purchase the McCalmont mortgage. On August 6, 1888, the chairman of the reorganization committee addressed a letter to Mr. Symmes, in which, among other things, he detailed the plans of reorganization, informed him all about the syndicate and of its purchase of the mortgage, and offered to extend the time for further subscriptions at 50 cents until the 25th of the month. On September 3, 1889, three months before this suit was commenced, he received and accepted \$12.98, interest on his bonds at 4 per cent. per annum from date of his payments to January 1, 1888. He admits in his testimony that when he subscribed for the bonds he remembered reading the closing paragraph of the circular, that "a compliance with the terms of this circular will be regarded as your assent to the reorganization plan, with foreclosure if necessary," and further admits that he had knowledge of the transactions in relation to the efforts made to raise the necessary money; but he testified that Sutro did not tell him, and that he did not know, that Sutro was to receive \$100,000 as a fee, or that the executive and reorganization committees and attorneys Seligman & Seligman were to receive any fees, and that his first knowledge of Sutro's fee was obtained from the answer in this suit.

As to complainant Joseph Aron, the facts fully sustain the assertion of respondents' counsel that, "from the beginning of the transaction here disputed to the end of it, Mr. Aron was advised

of every step, every proposed change or modification of plan, and every hope and every fear of any of the parties connected with it." Aron was one of the incorporators of the Sutro Tunnel Company, was the president thereof from 1872 to 1874, and had over 10,000 shares of stock standing in his name on the books of the company. Mr. Lowengard, who was a member of the executive and of the reorganization committees, was Mr. Aron's confidential agent and broker, and acted throughout all the transactions in that capacity. He was one of the stockholders who first employed Mr. Sutro, and asked his aid, assistance, and advice. He is also made a respondent in this suit, and is charged by complainants with being one of the conspirators in the commission of the alleged frauds. There is not a scintilla of evidence in the voluminous record, nor is it claimed by complainants' counsel, that Lowengard ever exceeded his authority as Aron's agent, or that he at any time withheld from Aron any material fact or circumstance in relation to any of the transactions, whereby Mr. Aron was misled or deceived as to the true and actual condition of the affairs as they transpired. On the contrary, the record affirmatively shows that Mr. Lowengard informed Mr. Aron of every move that was taken in the efforts of Sutro and others to defend the foreclosure suit; to raise the money to pay off or purchase the McCalmont mortgage; the formation of the various plans adopted by the committees, and approved by the trustees of the Sutro Tunnel Company; the organization of the syndicate; the signing of the syndicate agreement, and the contents thereof; the purchase of the mortgage, and assignment thereof to the Union Trust Company,—and that Mr. Aron, with full knowledge of all the facts, consented to, ratified, and approved of all these transactions and negotiations, and of Mr. Lowengard's action and conduct in connection therewith.

Mr. Lowengard testified: That he interested himself in the affairs of the Sutro Tunnel Company, as the representative of Mr. Aron, in December, 1886. That he then cabled to Mr. Aron, in Paris, that Messrs. Baltzer, Stursberg, and others had organized a movement to put the interests of the Sutro Tunnel stockholders into the hands of Mr. Theodore Sutro, and received an answer: "We approve. Sign in your own name. Aron." That thereupon the firm of Palmer & Lowengard signed in their own names for 30,000 shares for Mr. Aron, and afterwards subscribed for 1,000 shares more. Mr. Aron did not want to sign in his own name because he had, or imagined he had, some special grievance against the McCalmonts and others, and wished to push that matter, whatever it was, whether the foreclosure suit was settled or not. On May 27, 1887, Mr. Aron wrote to Lowengard, with reference to the subscriptions, as follows:

"You can sign in your individual name if, as Stursberg says, no liabilities. You know me well enough that I would not dare to ask it of you if there was any liability to it. But as my agent I do not wish to sign it. By doing this all would be lost to me, as far as I am concerned, and I do not intend it to be so. I will be able to place lots of bonds, I am satisfied.

On November 30, 1887, in answer to a letter of Mr. Lowengard informing him that he would have to pay \$15,500 on his 31,000 shares, Mr. Aron wrote:

"First of all, let me assure you that I appreciate very much all the trouble, pains, &c., you have taken in my behalf. * * * You are in a committee representing 31,000 shares. You would like to see your proposition carried out; that is, anyway, as far as yourself are concerned, be one of the signers of the taking of the bonds. Well, I have been trying to do the very thing without doing it myself, as, for reasons explained, I wish to leave myself out of all direct subscriptions. You represent the 31,000 shares you have on hand. (You do not represent J. A.) This letter will reach you on or about the 10th of December. I shall cause, before this, to get the party whom I told you some time ago to cable you, 1st, 10%, then the balance; making, in all, \$15,500. This you will, of course, subscribe in the name of the party that will be mentioned to you, or you may even subscribe it, if you prefer, 'Ott Lowengard, agent.' In this way you, as member of the committee, will have subscribed, and I suppose this will be satisfactory to you. Again thanking you for your trouble, believe me to be at your disposal if I can be of any use to you in Paris."

On May 10, 1888, Mr. Aron wrote to Lowengard:

"What you have done about the 31,000 shares * * * has been approved."

In a letter written to Mr. Lowengard on the 30th of July, 1888, Mr. Aron referred to the large reduction made by the McCalmons for the benefit of the syndicate and subscribing stockholders, complains of the acts of Sutro, and declares that:

"The bonds will not be issued by the Sutro Tunnel Company because that company will be wiped out. The new company is not yet formed which can issue them. * * * Of course, neither I or anybody else can find any fault for a committee to buy a mortgage and foreclose it. But to do so with the aid and advice of the company's own counsel, own president, whose only authority is derived from the company, for the purpose of freezing out, &c., &c., seems to me preposterous and wicked. * * * Of course, \$100,000 fee to Theodore Sutro could not be paid by the S. T. Co.; only the profit of a scheme could do it."

The record shows that, when this letter was written, Mr. Aron had subscribed on 31,000 shares for \$31,000 face-value bonds, and paid \$15,500, upon the plan which he denominates a "preposterous and wicked scheme." This letter, which, like the Parthian arrow, pierces as he who casts it flees, clearly shows, by a careful reading between the lines, that in Mr. Aron's opinion it was only preposterous and wicked because some one by the name of Sutro was connected with it. Nobody, not even Mr. Aron, could find any fault "for a committee to buy a mortgage and foreclose it." That would be an honest, straightforward, business transaction, provided Mr. Sutro did not get any fee. The entire letter was evidently written by Mr. Aron for the purpose of casting discredit upon the conduct of Sutro, and at the same time to indorse everything that was done by his own agent, in order that he, as principal, might profit by the transaction. When complainants Symmes and Aron subscribed for their stock, with full knowledge of all the facts, they did not think they were guilty of any fraud, or that they were encouraging any conspiracy to defraud any stockholder of the Sutro Tunnel Company of his property or rights. They con-

sidered that all the proceedings that were taken in the premises were fair, legitimate, business transactions. They favored the plans, encouraged them, and aided them by their subscriptions and their money, when they knew or believed that a new company would have to be organized to issue the bonds, and that the Sutro Tunnel Company would be wiped out of existence. Why Mr. Symmes retained a portion of his stock in the Sutro Tunnel Company, upon which he did not subscribe, does not appear. But the reason why Mr. Aron did not subscribe on all his stock has already been referred to, and is made perfectly clear. He wanted to save some for the purpose of enabling him to have, as he supposed he would thus have, a legal standing against the McCalmonts, Kidder, Peabody & Co., and Adolph Sutro in relation to their prior connection and conduct in the affairs of the Sutro Tunnel Company, for the assertion of some rights of which he thought, and evidently still thinks, he had been unfairly or fraudulently deprived. But, whatever their motive, purpose, or object may have been in retaining a portion of their stock in the Sutro Tunnel Company without subscribing thereon to the scheme of which they now complain, it seems perfectly clear to me that, having subscribed upon a large proportion of their shares of stock, and having, with full knowledge of all the facts, ratified, acquiesced, and approved of the plans adopted by the executive and reorganization committees, and of everything that was done by the syndicate, except the payment of a fee to Sutro, and waited for a period of 18 months after the signing of the syndicate agreement before taking any action to protect their nonsubscribing shares of stock, they are not in a position to maintain this suit. Although it is averred in the bill that this suit is brought for all other stockholders who did not subscribe, it is a significant fact that not a single other nonsubscribing stockholder has, so far as the record shows, complained of any deprivation of his rights, or offered to come forward and pay his proportion of the expenses of this litigation, or claimed any privilege to share in its results.

In *Berry v. Broach*, 4 South. 117, the supreme court of Mississippi held that it was within the power of a majority of the stockholders to make the sale of the property of an incorporated company doing an unsuccessful and unprofitable business, and that, even if such sale was voidable by the nonparticipating stockholders, a stockholder who participated in the sale could not avoid the contract, which had been ratified by the acquiescence of the other stockholders.

In *Matthews v. Murchison*, 15 Fed. 691, the court held that a bondholder of a former organization had no standing in a court of equity to dissolve a new organization of a railroad company for which her agent had voted bonds, and to enforce a different plan, where it appears that she had known of what her agent was doing and did not dissent; but had accepted her share of the bonds of the new organization, and so acted as to induce others to believe she had acquiesced in the new organization. There the old company had made default in the payment of its debts, and its property was sold, and bought in by the first mortgage bondholders. The

old corporation was dissolved, and a new one formed, to which the property and franchises of the old corporation were conveyed. There, as here among the stockholders, there had been consultation among the bondholders respecting the sale and purchase of the property, and the plan of reorganization to be followed when the purchase was made; and it was in respect to these plans that the complainant filed her bill. It appeared that the complainant received her proportion of bonds in the new organization without objection; yet, according to the averments in her bill, she knew the company was illegally organized, and had no power to issue either bonds or stock. French had acted as her agent, and, although she claimed that French had exceeded his authority, it was shown that she knew of his acts and had ratified the same. Upon this state of facts the court said:

"To come into a court of equity, and ask it to set aside the organization of the new company, under these circumstances, and to take its property out of its hands, and put into those of a receiver, is little else than monstrous. Every act of complainant and her husband after the vote of French led the public and the committee of purchase and organization to suppose they acquiesced. The law and good conscience required that if they disapproved French's conduct, and denied his power to act as he had done, then to say so at once, and not mislead everybody by dealing in the worthless securities which they secretly meant to repudiate. Whether this is an estoppel or a ratification is of little consequence. Not to regard it as one or the other would work the greatest injustice to the other bondholders. We think this decides the matter, and is fatal to complainant's claim for a receiver, now, or at any other time, under her bill of complaint."

In *Kent v. Mining Co.*, supra, the court said:

"Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, then it is not needed that there be an express assent thereto on the part of stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and, when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity."

In *Rabe v. Dunlap*, 25 Atl. 962, the court of chancery of New Jersey said:

"Where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances,—to wait until he can see whether such act is likely to result in profit or loss,—but, to be entitled to the summary interference of the court, he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed or greatly impaired if the act be nullified or undone. Or, stated with greater brevity and in its simple essence, the rule is this: If he wants protection against the consequences of an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others. * * * This principle must control the decision of the present application. No argument is required to show its pertinency. When the leading facts of the case are recalled, it applies itself. Whether the com-

plainants remained inactive to speculate upon the chances, intending to abide by the consolidation if it resulted in benefit, and, if not, to try to undo it, it is manifest that they acted precisely as they would have done if such had been their intention."

See, also, *Kitchen v. Railroad Co.*, 69 Mo. 225, 261; *Thornton v. Railway Co.*, 81 N. Y. 462; *Ashhurst's Appeal*, 60 Pa. St. 290; *Watts' Appeal*, 78 Pa. St. 370, 394; *McGeorge v. Improvement Co.*, 57 Fed. 262, 268; *Streight v. Junk*, 8 C. C. A. 137, 59 Fed. 323; *Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 U. S. 13; *Indianapolis Rolling Mill v. St. Louis, etc., R. Co.*, 120 U. S. 256, 7 Sup. Ct. 542; *Cook, Stocks & S.* §§ 161, 729, 732; *Mor. Priv. Corp.* §§ 262, 264, 624, 631.

These views virtually dispose of this case; but in view of its magnitude, and of the many charges of fraud that have been made, it is deemed proper to review the case upon its merits.

4. The only debatable question is whether the facts show any constructive fraud upon the part of Mr. Sutro or his associates, or any violation of trust or confidence of such a character as requires a court of equity to interfere, and declare the transactions, however innocent they may have been intended, to be fraudulent in law. Constructive fraud is such as the law infers from the relationship of the parties and the circumstances and conditions by which they are surrounded, regardless of any actual dishonesty of purpose or evil design. There are certain well-defined principles, which have become axiomatic in the jurisprudence of this country, with reference to the acts, conduct, and duties of the directors, trustees, and officers of a corporation in their relations with the corporation and with its stockholders. The officers of a corporation are trustees for the creditors and stockholders; and if an officer thereof, by means of his power as such, secures to himself any advantage over other stockholders or creditors, equity, with its strong arm, steps in, and treats the transaction as void or voidable, and will charge him as a trustee for the benefit of the innocent and injured parties. The officers, being in a place of trust, are, of course, obliged to execute their duties with fidelity, not for their own benefit, but for the common benefit of all the stockholders of the corporation. The directors and trustees of a corporation hold a fiduciary relation to the stockholders. They are intrusted with the management and control of the property of the corporation for the benefit and advantage of all the stockholders, and are therefore necessarily concluded from doing any act, or transacting any business, in which their own private interests or individual business will come in conflict with the duty they owe to each and every stockholder of the corporation. The same person cannot act for himself for gain, and at the same time, with reference to the same thing, act as the agent of others whose interests are conflicting. "No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other."

Equity does not, as a general rule, permit persons occupying fiduciary relations to be placed in such a position that the influence of personal motives is liable to be so strong a temptation as to

overcome their duty, or have a tendency to lead them to a betrayal of their trust. Directors or trustees are not allowed, by the rules of equity, to transact any business in relation to the corporate property with themselves, or to acquire any interest therein for their individual advantage, to the detriment of the stockholders of the corporation. It is not, however, so much the profit to themselves, as it is the detriment to others, that furnishes the ground for setting the transaction aside. The officers of a corporation are always required to exercise the utmost good faith in all their dealings with their cestui que trust, and should be ready at all times to explain all that they have ever done in connection with their management of the trust property. The books are full of cases sustaining these general principles; and in all such cases the rules should be rigidly enforced, so as to deprive them of all the benefits and advantages which they obtained, by setting aside the transactions, and disarming them of all legal sanction or protection for their acts.

But the question here to be decided is whether the facts presented by the record are of such a character as to bring this case within the application of these principles. The facts speak for themselves. They must be taken in their entirety, and weighed and considered with reference to all the conditions and surroundings of the Sutro Tunnel Company. Suit had been commenced to foreclose a mortgage against its property for about \$1,500,000. There was no real defense to the suit. It owed the money, and its property was subject to the lien of the mortgage. A receiver had been appointed. An attorney had been employed. Testimony had been taken by the owners of the mortgage. Interest and costs were rapidly accumulating. The time for final hearing was near at hand. The stock of the company had depreciated in the market. The company had no ready money, and no means of raising sufficient to meet the demands of the suit. The question of levying an assessment was not even mooted. The trustees then in office were friendly to McCalmont Bros. & Co. They evidently and honestly believed that any attempt to levy an assessment would be useless, or that it would doubtless lead to litigation; and staggering, as the company then was, under heavy burdens, further litigation meant disaster to the company, if not the utter destruction of its property. This was the condition when Mr. Sutro first appeared to take hold of the company's matters, and make an effort to save the life of a tottering corporation which was overwhelmed in debt far beyond the market value of its property. These conditions must be kept constantly in mind in determining whether his acts were fair and open, or secret and fraudulent, in the various transactions that thereafter took place. There was a general belief among some of the stockholders living in New York City that the trustees were not inclined to defend the foreclosure suit or in any manner to protect the corporation, and were also of opinion that the property of the company, although heavily incumbered with a mortgage lien, was of great value, and that some

united effort ought to be made to try and save it from foreclosure and sale. It is wholly immaterial whether their belief was well or ill founded. It was with that object in view—a laudable one, to say the least—that Mr. Sutro was consulted by them, which fact afterwards led to his employment as counsel for the company.

The mere fact that an officer deals with the corporation in business transactions does not, of itself, make the transactions fraudulent in law. If any officer of the corporation, after the foreclosure suit was commenced, had had the money, and was disposed to do so, he could have made a loan to the corporation in order to extricate it from its existing difficulties, if the transaction was open and free from actual fraud, without placing himself under the ban of prohibited acts. In *Oil Co. v. Marbury*, 91 U. S. 589, the court said:

"While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

See, also, *Hotel Co. v. Wade*, 97 U. S. 13; *Warfield v. Canning Co.* (Iowa) 34 N. W. 467; *Gorder v. Canning Co.* (Neb.) 54 N. W. 833; *Duncomb v. Railroad Co.*, 84 N. Y. 191, 88 N. Y. 1; *Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Cook, Stocks & S.* § 661.

The rule in relation to constructive fraud is founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong. It was adopted to secure justice, not to work injustice; and for this reason limitations and qualifications have been made upon its operation and effect which are well calculated to guard it against evil results as inequitable as those it was designed to prevent. Morawetz, in his work on *Private Corporations* (volume 1, § 521), speaking of the qualification of the rule, says:

"But the rule referred to is not an arbitrary one. It is founded on reason, and should not be applied without regard to the circumstances of the case. A merely nominal or a naked legal interest in the subject-matter of a transaction would not disqualify an agent from representing his principal in the transaction, if there is no temptation to the agent to obtain an advantage at the expense of the principal."

Any officer acting in good faith, for the benefit of the corporation, certainly had the right to use his official power and influence in endeavoring to induce other persons to give such aid as would relieve, or tend to relieve, the corporation from its financial embarrassments, or to secure a settlement or compromise of the pending litigation; and it was within the legitimate and lawful power of the board of trustees to employ any person—even one of their own members, if deemed advisable so to do—to act as agent or attorney of the corporation, and request him to devote his time, energy, and

ability, and to use all necessary and honorable means, to the accomplishment of such a purpose, and to agree in advance to pay him a reasonable compensation for his services. *Bagaley v. Iron Co.*, 146 Pa. St. 478, 23 Atl. 837; *Brown v. Silver Mines*, 17 Colo. 421, 30 Pac. 66; *Mor. Priv. Corp.* § 508; *Pew v. Bank*, 130 Mass. 391, 395; *Construction Co. v. Fitzgerald*, 137 U. S. 99, 111, 11 Sup. Ct. 36.

Mr. Sutro, as before stated, had been employed by a number of stockholders to look after their interests. He ascertained that it would be difficult, if not impossible, to accomplish anything in their behalf without having the aid of the trustees, and being clothed with the authority of the corporation to act. He so notified the stockholders, and they, with him, immediately commenced active efforts to elect a new and more favorable board of trustees. There was no fraud; no conspiracy. It was their open and avowed purpose to save the company's property if it could possibly be done. A majority of the stockholders deemed it advisable to make a change in the management. Surely, they had the unquestioned right to do this. The rule is well settled that a majority of the trustees have the power to control all questions relating to the affairs of the corporation as long as their acts are not *ultra vires*. As is said in *Cook on Stockholders* (section 684):

"The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. Such, also, is the rule with the majority of the stockholders in meeting assembled. An act *intra vires* and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act."

See, also, *Road Co. v. Jewell*, 8 B. Mon. 144.

Mr. Sutro was regularly elected as counsel of the corporation, and his salary agreed upon, at the annual election held March 28, 1887. He thereafter continued his efforts in behalf of the stockholders and the corporation. He formulated the subscription and bond plans of November 15, 1887, and of April 27, 1888. The trustees were at all times advised with reference to these plans, and to his efforts to induce stockholders to subscribe thereto, and of his efforts to secure a reduction of the mortgage debt; and with full knowledge of all the facts they indorsed, approved, and ratified all his acts in relation thereto. The principal contention of complainants is that he withheld the facts in regard to the syndicate agreement until the last moment, and that Mr. Wilson, of counsel for the Sutro Tunnel Company, was not fully advised in regard thereto when he joined with Mr. Sutro and Mr. Tauszky in writing the letter to the trustees, recommending the proposed settlement, which led to the action of the board consenting to a decree upon the terms proposed. Mr. Wilson had for more than a quarter of a century maintained his position in the front ranks of the legal profession in the city of San Francisco. He was a man of well-known probity of character and of unquestioned legal ability. His advice was naturally calculated to have great weight, if not controlling influence, in the final decision and action of the trustees. Complainants' counsel, in commenting upon the facts, said:

"We do not want to be understood to say that Mr. Sutro could control Mr. S. M. Wilson in a matter of this kind; but that he did not submit to Mr. Wilson this syndicate agreement is painfully evident."

Is it possible that knowledge of this syndicate agreement, and of its terms, was withheld from Mr. Wilson? The knowledge of the trustees, of Mr. Ames, the secretary, the acts of Lillienthal, the employment by him of Mr. Jarboe, the reasons given for his employment, the character of Mr. Wilson, the positive testimony of Mr. Sutro, and all the facts and circumstances in connection with the action of the trustees, are such as to convince the court that Mr. Wilson was fully advised in regard to the terms and conditions of the syndicate agreement when he signed the letter. The trustees knew what they were doing when they consented to the entering of the decree. They knew what the terms of the syndicate agreement were. They knew it was the only hope—the only chance—to get a further extension of time for 90 days. If the money could be raised in that time from the stockholders, the Sutro Tunnel Company could retain its life. If it could not be raised, its existence would come to an end. A new company would have to be formed. Reorganization was certain to take place. The stockholders who did not subscribe would lose all their interest in the property. All these things were painfully evident to the board of trustees when they acted in the premises. Complainants Symmes and Aron also knew what the result would be. With full knowledge of all the facts, they acquiesced and permitted the result to be accomplished without objection, and without taking any steps to prevent it.

No portion of the money paid by the syndicate for the purchase of the mortgage belonged to the Sutro Tunnel Company. When the mortgage was transferred and assigned to the Union Trust Company, it belonged absolutely to the subscribing stockholders and the outsiders who constituted the syndicate, subject only to the right of the nonsubscribing stockholders to come forward within 90 days and save their stock if so inclined. It is argued by complainants that in everything that was done by Mr. Sutro he was working to secure his contingent fee. This may be conceded. It would be strange, indeed, if he did not expect to get a good fee for his services. But it is claimed that the fee agreed upon and promised by a majority of the trustees, and allowed by the syndicate, was excessive, exorbitant, and outrageous. Could not the corporation have well afforded to pay him the sum of \$100,000 if he had succeeded in carrying out his object of getting sufficient funds from the subscribing stockholders to the plans which he had formulated? The amount of the fee was large. The work to be done was stupendous. Who would have undertaken it without the hope or promise of a suitable reward? The work was difficult, and required extraordinary efforts. It demanded all his time, energy, and ability, as well as "his fertility of resources," so often referred to by counsel. Mr. Sutro received no more advantage or benefit from the syndicate agreement than had been promised him by the trustees if his other plans could have been carried out. The syndicate simply agreed to pay him the same amount of money that had been

originally promised by the trustees. The subscribing stockholders evidently deemed that this was just, right, fair, and proper in the premises. Mr. Lowengard, on the 31st of August, 1888, in answering a letter received from Mr. Aron, complaining of Sutro, and especially of the large fee which he was to receive under the terms of the syndicate agreement, expressed views which are directly applicable to this question, as follows:

"My Dear Mr. Aron: Your letter of July 30th has duly come to hand, and, according to your wishes, I have shown it to all the members of the reorganization committee. All of them feel, like me, that your antagonism against everybody of the name of Sutro must make you look at the doings of Mr. Theodore S. in a strongly prejudiced way. Whilst it is not necessary for me to enter into all the details, I only wish to submit to you the question, what would have become of the Sutro T. Co. if Theodore S. had not, a year and a half ago, begun to fight McCalmonts in the interests of the stockholders? The answer is very simple. The property would have been foreclosed long ago, in the interest of McCalmonts only, without even the attempt of a defense on the part of the company, whose lawyer Mr. Theodore Sutro was not at that time, and without any of the stockholders having had a chance of preserving their rights in the old or a new company; for you must admit that if a full decree had been entered then, with compound interest, and in view of additional 18 per cent., court and interest expenses, there would not have been the slightest probability that anything like the necessary amount could have been raised from the widely-scattered stockholders. Mr. Sutro was the man who took up the whole matter; and if, owing to the stubbornness and unwillingness of many stockholders, he may not succeed in saving the old company in its present form, he will have certainly managed to preserve the property for those shareholders who were willing to bring some sacrifices towards that end (if it can be called a sacrifice at all, when you give people a probably very good interest-bearing security for their money advances.) That Mr. Sutro wanted to make money for himself out of the matter, can you blame him for that? Was he under any obligations to anybody to defend the suit? I agree with you that the amount is very large indeed; but he has devoted his entire time to this matter for more than a year and a half, and, moreover, a majority of the members of the old board had promised him the amount at the beginning of his attempt to do something towards saving the shareholders. He has always maintained, and still clings to the hope, that the old company ought to be kept alive if possible. If he, nevertheless, now consents to a decree, it is simply because he—and every lawyer whose opinion I have heard in the matter—knows very well that there is no valid defense; so that I understand even the court has advised some such plan as is being carried out. Still more time for the delinquent stockholders (90 days), and a reduction in the decree to the simple interest basis, is a valuable consideration, and Mr. Sutro has strenuously fought for that against the interest of the syndicate. I and all the members of the committee fail to see how bona fide shareholders can claim to receive ampler time or facilities to protect their property. Originally, nobody thought it would be necessary to call in the assistance of a syndicate, who naturally want to make a big profit, but it was expected that the shareholders themselves would protect their property. Had they done so, that would, of course, have saved a large amount of money to the new or old company. But it is of no use to blame Mr. Sutro for the course of events."

Whatever criticism may be indulged in as to Mr. Sutro's actions and conduct, it cannot be fairly said that he obtained any undue or improper advantage by virtue of his position as counsel, trustee, or president of the Sutro Tunnel Company, to the detriment of any of the rights of the subscribing stockholders. He constantly advised with the trustees; notified them of every step he was tak-

ing; informed them of what he had done, what he desired to do, and hoped to be able to accomplish; and consulted with other officers of the company, some of the leading stockholders, and various members of the executive and reorganization committees, and with other attorneys for the company as to what was best to do. He earnestly protested when his plans were interfered with, and frankly stated that such interruptions and interference would result, if continued, in the loss of the property of the corporation, and that a syndicate would have to be organized with outsiders, to whom a bonus would have to be paid, and subscribing stockholders; that he wished to avert this if possible, and asked for the confidence, support, and assistance of the trustees, and finally, when all his efforts in that direction failed, he submitted and recommended the syndicate agreement for approval, with the results before stated. Without specifically noticing other points discussed by counsel, or further comment upon the evidence, it is deemed sufficient to say that, after a careful and thorough examination of all the testimony contained in the voluminous record, the mind of the court has been irresistibly led to the conclusion that no actual fraud or conspiracy has been established against any of the respondents; that the acts of Sutro, of the executive and reorganization committees, and the board of trustees of the Sutro Tunnel Company were openly done, with full knowledge, and with as much notice as could reasonably be given to all parties interested; that no advantage was taken by any of the respondents who held fiduciary relations with the corporation, to the detriment or injury of the complainants; that there was no betrayal of trust or violation of confidence; that the facts are not of such a character as to raise any question of a constructive or resulting trust, or to bring the case within the application of the rule as to constructive fraud, and are insufficient to justify this court in granting the relief prayed for.

These conclusions are, in my opinion, fully sustained by the authorities. Morawetz, in his work on Private Corporations (section 812), says:

"The term 'reorganization' is commonly applied to the formation of a new corporation by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale. The result of a transaction of this kind is to form a new corporation to carry on the business of the old company upon a new basis, free from its debts and obligations, except to the extent that they have been expressly assumed."

Cook, in his work on Stocks and Stockholders (section 654), in treating of the same subject, and of the purchase of the corporate property by a majority of the stockholders, says:

"Accordingly, it is found to be expedient, during or previous to a railway foreclosure suit, for the parties interested in the property, whether they be the stockholders or bondholders, or mere outsiders, to formulate and propose to the bondholders and stockholders a plan of reorganization whereby, after a foreclosure sale, the purchaser of the property will allow the said bondholders, and often, also, the stockholders, to come into a new company, which shall own the property so purchased. It has been found necessary,

in most cases, to reorganize on some such plan, in order to quiet the defense to the foreclosure, or to raise the funds required in the reorganization, or to obtain a charter from the state for the reorganized enterprise, or to preserve intact the system of railways, branches, leases, and connections, which give value to the property foreclosed. This method of effecting a reorganization is legal and valid, since it involves an ordinary foreclosure of a mortgage, and an agreement of interested parties to purchase at the foreclosure sale. The foreclosure cuts off all rights of the old corporation and stockholders to the property foreclosed, and also the rights of the bondholders whose mortgage is foreclosed. The only rights which any of these parties have after the foreclosure are such rights as the plan or contract of reorganization gives them. By this plan, generally, the old stockholders are allowed to come into the new corporation upon the payment of a fixed sum for each share of stock held by them. The bondholders are generally allowed to exchange the old bonds for new ones in the new corporation, on different terms of interest and times of payment. Plans of reorganization such as this are favored by the courts. There must, however, have been no fraud or collusion exerted, whereby the property at the sale brings less than its real value. The courts uphold purchases by the reorganization company for the reason that thereby a better price is obtained for the property than could probably be obtained otherwise. Thus it has been held that a purchase of corporate property by a majority of the stockholders at a foreclosure sale, if made in good faith and without oppression or undue advantage being taken of the minority, is legal and valid. It is not constructive fraud."

In *Shaw v. Railroad Co.*, 100 U. S. 612, the court said:

"The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required, without asking the courts to engage in the business of railroad building. The result, so far as encumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution. The bare fact that some of the trustees were holders of bonds secured by their trust is not sufficient, of itself, to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that from the beginning their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees, when personally interested, should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done; but when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts."

In *Hayden v. Directory Co.*, 42 Fed. 875, the stockholders of a corporation which was financially embarrassed resolved to wind up its business, and authorized the trustees to sell the property to pay debts. At a sale duly advertised, of which the stockholders had notice, the property was struck off to the secretary, who bought it in the interest of a combination of stockholders, formed in good faith, for their own protection. The property was sold for all it was worth, and the purchase by the secretary was approved by all of the stockholders except the complainant. The court held, it not being shown that the action of the majority was

oppressive or in bad faith, that the sale should not be set aside, and the injunction asked for was refused. In the course of the opinion, Wallace, J., said:

"The real question in the case is whether the majority stockholders were acting in good faith towards the complainant as a minority stockholder in authorizing the sale of the property, and its purchase by the new corporation. The right of the majority stockholders of a corporation established for manufacturing or trading purposes to wind up its affairs and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized."

In *Hotel Co. v. Wade*, 97 U. S. 22, the court said:

"Differences of opinion existed among the stockholders as to the best way of raising the money, and prior discussions had not tended to quiet the dissensions; but the stockholders at the meeting referred to decided to adopt the proposition which was carried into effect. Beyond doubt, some of the conditions of the proposition were somewhat peculiar; but the proofs show that it was openly submitted to the stockholders, and that they adopted it by a majority of their votes; that the bonds were subsequently issued, and that they were voluntarily secured by the mortgage or trust deed set forth in the record. * * * Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the evidence fails to support the proposition that the bonds and mortgage are invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred; and it has never been held that the arrangement was invalid, where it appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence."

In *Harts v. Brown*, 77 Ill. 226, the court held that where a company is insolvent, and has no means to discharge its debts, and the directors give all the stockholders an opportunity of making advances to relieve the company of its embarrassment, which they refuse to embrace, the directors will have the right to purchase the indebtedness, and acquire title to the corporate property, by enforcing its sale under a deed of trust given to secure such indebtedness, and the other stockholders will have no right to complain. Among other things, the court said:

"The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence; but this they refused to do, and, as it could not be preserved and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale. They were under no moral or legal obligation to advance their own means, pay the debt, and preserve the property for the use of the other shareholders, who had declined to join in making pro rata advances to relieve it from debt. Appellants seem to have acted fairly, as they purchased at a sum sufficient to pay all the debts of the company. They chose to do so rather than make an effort to obtain all the property for the debts secured by the trust deed and the certificate of purchase. On the contrary, they gave many thousand dollars more, that honest creditors might be fairly paid, and the company wrong no one. This does not have the appearance of fraud. Appellants had faith that the enterprise could be carried out with success, and that they could thus save the means they had advanced; but appellees, by the course they adopted, manifested an entire want of confidence in its ultimate success. They were even offered the opportunity to come in for a considerable period afterwards, and share in the new enterprise, by advancing a ratable portion of the means, but they all declined;

but, when success was achieved, they then saw the advantages they had lost, and then sought to set aside the sale, and have the property restored to the old company, and thus reap the benefits arising from the enterprise and means advanced by others. To do so, they should show fraud or a want of power to make the sale or the purchase by appellants, neither of which has been done."

See, also, *Leavenworth Co. Com'rs v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688, 707, 10 Sup. Ct. 708; *Osborne's Adm'x v. Monks (Ky.)* 21 S. W. 101; *Kitchen v. Railroad Co.*, 69 Mo. 224; *Oil Co. v. Marbury*, supra; *Appeal of Shaaber (Pa. Sup.)* 17 Atl. 209; *Sperling's Appeal*, 71 Pa. St. 20; *Bristol v. Scranton*, 57 Fed. 70; *Barr v. Plate-Glass Co.*, 6 C. C. A. 260, 57 Fed. 86, 97.

Complainants' bill should be dismissed, and judgment entered in favor of respondents for their costs. It is so ordered.

MARION PHOSPHATE CO. v. CUMMER et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1893.)

No. 177.

1. APPEAL—REQUISITES OF BILL OF EXCEPTIONS.

A record containing the evidence in a case tried by the court without a jury, the findings, and requests and refusals to find, with occasional entries stating that plaintiff excepts, but not in form stating the ruling, the exception, or the grounds of either, although certified as a bill of exceptions, is not sufficient to permit a review of rulings on admission or rejection of evidence or findings or refusals to find.

2. PLEADING—VERIFICATION.

Verification of a plea, in an action against partners and a corporation, by one shown by the record to be, individually and as a member of the partnership and agent of the corporation, the principal and active defendant, is a sufficient compliance with the requirements of Rev. St. Fla. § 1062, and a rule of court that pleas shall be sworn to either by the defendant or his agent or attorney.

3. SAME—LEAVE TO FILE SPECIAL PLEAS.

An order overruling a motion to strike special pleas may be taken as leave granted to file them, if leave is necessary.

4. CIRCUIT COURT OF APPEALS—APPELLATE JURISDICTION.

Objections to pleas that an exhibit was made part thereof by reference, and that no sufficient bill of particulars was attached, are not reviewable by the circuit court of appeals.

5. PLEADING—SET-OFF—DEMURRER.

Under Rev. St. Fla. § 1040, which provides that no pleadings shall be deemed insufficient for any defect which heretofore could only be objected to by special demurrer, an objection that pleas of set-off of unliquidated demands arising out of contract, which sections 1069, 1075, and 1058 permit to be general, as in common counts in assumpsit, are not sufficiently specific, cannot be taken by demurrer; the remedy is by motion for more detailed bills of particulars.

6. TRIAL BY THE COURT—FINDINGS OF FACT.

Upon issues presenting the questions whether plaintiff and defendants were in default on a contract between them, each claiming a large recovery from the other, findings that defendants had substantially complied with the terms of their contract; that, so far as there had not been full compliance, it was the fault of plaintiff; and that a specific amount is due from plaintiff to defendants under the terms of the contract,—are sufficient to sustain a judgment for defendants for such amount.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action by the Marion Phosphate Company against F. D. and W. M. Cummer, copartners trading as F. D. Cummer & Son, and the F. D. Cummer & Son Company, a corporation, in which two separate actions, brought by plaintiff against defendants in a court of the state of Florida, and removed to the United States circuit court, were consolidated. On trial by the court without a jury, judgment was rendered for defendants. Plaintiff brought error.

John C. Cooper and Alexander R. Lawton, for plaintiff in error.

H. Bisbee, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The Marion Phosphate Company, plaintiff in error, brought two suits against F. D. and W. M. Cummer, copartners under the firm name of F. D. Cummer & Son, and the F. D. Cummer & Son Company, a corporation organized and existing under the laws of the state of Ohio, defendants in the circuit court of Marion county, state of Florida, which suits were afterwards removed to the United States circuit court for the northern district of Florida. One of the said suits, as originally brought, was to recover the amount of a certain draft for \$3,000, paid by plaintiff to defendants. The other suit was brought to recover the amount of \$6,000 under the general counts in assumpsit. In these suits, before removal, the defendants, pleaded the general issue, "Never was indebted." After the cases were removed to the United States circuit court, the defendants filed in each of said causes five additional pleas; the first of which was a plea of set-off, setting forth that the plaintiff was indebted to the defendants in a sum much greater than plaintiff's demand against defendants. To this plea the contract between the plaintiff and the defendants (which is the real subject-matter of the suits, and which relates to the construction and reconstruction of certain machinery) is attached, and made a part thereof by reference to the same as an exhibit to the plea. The remaining additional pleas were pleas of set-off, in substance upon the same allegations as are usually contained in the common counts of a declaration, to wit, respectively, for work and labor performed at plaintiff's request; for goods, wares, and merchandise sold and delivered to the plaintiff; for work done and materials furnished to plaintiff; and for money paid for plaintiff, and at his request. To all the additional pleas was attached an exhibit, giving in detail the particulars upon which defendants relied. The plaintiff filed a motion to strike the five additional pleas on five grounds, as follows:

"First. The said pleas were filed without leave of court first obtained. Second. The said pleas purport to be the joint pleas of all the defendants, but are not sworn to by any officer of the defendant F. D. Cummer & Son Company. Third. The said second plea attempts to make an alleged contract, marked 'Exhibit A,' a part thereof by reference, which is not permissi-

ble in common-law pleas. Fourth. The third, fourth, fifth, and sixth pleas have no sufficient bill of particulars accompanying same, particularly the item thereof: 'August 13th, to contract, \$10,000,' to require replication or other pleading by plaintiff. Fifth. The said pleas are inconsistent with defendants' plea, already filed."

This motion being overruled, the plaintiff filed a demurrer to these pleas on the ground that they were bad in substance, specifying as follows:

"First. Said second plea is vague, uncertain, and indefinite in not setting forth in the plea the terms of the contract referred to, but attempts to adopt same by reference to an exhibit. Second. Said second plea fails to state what payments, if any, plaintiff was to make, referred to in said plea. Third. Said second plea is insufficient and uncertain in that it does not set out what the 'great damage' consists of, claimed to have been suffered by defendants. Fourth. Said second plea sets up alleged damage not subject to offset. Fifth. The third, fourth, fifth, and sixth pleas are vague, uncertain, and indefinite in not setting forth what the work, labor, goods, merchandise, and materials and moneys consisted of, and the terms and conditions of defendants under which defendants did such work and furnished said merchandise and materials. Sixth. Said third, fourth, fifth, and sixth pleas attempt to set up in general terms alleged claims against plaintiff, but should set forth the facts and conditions and particulars of said claims in said pleas."

This demurrer was overruled, whereupon the plaintiff, by leave of the court, filed five additional counts to its declaration to recover from the defendants for alleged breaches of contract on their part, and joined issue on all the defendants' pleas.

The two suits having been consolidated on motion of the plaintiff, and being fully at issue, the following stipulation was filed:

"Two cases as consolidated. The plaintiff and defendants, by their respective attorneys, in the two above-entitled cases as consolidated and tried together, do hereby waive a jury in said causes so consolidated and tried together, and that the same be heard and determined by the court without a jury, and that the court shall make special findings of the facts and of the law, and pass upon all questions and requests of counsel, noting his decision in writing, and making his findings of law and fact and action on requests of counsel matter of record and part of the record in said cause."

The cause having been heard under this stipulation, the court rendered the following judgment:

"The Marion Phosphate Company v. F. D. Cumber and W. M. Cumber, Partners Using the Firm Name and Style of F. D. Cumber & Son, and The F. D. Cumber & Son Company.

"Findings of Facts Requested by the Defendants.

"The court finds for the defendants, and assesses their damages at seventy-two hundred and sixty-five dollars and fifty cents (\$7,265.50). Now, therefore, it is ordered and considered by the court that the defendants F. D. Cumber and W. M. Cumber, partners using the firm name and style of F. D. Cumber & Son Company, do recover of and from the plaintiff, the Marion Phosphate Company, the sum of seven thousand two hundred and sixty-five dollars and fifty cents for their damages in this behalf sustained, and the further sum of \$308.35 for their costs, fees, and expenses in this their suit, together with 8 per cent. interest until paid; for which let execution issue in due course of law."

—Whereupon the plaintiff in error brought the cause to this court for a review upon 81 specified assignments of error, all but two of which relate to rulings by the court on the admission or re-

jection of evidence during the progress of the trial, and on the findings and refusals to find of the court upon both law and fact, and seem to be based upon the assumption that there are in the record bills of exceptions which so present and preserve the questions of law involved as will enable this court to review the errors complained of.

We find in the record (page 151) that following the stipulation waiving a jury, as given above, is this entry: "And thereupon, the said cause as consolidated being thus submitted to the court for trial, the following evidence was taken in said cause, and the hereinafter stated findings of facts and judgments were had therein, to wit." Then follow the contract and certain testimony, covering 421 printed pages of the record, scattered through which there are occasional entries like these: "Plaintiff excepts;" "Defendants except;" "Plaintiff, by his counsel, takes exception to the ruling of the court;" "Plaintiff, by counsel, excepts;" "Plaintiff's counsel excepts." Following the testimony there is a general finding of the court in favor of the defendants, and special findings of fact and conclusions of law as requested by defendants, to each and every one of which there is an entry in these words: "To which said opinion and finding of the court the said plaintiff, by his attorney, did then and there except." Following the findings of court it appears that the plaintiff's counsel requested the court to find 20 distinct propositions of law and fact, all of which the court refused, and to the court's refusal in each and every case an entry is made in these words: "Which said findings the said court did refuse to make, to which said opinion and rulings of the court the said plaintiff, by its attorneys, did then and there except." It further appears that the said plaintiff, by its attorney, then entered and submitted a motion in writing for a new trial upon 13 distinct grounds alleged, in regard to which this entry is made: "And, the said motion coming on to be heard, the said court did consider and decide that the said motion should not be granted, to which decision the said plaintiff, by its attorneys, did then and there except." After the last ruling appears the following: "Whereupon the court aforesaid, on the 1st day of June, A. D. 1893, at the term aforesaid, did render judgment in favor of the said defendants and against the said plaintiff in the sum of seventy-two hundred and sixty-five and 50-100 dollars damages, and three hundred and eight and 35-100 dollars costs, as appears of record; and, inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the finding and judgment aforesaid, the said plaintiff, by its attorney, did then and there propose this, its bill of exceptions, to the said opinions and decisions of the said judge, and requested him to sign the same, according to the form of the statutes in such case made and provided, which is done this, the 12th day of June, A. D. 1893." This certificate is signed by the judge, and marked, "Filed June 12th, 1893."

Conceding that the certificate above relates to the whole proceedings recited previously thereto, from the alleged heading to

the signature of the judge, and that the same constitutes one document, and was intended for a bill of exceptions, we are of the opinion that the same is not sufficient, in form and substance, to permit us to review the questions sought to be raised, for therein there is not a single exception drawn up in form stating the ruling of the court, the exception thereto, and the grounds of the ruling or of the exception, as required by the practice of the courts.

The supreme court of the United States, in the case of *The Francis Wright*, 105 U. S. 381-389, on the matter in hand, said:

"There is another equally fatal objection to this bill of exceptions. An evident effort has been made here, as it has been before, to so frame the exceptions as, if possible, to secure a re-examination of the facts in this court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below. The bill of exceptions sets forth that at the trial the pleadings were read by the respective parties, and the testimony then put in on both sides. This being done, the libelants presented to the court certain requests for findings of fact and of law. These requests were numbered consecutively, sixteen relating to facts and three to the law. Afterwards, six additional requests for findings of fact were presented. It is then stated that the court made its findings of fact and of law, and filed them with the clerk, together with an opinion in writing of the circuit justice who heard the cause. The libelants then filed what are termed 'exceptions' to the findings and the refusals to find. In this way exceptions were taken separately to each and every one of the facts found and the conclusions of law and to the refusal to find in accordance with each and every one of the requests made. The grounds of the exceptions are not stated. Many of the requests of the libelants are covered explicitly by the findings as actually made, some being granted and others refused. We have no hesitation in saying that this is not a proper way of preparing a bill of exceptions to present to this court for review rulings of the circuit court such as are now complained of. A bill of exceptions must be 'prepared as in actions at law,' where it is used, 'not to draw the whole matter into examination again,' but only separate and distinct points, and those of law. *Bac. Abr. 'Bill of Exceptions';* 1 Saund. Pl. & Ev. 846. Every bill of exceptions must state and point out distinctly the errors of which complaint is made. It ought also to show the grounds relied on to sustain the objection presented, so that it may appear the court below was properly informed as to the point to be decided. It is needless to say that this bill of exceptions meets none of these requirements. From anything which is here presented, no judge would be presumed to understand that the specific objection made to any one of his findings was that no evidence whatever had been introduced to prove it, or to one of his refusals that the fact refused was material, and had been conclusively shown by uncontradicted testimony. No ground whatever is stated for any one of all the exceptions that have been taken. To entitle the appellants to be heard here upon any such objections as they now make to the findings, they should have stated to the court that they considered the facts refused material to the determination of the cause, and that such facts were conclusively proven by uncontradicted evidence. Under such circumstances it might have been permissible to except to the refusal, and present the exception by a bill of exceptions, which should contain so much of the testimony as was necessary to show that the facts as claimed had been conclusively proven. And so, if the exception is as to facts that are found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might, under some circumstances, include the whole, should be incorporated into the bill of exceptions. In this way the court below would be fairly advised of the nature of the complaint that was made in time to correct its error, if satisfied one *had* been committed, or to put into the bill of exceptions all it considered ma-

terial for the support of the rulings. From this it is apparent we cannot, on this appeal, consider any of the rulings below which have been presented by the bill of exceptions."

To the same effect, substantially, is *Lincoln v. Clafin*, 7 Wall. 132.

The record shows, as filed on the same day with the judgment of the court, a document entitled in the case "Findings of Fact Requested by the Defendant," which shows that the court found for the defendants generally, and assessed their damages at \$7,265.50; and immediately followed the same with special findings to the number of five conclusions on the facts of the case, and followed that with six conclusions of law and fact. This document is signed by the judge, and thereto is appended the following, bearing the same date: "To each and every of the foregoing findings the plaintiff, by their attorney, hereby excepts," signed also by the judge. This document cannot be taken as a bill of exceptions, for the reasons given in *The Francis Wright*, supra; but we consider it a part of the record, and, taken in connection with the terms of the stipulation waiving a jury, that proper questions of law arising thereon may be reviewed by the court.

Having eliminated from the case the alleged bills of exception, the questions presented to us for review are those which arise on the first two assignments of error and the question of law as to whether the special findings of fact are sufficient to warrant the judgment rendered against the plaintiff in error.

The first assignment of error complains of the overruling of plaintiff's motion to strike the defendants' second, third, fourth, fifth, and sixth pleas, on the ground stated in the motion hereinbefore recited. In relation to this motion counsel for appellant say that the main ground relied upon is that the pleas were not properly sworn to. The laws of the state of Florida (Rev. St. § 1062) and the common-law rule 15 (Circuit Court, State of Florida) require that all pleas shall be sworn to either by the defendant or his agent or attorney. The supreme court of the state of Florida, in speaking of this rule, says that "the affidavit is required as an evidence of the pleader's good faith in setting up the defense." *State v. County Com'rs*, 22 Fla. 1. In the present case the plea was sworn to by Franklin D. Cummer, who, as the record shows, was individually, and as a member of the partnership of F. D. Cummer & Son, and as the agent or representative of the F. D. Cummer & Son corporation, the principal and active defendant in the case. The other grounds for the striking seem to be no better grounded. The order of the court overruling the motion to strike may be taken as a leave granted by the court to file the special pleas, if such leave was necessary; and it is to be noticed that the Revised Statutes of Florida (section 1062) expressly authorize contradictory and inconsistent pleas. The objection that an exhibit was made part of the pleas by reference, and the further one that no sufficient bill of particulars was attached to the pleas, are not matters for review in this court.

The second assignment of error is that the court below erred in overruling the plaintiff's demurrer to the same pleas. The demurrer, as overruled, was a special demurrer, claiming that the said pleas were vague, uncertain, and indefinite in attempting to set forth the terms of a contract by reference; in failing to state what payments, if any, referred to in said pleas, plaintiff was to make; and in failing to set out the great damage claimed to have been suffered by the defendants in not setting forth what the work, labor, goods, merchandise, and materials and money, referred to in said pleas, consisted of, and may be summed up in the sixth proposition of the demurrer as follows: "Said third, fourth, fifth, and sixth pleas attempt to set up in general terms alleged claims against plaintiff, but should set forth the facts and conditions and particulars of said claims in said pleas." Section 1062 of the Revised Statutes of Florida provides "that all debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set off and may be pleaded accordingly;" and section 1075 of the same statutes provides the forms of pleas which shall be sufficient in the case to which they shall be respectively applicable, and the form given with regard to set-off is as follows: "The plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim for [here state the cause of set off as in a declaration], which amount the defendant is willing to set off against the plaintiff's claim;" and in section 1058, Rev. St. Fla., it is provided that in causes of action on contracts a declaration may be general on all counts similar in effect to the common counts in declarations in assumpsit. It is not pretended that either or any of the pleas demurred to are insufficient in substance. The complaint being substantially that the pleas were not sufficiently specific, the remedy was not by demurrer, but by motion for more detailed or itemized bills of particulars. See section 1040, Id., which provides that "no pleadings shall be deemed insufficient for any defect which heretofore could only be objected to by special demurrer."

It is clear to us that neither the first nor second assignment of error is well taken.

A critical examination of the special findings of fact in connection with the pleadings in the case and in the light of the very able briefs filed by the complainant's counsel satisfies us that the facts specifically found by the court below, taken together, are sufficient to warrant the judgment rendered. The issues in the case presented the questions whether the plaintiff had complied with the contract or was in default, and whether the defendants had complied with the same contract or were in default; and each party claimed a large recovery from the other. The court finds that the defendants had substantially complied with the terms of their contract, and that, so far as there had not been full compliance, it was the fault of the plaintiff, and the findings are specific as to the amounts due from the plaintiff to the defendants under the terms

of the contract. From the special findings the judgment rendered logically and necessarily follows.

The judgment of the circuit court must be affirmed, with costs, and it is so ordered.

ST. LOUIS & S. F. RY. CO. v. DEARBORN.

(Circuit Court of Appeals, Fifth Circuit, January 23, 1894.)

No. 169.

EVIDENCE—PAROL TO VARY WRITING—RELEASE.

Parol evidence that the consideration for a release pleaded in bar of the action was different from that named therein, and that such consideration was never paid, is inadmissible, as being an attempt to vary a written instrument by parol.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Charles Dearborn against the St. Louis & San Francisco Railway Company for personal injuries. Plaintiff obtained judgment. Defendant brings error.

This was a suit brought by defendant in error in the district court of the state of Texas in and for Lamar county, by petition filed February 11, 1892, against plaintiff in error to recover damages in the sum of \$10,000 for injuries alleged to have been received August 14, 1891, while in defendant's employ as a locomotive engineer. The plaintiff in error (defendant below), among other defenses, specifically pleaded, in bar of the action, that "plaintiff did, on, to wit, September 26, 1891, for a valuable consideration, and under his seal, execute and deliver to defendant his written release as aforesaid, acquitting and discharging and fully releasing defendant from any claim or liability whatsoever accruing to him, or to accrue to him, out of said accident, and that, on the faith of said release, defendant re-employed plaintiff as an engineer, and continued him in its employ, as provided in said release, until he ceased to give satisfaction to defendant, which occurred when, by his negligence subsequent to his re-employment, he was guilty of flattening the wheels of his engine, and other negligence, while at work in the Paris yard of defendant." In response to said plea of release, the plaintiff (defendant in error) replied, in substance, as follows: "That the so-called release or contract set up by defendant in this case is not valid and binding on him, for that it is and was wholly without consideration, and was signed by him under the following circumstances, to wit: From the date that plaintiff received the personal injuries for which he brought this suit he had been suffering great pain, and was unable to labor or do any kind of business; that on or about the 26th day of September, 1891, the defendant, through some of its agents or employes, sent for plaintiff to come to its office at Paris, Texas; that, when he arrived there, one H. C. Moore and one C. E. Boss, who were employes of defendant, told him they wanted him to sign a release, discharging defendant from any liability on account of his injuries for which this suit was brought, stating to him that, as soon as he was able to go to work, it would be better for him to do so, and that the defendant would do what was right about it, and would give him permanent employment, and that if he would sign a release, which was already written and shown to plaintiff, the defendant would give him a check for, and pay him for, all the time he had lost on account of his injuries, which amounted then to one hundred and thirty-four dollars. and would, in addition, pay all expenses that he had incurred at the hospital and at the hotel, and all his doctor bills at Paris, which amounted to something like one hundred dollars more, and that it would also pay him one dollar, which would make the contract legal." The defendant

demurred to said replication on the following, among other, grounds: "Because it seeks to cancel and set aside a written contract, under seal, which is relief of an equitable nature, and cannot be awarded in an action at law; and said defendant specially demurs to all that portion of said pleading setting up that this defendant agreed that if plaintiff would sign said release, that it (defendant) would do what was right about it, and would give him permanent employment, and would give him a check for, and pay him for, all the time he had lost on account of his injuries, and would pay all expenses he had incurred at the hospital and hotel, and all doctor bills, and would pay him one dollar, because the same seeks to vary and change a written contract by parol evidence,"—which demurrers were overruled.

The release referred to is in the following words and figures, to wit:

"Form 715.

Release.

5-90-5M.

"Whereas, on and prior to August 14th, 1891, one Chas. Dearborn was an employé of the St. Louis & San Francisco R'y Company, and, as such employé, was engaged as engineer on engine 228, on the Texas division, and whereas, said Chas. Dearborn received certain injuries, as follows, to wit, he was running engine No. 228, when main rod strap bolts broke, and, thinking that engine was going over, he jumped off, breaking his right arm above the elbow, for which said injuries said Chas. Dearborn does not make any claim of any class or character against said railway company, and admits that his injuries are not the result of any negligence on the part of said railway company: Now, therefore, in consideration of the sum of one dollar (\$1.00) in hand paid, and the further consideration of re-employment by said St. Louis & San Francisco Railway for such time only as may be satisfactory to said company, said railway company is hereby released from any and all claims that I, said Chas. Dearborn, claimant herein, ever had against said company, up to date, and especially released from any and all claims arising out of injuries specially set forth herein.

"Given under my hand and seal this 26th day of Sept., 1891.

"[Seal.]

[Signed]

Chas. Dearborn.

"Witness:

"C. E. Boss.

"H. C. Moore."

H. D. McDonald, for plaintiff in error.

V. W. Hale, for defendant in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

TOULMIN, District Judge (after stating the facts). In our view of this case, the only assignments of error necessary for us to consider are those which involve the ruling of the court below in reference to the release pleaded and read in evidence by the defendant (now plaintiff in error). The assignments of error referred to are, in substance, the overruling defendant's demurrer to plaintiff's replication to the plea of release; the overruling defendant's motion to exclude from the jury the plaintiff's testimony to the effect that the defendant agreed to pay plaintiff's hotel and hospital bills, and his lost time, etc., as the consideration for the release; and the refusal of the court to instruct the jury, as requested by the defendant, that the written release precluded any recovery by the plaintiff; and that they should find for the defendant. The general principle is that contracts or agreements between parties, reduced to writing, deliberately executed or accepted, not bearing any evidence of incompleteness, are presumed to comprise the whole meaning, purposes, and contracts of the parties. Parol evidence is not admissible to add to, alter, or vary the terms of such a contract.

In equity, if it appears that by fraud or inadvertence or mistake the writing contains more or less than the parties intended, or that it varies from their intention by expressing something materially different, a court of equity will rectify it, and conform it to the true agreement. 1 Greenl. Ev. 275; Bigham v. Bigham, 57 Tex. 240. If, however, one person fraudulently imposes on another, and procures the latter's signature to an instrument he had not agreed to sign, did not know he was signing, and did not intend to execute, this amounts to fraud in the execution of the instrument, which may be proved by parol, and, if satisfactorily established, will justify a finding against the validity of the instrument, and would not be obligatory on the person so signing. Davis v. Snider, 70 Ala. 315; Railway Co. v. Lewis, 19 Am. & Eng. R. Cas. 224. And in such case there must be clear and indubitable evidence of fraud to warrant the submission of the question to the jury. Id. 233, and note; Railroad Co. v. Shay, 82 Pa. St. 198. But such is not the case under consideration. The evidence shows that the plaintiff read the instrument in question, understood its contents, and, after some hesitation, signed it. He deliberately executed it. It bears no evidence of incompleteness, is unambiguous, and he does not pretend in his testimony that it was obtained by fraudulent practices on the part of defendant's agents. He says that they agreed to do certain other and different things for him than those recited in the release as a consideration for it, and which they have not done. There was conflicting evidence on this point, which we deem it unnecessary to notice here. Plaintiff testified as follows on the subject:

"When I signed that release those parties agreed to pay me the one dollar mentioned in the release. They were to pay me for the time I lost, and my hotel and hospital bills, in the same check. The check never came. I paid the hospital bill myself; I think it was \$10. I paid a hotel bill, which averaged about \$1 a day while I was laid off. They have never offered me the check or the one dollar. When I signed that release, I intended to carry out its provisions in good faith; but I broke it because the company discharged me, and never paid me what they had promised to pay. At the time I signed that release, I was advised by my attorney that I had a good cause of action. I concluded to sign the release, get my pay, and go back to work. Defendant has wholly failed to carry out any part of that agreement. I thought that, if I got reinstated, there was nothing in that release that would damage me as long as I was paid for my work. I admitted in the release that it did not result from the negligence of the company, but I was told that was a matter of form. I at first refused to sign the release, and asked Mr. Boss about the dollar; he said that was to make it legal. I says, 'What about those other bills?' He said, 'You will get a check all right; that is only a matter of form.' Mr. Boss and Dr. Dailey told me the company would pay my hotel, doctor's, and hospital bills. I thought when I signed that release, and got my pay, that the matter would be settled. I signed the printed form, and did not ask that any change be made in it. I signed it in good faith."

He thus seeks to alter, vary, or add to his written agreement by parol evidence. This he cannot do. There is a distinction between a representation of an existing fact which is untrue, and a promise to do, or not to do, something in the future. In order to avoid a contract, the former must be relied on. The plaintiff does not

pretend that there was any representation of an existing fact which was untrue, but the claim is that there was a promise to do something in the future. *Bigham v. Bigham*, supra. Our opinion is that the release was an effectual bar to this action, and that the trial court erred in its several rulings in reference thereto. Reversed and remanded

KINNEY v. UNITED STATES.

(Circuit Court, D. Connecticut. April 4, 1894.)

1. UNITED STATES MARSHALS—PER DIEM—ATTENDANCE ON COURT.

A marshal is entitled to his per diem when, in obedience to an order of court directing an adjournment to a certain day, he is present upon that day, the journal is opened by the clerk, and the court is then adjourned to another day by direction of the judge. 54 Fed. 313, overruled. *U. S. v. Pitman*, 13 Sup. Ct. 425, 147 U. S. 669, followed.

2. JURY COMMISSIONERS—COMPENSATION—DEFICIENCY BILLS.

The office of jury commissioner was created by the act of June 30, 1879, but no compensation was attached thereto until the act of July 7, 1884. In the deficiency bills of March 30, and October 19, 1888, there were items appropriated to the payment of jury commissioners, but they did not state that they were to apply to any particular years. *Held*, that they applied only to the current year, and could not inure to the benefit of one who served as jury commissioner in 1882, 1883, and 1884.

3. SAME.

The person so serving was not entitled to payment, independent of appropriations, on the ground that such services were part of the miscellaneous expenses of courts, for the imposition of a service of this character upon an individual gives rise to no implied obligation to pay for it, in the absence of specific provision therefor.

4. SAME—LIMITATION OF ACTIONS—RUNNING OF STATUTE.

A United States marshal who retains in his hands money belonging to the United States would have no right, when sued therefor, to a set-off or counterclaim for money claimed to be due him for services rendered as a jury commissioner; and therefore the fact that the government delayed suing him would not prevent the statute of limitations from running as against his demand.

5. SAME.

The fact that one having a claim for services rendered as a jury commissioner had no right to sue the government in the circuit courts prior to the act of March 3, 1887, did not prevent the statute of limitations from running against his claim prior to that date, for he might at any time have presented it to the court of claims.

This was an action by Sarah T. Kinney, as administratrix of John C. Kinney, for services and disbursements by him as United States marshal and as jury commissioner. Judgment was rendered for plaintiff for part of the items claimed (54 Fed. 313), but was reopened as to certain items.

Lewis E. Stanton, for plaintiff.

Geo. P. McLean, U. S. Atty.

TOWNSEND, District Judge. This case has already been heard, and a judgment rendered in favor of the plaintiff. 54 Fed. 313. Upon motion of the United States district attorney, the judgment was opened to permit the introduction of additional testimony as to certain items of the account.

It now appears that items amounting to \$108.17, allowed in that judgment, had been already credited to the plaintiff's decedent on other accounts, and that, therefore, said amount should be deducted from the amount of the previous judgment.

The court, following the rulings in similar cases in other circuits, disallowed an item of \$20, charged for per diems in court on the former hearing, because it did not appear that business was actually transacted in court on the days for which said charges were made; but since that decision it has been held in *U. S. v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, that marshals are entitled to such per diems when the court is actually in session, and that it is so in session when, in obedience to an order of the court directing its adjournment to a certain day, the officers are present upon that day, the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge. This case seems to be controlling upon the facts in regard to this item, and it is therefore allowed.

Another item of \$21.40 in the above account was for blanks furnished by the marshal for the use of the United States district attorney. Upon the former hearing it appeared that said charge had been disallowed by the United States, and that the plaintiff's intestate had acquiesced in such disallowance; but, inasmuch as by the decision in *U. S. v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327 (rendered since the former hearing), such charges are distinctly allowable, they should be allowed in this case.

Plaintiff further claims the sum of \$405 for services rendered by decedent as jury commissioner during nine periods of six months each from his appointment, August 4, 1882, until July 1, 1887; being nine days for each six months, or three days for each term of court. The government denies liability for the years 1882, 1883, and 1884, and also pleads the statute of limitations as to said years. The appointment of jury commissioners was authorized by section 2, Act June 30, 1879 (21 Stat. 43), but no provision was made for compensation until the act of July 7, 1884 (23 Stat. 194, 224). By this act five dollars per day was allowed for each day of actual and necessary employment, not exceeding three days for each term of court. Similar appropriations have been annually made since that date.

Plaintiff claims that the deficiency bills of March 30, and of October 19, 1888 (25 Stat. 47, 57, 565, 582), cover the years 1882, 1883, and 1884. These bills provide for "appropriations to supply deficiencies in the appropriations for the fiscal year ending June 13, 1888, and for prior years, and for other purposes." The items appropriated in these bills for compensation of jury commissioners do not state that they are to apply to any particular year. The plaintiff claims that there is therefore no limitation upon their application to any year in which a deficiency may be found to exist. But the government claims that a construction has always been placed upon these deficiency bills, to the effect that, where no year is appended to an appropriation, it applies only to the current year. An examination of said bills indicates

that this was the construction intended by congress. In cases where an appropriation is made in said bills for a specific year, such year is prior to the fiscal year ending June 30, 1888. The general character of the appropriations where no specific year is named indicates that they are for the fiscal year ending June 30, 1888. In several cases several appropriations for the same object are provided for in separate sections, the first not naming any specific year, while each of the following ones is confined to a prior year, specifically named. Furthermore, as no compensation was fixed when the office was created, and no per diem is suggested or stated in the deficiency bills, it would seem that, at most, it could only be intended to apply to such prior years as to which a rate of compensation had been fixed.

Plaintiff claims, irrespective of said deficiency acts, that she is entitled to payment for said services as part of the miscellaneous expenses of courts. I think that such was not the intention of congress, as evidenced by subsequent deficiency acts, appropriating money specifically to pay jury commissioners. Furthermore, this was a new office, without any specified emoluments. In the absence of a special provision to that effect, I do not think that the right to compensation, and the right of appropriation from a particular fund hitherto devoted to other purposes, can be maintained under such circumstances. Where a service of this character is imposed upon an individual, while it is his duty to perform it, no obligation is implied on the part of the government to grant any compensation therefor, except where specific provision is made for the payment of such compensation. *Dunwoody v. U. S.*, 23 Ct. Cl. 82; *White v. Levant*, 78 Me. 568, 7 Atl. 539.

In view of these conclusions, it seems unnecessary to discuss the effect of the statute of limitations, but, for the purpose of a full presentation of the case, it has seemed desirable briefly to consider it. Counsel for plaintiff argues that said statute does not apply to said claims, for the following reasons:

First. The government left \$1,094 of its money in the hands of deceased until June 17, 1889, and the suit was brought in 1891. The statute does not run against an officer of the United States while he holds its money in his hands, because the government has the right to sue him therefor, and, not having done so, he does not lose his right to recovery by his failure to sue. This claim, whether it proceeded upon the theory of mutual accounting or of set-off, overlooks the facts in this case. The money belonging to the United States was received and held by the deceased as United States marshal, for services and disbursements due, or thereafter to become due, to him as such marshal, and in no other capacity. The sum claimed in this action has no reference to his position as marshal of the United States, but is for services rendered by him as a jury commissioner, appointed under said act of June 30, 1879, which provides for the appointment, by the judge of said court, of a citizen to act as jury commissioner with the clerk of the court. No provision is made under said act for any salary or compensation for the services rendered by such

commissioners. It is well settled that there can be no set-off except where the debts are mutual, and that they are not mutual unless the demand be due the party in his own right, or unless the parties stand in the same relation to each other. *Harris v. Taylor*, 53 Conn. 500, 2 Atl. 749; *Olmstead v. Scutt*, 55 Conn. 125, 10 Atl. 519. This distinction, and its application to the statute of limitations, is recognized in the case of *U. S. v. Clark*, 96 U. S. 37, cited by plaintiff, where the court says, at page 43:

"We think it is a principle of general application that, so long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defense to that action be protected from the bar of the lapse of time, provided it is not a cross demand, in the nature of an independent cause of action."

Second. The plaintiff further claims that this suit is not barred, because it was brought within four years after the right accrued; it being claimed that the right of action was granted by the act of March 3, 1887 (24 Stat. 505). This statute provides that no suit against the government shall be allowed, unless the same shall have been brought within six years after the right accrued for which the claim is made. The second section of the act simply gives this court concurrent jurisdiction with the court of claims. But prior to the passage of said act there was nothing to prevent the decedent from presenting his claim for services, if he had any, to said court of claims, as soon as the services were rendered. Rev. St. § 1059. It would seem, therefore, that it would be barred in either court. *Cross v. U. S.*, 4 Ct. Cl. 271. Furthermore, the construction contended for by plaintiff would make the statute operate to revive all claims arising since the adoption of the constitution of the United States. This is clearly not the intent of the statute.

It appears from the complete statement, now submitted by the government, that the sum of \$406.02 had been paid the late marshal by the United States, upon the account, which payment was not known to the parties at the former trial, but is now admitted. Deducting this item, together with the \$108.17 above stated, from the amount of the former judgment, and the balance would be \$579.29. The items of jury commissioner fees now allowed, to-wit, \$270, blanks, \$21.40, and per diems, \$20, added to the above balance, amount to \$890.69, for which sum judgment may be entered in favor of the plaintiff.

DEVERE v. DELAWARE, L. & W. R. CO.

(Circuit Court, D. New Jersey. March 27, 1894.)

FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Section 88 of the New Jersey corporation act authorizes service to be made upon foreign corporations by serving any "officer, director, agent, clerk, or engineer" thereof. *Held*, that the word "engineer" includes a railroad locomotive driver.

This is an action by one Devere against the Delaware, Lackawanna & Western Railroad Company. Heard on motion to quash the writ of summons for irregular service.

Wm. D. Tyndall, for plaintiff.
Bedle, McGee & Bedle, for defendant.

GREEN, District Judge. The writ of summons in this case was served by the marshal upon John English, an engineer in the employment of the defendant company, a foreign corporation. The service was made under section 88 of the corporation act of this state. That section provides that:

"In all personal suits or actions hereafter brought in any court of this state against any foreign corporation or body corporate, not holding its charter under the laws of this state, process may be served upon any officer, director, agent, clerk or engineer of such corporation or body corporate either personally or by leaving a copy thereof at the dwelling house or usual place of abode of such officer, director, agent, clerk or engineer, or by leaving a true copy of such process at the office, depot or usual place of business of such foreign corporation or body corporate. And such service shall be good and valid to all intents and purposes."

It is contended on the part of the defendant that the word "engineer," as used in this section, does not include "engineers in charge of locomotives," or "engine drivers," but is confined to those persons who are skilled in the principles and practice of the art of "engineering;" that is, the planning and constructing of roads, bridges, railroads, canals, aqueducts, machinery, and other similar works. The argument is that it was the intention of the legislature to direct service of process against a foreign corporation to be made upon some one who was directly interested in the management or operation of the company, and not upon a mere employé, whose duty would not include that of notifying the company of service upon him of civil process. This argument is undoubtedly very persuasive, but I cannot assent to its conclusiveness. The word "engineer," as used in this act, must be given its usual and commonplace meaning. It is defined in the "Century Dictionary" as "an engine driver; one who manages an engine; a person who has charge of an engine and its connected machinery." This definition is quite broad enough to include the employé of the defendant corporation upon whom process was served in the present suit. He was admittedly in charge of and was managing a "locomotive engine" of the defendant, and was one of its "engineers." Clearly, he was of that class of employés of a foreign corporation upon whom service of process against the corporation could be made under the act in question. An argument in favor of this construction of the act could be founded, perhaps, upon the sequence of the persons liable to service of process as stated in the act itself. Such service should be made, if possible, at first upon an "officer" of the corporation representing the "executive department;" secondly, upon a "director," representing the "management;" thirdly, upon an "agent," representing fairly the "business department;" fourthly, upon a "clerk;" and, lastly, upon an "engineer,"—together representing the body of employés. It will be noticed that there seems to be a sliding scale, so far as the power, responsibility, and duties of the person selected for service of process are concerned. If this be true in fact, it would seem that an "en-

gineer," who, it is insisted by the counsel for defendant, must be an "officer," as intended by the act in question, and not simply an employé, would have been placed before a mere "clerk" in the list. The motion to quash is refused.

SLEEPER et al. v. WOOD et al.

(Circuit Court of Appeals, First Circuit. March 27, 1894.)

No. 26.

SALE—WARRANTY—EVIDENCE—CUSTOM.

In March, 1888, certain packers of corn sold 2,000 cases "best packing of 1888 corn," with "usual guaranty against swells." The evidence showed conclusively that "swells," as used in the trade, included all cans whose contents were sour; that the "usual guaranty" was until July 1st of the following year; and that it was customary before that time to notify the seller of the number of spoiled cans, and return the goods. The evidence failed to show that the words "best packing of 1888" had any definite meaning in the trade. *Held*, that these words carried no implied warranty of quality, and that in the absence of any notice or return of the spoiled goods, according to the conditions of the warranty against swells, there could be no recovery for the spoiled corn.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Solomon S. Sleeper and others against William B. Wood and others to recover damages for breach of warranty in the sale of certain canned corn. The court below directed a verdict for defendants, and to review the judgment entered thereon plaintiffs sued out this writ of error.

William B. French and Heman W. Chaplin, for plaintiffs in error.
Myers & Warner and George E. Bird, for defendants in error.

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

CARPENTER, District Judge. The questions arising in this case will appear from the following extract from the bill of exceptions:

This is an action of contract to recover for breach of warranties of quality of 2,000 cases of canned corn sold by the defendants to the plaintiffs. * * * There was evidence tending to show the following facts: The plaintiffs, partners under the firm name of S. S. Sleeper & Co., are wholesale grocers, having their usual place of business in Boston. The defendants are manufacturers and packers of canned corn, residing in Portland, but having a factory or canning establishment at Cumberland, in the state of Maine. The defendants had, before the sale, employed F. Robbins & Co., merchandise brokers, of Boston, to sell canned corn for them, including the corn in question. The contract for the sale of the corn was made between the brokers, F. Robbins & Co., representing the defendants, and the plaintiffs. Immediately after the sale, the defendants wrote and forwarded to the brokers, who delivered to the plaintiffs, the sold note, of which the following is a copy:

"Portland, Me., March 15, 1888.

"Sold Messrs. S. S. Sleeper & Co., Boston, 2,000 c., 4,000 doz., best packing of 1888 corn, at \$1.20 per doz., less 1½% dis. for cash, if paid within ten days from shipment, or sixty days accep., tins to be lacquered or left bright as

buyer may prefer, buyer to furnish labels and wrappers at our factory in Strong, Maine, on or before Aug. 15/88, without charge; we to put them on in first-class style, and ship goods when ready, F. O. B. Portland; usual guarantee against swells and of delivery in case of short pack, i. e. pro rata delivery and guarantee 60%. In case the delivery is less than 60%, then we to pay difference between \$1.20 and price of best Maine corn on each doz. short. We prefer to have buyer examine corn at factory before labeled, or we will ship a few cs. specimens for examination and approval after packed.

"Franklin Packing Co.,

"J. P. Jordan, Treas.

"Quantity changed from 2,500 to 2,000 cs.

"3/20/88.

J. P. Jordan."

Early in October, 1888, the defendants shipped to the plaintiffs a few cans of corn, for examination and approval, in accordance with the provisions of the sold note. The plaintiffs, on examination, found the specimen cans to be all right, and ordered forward the 2,000 cases of corn, which the defendants, on the last days of October, shipped to the plaintiffs, and for which the plaintiffs paid the contract price on November 26, 1888. * * * The plaintiffs contended that the sold note contained two warranties. The one, that the corn should be of a quality equal to that known in the trade as "the best packing of 1888 corn;" the other, that the corn should be sweet, sound, and merchantable corn, until the 1st day of July, 1889. The plaintiffs requested the court to rule: "The descriptive words 'best packing of 1888 corn' in the sold note given by the defendants to the plaintiffs import, constitute, and amount to a warranty that the goods sold should be of the quality so described." The court refused the plaintiffs' request, and directed a verdict for the defendants, and ruled as follows: "(1) The court rules, as matter of law, on the evidence, that the plaintiffs are not entitled to a verdict, for the reason that they have not shown that the notice required by the warranty proved was given to the defendants on or before July 1. (2) The words 'best packing of 1888 corn,' used in the sold note, did not import a warranty." * * * The plaintiffs duly excepted to the rulings of the court and to his refusals to rule, and ask that their exceptions be allowed.

It appeared in the evidence that after the delivery, and before the 1st of July following, a large part of the corn was found to be sour. The question which has been argued here is, in the first place, whether the souring of the corn be included in the "guarantee against swells," or whether it be covered by a guaranty implied in the words "best packing of 1888 corn." It seems to us that on this question there could be only one proper conclusion by the jury. The word "swells," according to the testimony, primarily refers to cans whose ends are forced outward by the gases engendered by fermentation; but the evidence seems to us conclusive that, in the meaning of the trade and in the meaning of the parties to this contract, it includes all cans whose contents are sour. One of the plaintiffs testifies that the word "swells" covers bad corn,—corn that is spoiled,—and that the usual guaranty is until the 1st of the following July; and the testimony of others so completely supports this statement that a different conclusion seems to us inadmissible. It seems to us also very clear that a condition of the "usual guarantee against swells" is that the purchaser of corn who means to take advantage of this guaranty must, before the 1st of July following, make to the seller a statement of the number of spoiled cans, and return the goods as evidence of good faith, and to enable the seller to verify the truth of the claim. One of the plaintiffs testifies that it is usual "to return the cans to the packers." There

is, indeed, some testimony against both these propositions; but the testimony of both plaintiffs and defendants clearly establishes both, as far as it goes, and does not contradict either, and the great mass of the evidence is to the same effect. If a new trial were to be awarded, the plaintiffs must ask the jury to discredit the testimony of both parties and of much the greater part of the witnesses on both sides, unless they consent that the defects in the corn come under the "guarantee against swells" and that the guaranty is to be interpreted as above stated. Now the evidence shows general complaint of the quality of the corn, but no specific claim or statement of the amount of damaged goods, and no return or offer to return the same to the seller. Under these circumstances, we think the learned judge could not have done otherwise than direct a verdict for the defendants. A verdict for the plaintiffs, on this evidence and the concessions of the plaintiffs, it seems to us, must have been set aside upon the ground that there was no evidence to justify such result. There was some testimony of a few witnesses to the effect that sour corn, where the ends of the cans are not actually pressed outwards by gas, is not included in the "guarantee against swells;" and the plaintiffs contend that on this evidence the jury should have been left free to find that the defects in the goods of which they complain do not come within the guaranty against "swells" with its accompanying proviso of notice and return of the goods, but, on the other hand, are covered by an implied warranty of good quality contained in the words "best packing of 1888 corn." Passing by the question whether there can be an implied warranty in any words of a written contract which contains an express warranty, we are unable to find any warranty implied in the words above quoted. There is no evidence to show that these words have any definite meaning in the trade here involved. It is clear that of themselves they do not import a definite warranty. Many witnesses were called to state the understanding of these words by the trade, but hardly any two of them agree in their interpretation. Some say it means "the best corn packed that year;" some, "the best corn packed that year in the state of Maine;" some, "the extra corn, the finest grade;" some, "the best corn that can be produced in Maine;" and some, the best quality of milky, white, tender, juicy, and sweet corn. It is manifest that there is no evidence of a general custom of the trade which could interpret the warranty supposed to be contained in these words. Our conclusion is that the record shows no error. Judgment of the circuit court affirmed.

UNITED STATES v. WILSON et al.

(District Court, D. Oregon. March 24, 1894.)

No. 3,594.

1. CONSPIRACY—INDICTMENT—LANDING OF CHINESE LABORERS.

An indictment under Rev. St. § 5440, charged a conspiracy to commit the offense of aiding and abetting the landing of Chinese laborers not entitled to enter the United States by furnishing them with false and

fraudulent evidence of identification. *Held*, that this is a sufficient allegation of a conspiracy to furnish such evidence, and that the indictment is not open to the objection that it describes but does not charge the offense named.

2. **SAME—CONCLUSIONS OF LAW.**

An indictment charged a conspiracy to aid and abet the landing in the United States from certain vessels named, "plying between the port of Portland, Oregon, and Vancouver, in the province of British Columbia," of Chinese laborers "not entitled to enter the United States." *Held* that, even if the last-quoted words stated a mere conclusion of law, in that they did not show that such Chinese were brought from a foreign port, yet this fact sufficiently appeared from the preceding words.

3. **SAME—OVERT ACTS.**

Under an indictment charging a conspiracy to aid and abet the landing from certain vessels named of Chinese laborers not entitled to enter the United States, it is immaterial whether any Chinese laborers were in fact landed as a result of the alleged conspiracy, if the criminal agreement was entered into, and any of the overt acts alleged was committed.

4. **SAME—EVIDENCE.**

On trial under such an indictment, the manifests of the vessels named, describing the Chinese passengers landed during the time of the alleged conspiracy as merchants, are not evidence of that fact, as such statements were necessarily derived from information furnished by the passengers themselves.

5. **WITNESS—COMPETENCY—PLEADING GUILTY OF CRIME.**

A mere plea of guilty by a conspirator does not render him incompetent to testify against his confederates. A judgment of conviction is necessary to produce that result.

This is an indictment under Rev. St. § 5440, against John Wilson, C. J. Mulkey, William Dunbar, P. J. Bannon, and others for conspiracy to commit the offense of aiding and abetting the unlawful landing of Chinese laborers in the United States. Defendants Mulkey, Dunbar, and Bannon were found guilty, and moved for a new trial.

Daniel R. Murphy, U. S. Atty., John M. Gearin, Sp. Asst. U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

Rufus Mallory and Alfred F. Sears, Jr., for defendants.

BELLINGER, District Judge. The indictment in this case is for a conspiracy, under section 5440, Rev. St., to aid and abet the landing of Chinese persons in the United States, in violation of section 11 of the amendatory act of July 5, 1884. That section is as follows:

"Sec. 11. That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof be fined in a sum not exceeding one thousand dollars and imprisoned for a term not exceeding one year."

The indictment charges that the defendants conspired together to commit an offense against the United States, to wit, the offense and misdemeanor of knowingly and unlawfully aiding and abetting the landing in the United States from a vessel, to wit, the steamship Wilmington and the steamship Haytian Republic, both

steamships plying between the port of Portland, Or., and Vancouver, in the province of British Columbia, dominion of Canada, Chinese persons, to wit, Chinese laborers, not lawfully entitled to enter the United States, by furnishing such Chinese laborers false, fraudulent, and pretended evidences of identification, and by counseling, advising, and directing said Chinese laborers and furnishing them information and advice touching the questions liable to be asked them upon their application for admission to land from said vessels, and by various other means to the grand jury unknown. It is further alleged that on July 28, 1892, and on June 14, 1893, and on various other dates between said July 28th and June 14th, in pursuance of such conspiracy, there was unlawfully brought from British Columbia, Canada, in the steamship Haytian Republic, into the port of Portland, Or., and landed there, a large number of Chinese laborers, the number and names of which are unknown, and that in like manner, and between the same dates, other large lots of Chinese laborers were brought here and landed in pursuance of the conspiracy from the steamship Wilmington. The indictment also alleges the making, on dates that are named, of fraudulent certificates by the defendants Holman and Bannon, in pursuance of the conspiracy, and their delivery to Blum for use in furtherance of the conspiracy.

The jury were unable to agree as to the defendants Lotan and Seid Back. Mulkey, Bannon, and Dunbar were found guilty, and the rest of the defendants were found not guilty. Mulkey, Bannon, and Dunbar filed a motion for a new trial upon various grounds, but mainly upon the ground that the indictment does not state facts sufficient to constitute a crime, and the questions for decision arise upon such motion.

It is contended in support of the motion that the allegation that the defendants conspired to aid and abet the landing of Chinese persons describes, but does not charge, the offense for which the defendants were tried; that the indictment is insufficient in not directly charging that the defendants conspired to do such acts as constitute a crime under the section referred to; that the allegation that the defendants conspired to aid the landing of Chinese laborers by furnishing them false evidence, etc., is not a charge that they conspired to furnish such evidence. As to this my conclusion is that the allegation of an agreement to do an act by the employment of certain means sufficiently alleges an agreement not only to do such act but to employ such means,—that an agreement to aid an unlawful landing, or, what is the same thing, to commit the offense of so doing, by furnishing false evidence, is necessarily an agreement to furnish such evidence. It is also contended that the facts thus alleged do not constitute the crime of aiding and abetting the landing of Chinese persons not lawfully entitled to land under the statute, since it does not appear that the object of the conspiracy was to aid the landing of such Chinese laborers as came from a foreign port or place, and as were, therefore, not entitled to land.

The case most relied on, among a large number cited in support of these positions, is that of *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. That case grew out of an injunction issued out of the circuit court of the United States for the district of Idaho, enjoining the Miners' Union of Wardner and others from intimidating any employé of the Bunker Hill & Sullivan Mining & Concentrating Company. The indictment alleged that the defendants conspired "to commit an offense against the United States as follows, to wit: Said defendants did," etc., "conspire, combine and agree together to intimidate by force and threats of violence the employés of said Bunker Hill and Sullivan Mining and Concentrating Company," etc. It did not allege that the conspiracy was for the purpose of violating the injunction, or of impeding the administration of justice in the United States circuit court, or that the defendants, in committing the acts charged, knew that there was an injunction forbidding such acts. It alleged that the conspiracy was to do certain acts, and that such acts were prohibited by the injunction. The court held that an agreement to do the things enjoined was not a combination to violate the injunction, unless it appeared that the parties to the conspiracy knew of the injunction; that there must be a purpose to violate the injunction, and such purpose would not be imputed to the defendants from the mere fact that the acts which they were alleged to have conspired to commit were wrongful or unlawful. The court, in its opinion, says:

"This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or obstruct the due administration of justice in the circuit court, but it states as a legal conclusion from the previous allegations that the defendants conspired so to obstruct and impede. It had previously averred that the defendants conspired by intimidation to compel the officers of the mining company to discharge their employés and the employés to leave the service of the company, a conspiracy which was not an offense against the United States, though it was against the state. Rev. St. Idaho, § 6541. The injunction was also set out, and it was alleged that the defendants did intimidate and compel the employés to abandon work; but the indictment nowhere made the direct charge that the purpose of the conspiracy was to violate the injunction, or to interfere with proceedings in the circuit court."

In this case the indictment charges in terms that the conspiracy had for its object the crime of aiding and abetting the landing of Chinese laborers not lawfully entitled to enter the United States. The crime is charged in the language of the statute, with the additional averments that the Chinese persons to be aided in landing were laborers seeking to land from the steamships *Wilmington* and *Haytian Republic*, which vessels were plying between *British Columbia* and this city. The fault that is found with this indictment is that it states a conclusion as to the right to land of the Chinese persons who were to be aided in so doing by the conspiracy. It is contended that the indictment should be so framed as to preclude all inference in favor of the right of such persons to land, and that to do this it was necessary to aver that they came from some foreign port or place.

Where the crime is one that had a common-law name, an indict-

ment charging the crime by such name, and leaving its definition to the common law, would allege only a conclusion. 1 Bish. Cr. Proc. § 610. Such an indictment does not advise the defendant of the particulars necessary to enable him to prepare his defense and to identify the crime so as to plead the judgment in bar of a second prosecution. But where the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to set forth the offense in the words of the statute. U. S. v. Carll, 105 U. S. 611. In this case all the acts of the defendants constituting the offense charged are particularly described. Nothing that is relied upon, as to such acts, is stated as a matter of inference or presumption. The point relied upon is that the indictment states a conclusion as to the right of the Chinese persons, who were to be aided in landing by the conspiracy, to enter the United States; that it is not only necessary to set out all the facts constituting the crime which the conspiracy was formed to commit, but that each of such facts, as just stated, must be so pleaded as to preclude every possible inference favorable to the accused. This involves that highest degree of certainty which places the matter alleged beyond the most "subtle objection." No such certainty has ever been required in the statement of the object of a conspiracy. In indictments for conspiracy the offense which the defendants are accused of having conspired to commit need not be set out with the same degree of strictness that is required where the indictment is for the commission of the offense itself. All the decisions upon this point are to the effect that certainty to a common intent is all that is necessary. The allegation that the defendants conspired to aid and abet the landing in the United States, within this district, of Chinese laborers not lawfully entitled to enter the United States from the steamships Haytian Republic and Wilmington, both plying between British Columbia and this port, states enough to clearly apprise the defendants of the identical crime with which they are charged. All Chinese laborers are excluded by the acts of congress. It is at least doubtful whether the words, "not lawfully entitled to enter the United States," add anything to the indictment. The act makes it a crime to "bring into the United States by land," or to aid and abet the same, or to aid and abet the "landing in the United States from any vessel" of any Chinese person not lawfully entitled to enter the United States. The landing in the United States from a vessel of Chinese not entitled to land has the same consequence as the bringing of such persons into the United States by land. The words, "bring into the United States," and "land in the United States," cannot, in my opinion, be understood to refer to persons already within the United States, or to persons who arrive on a vessel from a port or place within the United States. If I am correct in this, it follows that the words "from any foreign port or place," in section 2 of the act, which makes it an offense for the master of any vessel to knowingly bring within the United States on such vessel, and land or attempt to land, any Chinese laborer from any foreign port or place are

redundant. It was held in *Re Tong Wah Sick*, 36 Fed. 440, that where Chinese subjects who left one American port for another upon a through passage upon an American vessel without any intention of landing in any foreign country, and who did not go ashore, although the vessel landed at a foreign port, there was no departure from the United States. There seems to be no good reason for a different conclusion where the vessel is not American. A passenger upon any vessel, from one American port for another, without any intention of leaving the United States, cannot, upon his arrival at the port of destination, be said to have departed from the United States, or to be "brought into the United States" or landed therein (when landed), within the meaning of the words "bring into" and "land in the United States," contained in sections 2 and 11 of the act in question.

The question to be decided, however, does not depend upon the correctness of this conclusion. The indictment alleges that the conspiracy was to aid and abet the landing in the United States and in the state of Oregon from the steamers *Haytian Republic* and *Wilmington*, plying between British Columbia and the port of Portland, Or., of Chinese laborers, not lawfully entitled to land in the United States. Leaving out of consideration the words "not lawfully entitled to enter the United States," the natural and obvious meaning of what is alleged is that the Chinese laborers referred to were laborers from British Columbia, seeking to land from the two steamers named, and it is by such meaning that the phrase, "certain to a common intent," is defined. This construction may be liable to technical objection, but the strictness that answers such objection is not, as has already been shown, required in the description of an offense where the indictment is for a conspiracy to commit such offense. It is the duty of the court in such case to adopt the natural and obvious meaning of the words used, rather than an argumentative one. Nor is the court required to disregard the allegation that the Chinese laborers to be aided in landing were not lawfully entitled to enter the United States. There is no objection to the statement of a conclusion of a fact where such conclusion can only proceed upon a single ground, as in this case. There is no uncertainty or danger of surprise in such case. There is but a single objection that applies to a Chinese laborer not lawfully entitled to land under section 11 of the act of 1884, and that is that he comes from a foreign port or place. As to this, the case is within the principle adopted in *U. S. v. Simmonds*, 96 U. S. 363, where it was held, on an indictment under section 3266 of the Revised Statutes, charging the defendant with causing or procuring some other person to use a still boiler for the purpose of distilling, "within the intent and meaning of the revenue laws of the United States," that it was not necessary to aver that the distillery referred to was of alcoholic spirits; that the allegation that the vessels were used for the purpose of distilling "within the intent and meaning of the revenue laws of the United States" was broad enough to advise the accused of the nature of the offense charged.

It is also contended in support of the motion for a new trial that the allegation in the indictment that the Chinese persons whose landing the alleged conspiracy was formed to aid are to the grand jury unknown, is contrary to the proof, and inexcusable, for the reason that the manifests of the steamers Wilmington and Haytian Republic were on file in the customhouse, and contained the names of all Chinese persons who came to this port on these steamers during the time covered by the conspiracy. It does not appear that the object of the conspiracy was to aid the landing of particular Chinese, but rather to aid all Chinese of a particular class,—to aid the landing of such Chinese laborers as should come here on the steamers Wilmington and Haytian Republic. The indictment goes further, and alleges that, in pursuance of the conspiracy, a large number of Chinese laborers whose names are to the grand jury unknown were unlawfully brought from British Columbia on such steamships, and landed at the port of Portland. The steamers' manifests do not identify these laborers. They fail to disclose that any Chinese laborers arrived at this port by such vessels. The Chinese passengers who arrived during this time in the steamers in question are described on the steamers' manifests as "merchants." There is nothing in the manifests to give information of the names of any laborers unlawfully landed, and upon this the defendants make the additional point that these manifests, having been introduced in evidence by the government, establish the fact that the Chinese passengers who arrived by the Wilmington and Haytian Republic during the period of the conspiracy were merchants, and entitled to land, and that the verdict, as to this, is contrary to the evidence.

These manifests, so far as they relate to passengers, are the sworn statements of the master of the vessel of the passengers he carries, their sex, occupation, nationality, etc., necessarily derived from information furnished by the passengers themselves. These statements are not evidence in the trial of any issue depending upon such facts. Moreover, it is immaterial whether any Chinese laborers were in fact landed as a result of the alleged conspiracy. If the criminal agreement was entered into, and any of the overt acts alleged was committed, it is enough.

It is urged in behalf of the defendant Mulkey that there is no evidence tending to show that he was a party to, or had knowledge of, the alleged conspiracy; that the only testimony there is to involve Mulkey is that of Blum, to the effect that he hired Mulkey to aid and abet the landing of Chinese, and to assist in smuggling opium, and that there is nothing in this to imply knowledge on Mulkey's part that a conspiracy was in existence for such objects. The testimony of Blum is to the effect that Dunbar, Jackling, and himself entered into an arrangement to effect the landing of Chinese laborers from British Columbia arriving by the Wilmington and Haytian Republic by means of fraudulent certificates; that afterwards Dunbar introduced the defendant Bannon, who was brought into the office of the steamship company, and with whom the matter was talked over, and who was told what he was expected to do,

and requested to have 500 blank Chinese certificates, printed in three or four different forms; that Bannon agreed to make out the certificates for two dollars each, Blum and Dunbar to furnish the Chinese pictures therefor; that thereafter, and during October, 1892, on a Sunday morning, he, Blum, met the defendant Mulkey on board the Haytian Republic as she was lying at the Union Pacific dock in this city; that they came up town together in a carriage, and had a bottle of wine in a private box in the Reception saloon; that he said to Mulkey, "You have been bothering our Chinese and opium business a good deal, and I want to have a private talk with you," and was invited by Mulkey to meet him at his room in the Portland Hotel the next day at 2 o'clock. Blum continues his testimony as follows:

"I went up there the next day (Monday), and in the mean time I told Mr. Dunbar of this appointment. Mr. Jackling was there, too. We all talked it over, and it was suggested between us, by all of us, if we could make any deal with Mulkey, to bring him into this combination, we could afford to pay him to do it. When I met Mulkey I discussed this subject with him, and told him he was giving us a good deal of—a little—annoyance, and up to the present time there had been nothing but glory in it for him."

Blum testifies that in this conversation Mulkey told him that he (Mulkey) knew that we (the Merchants' Steamship Company) were bringing in a great deal of opium, and a great many Chinese laborers who had no right to land, and threatened to get them all in the penitentiary. Blum testified as to what followed this threat:

"And I said, 'I want to know how much money it would take to have him interested in our business matters.' After a good deal of talk, he agreed not to interfere with our Chinamen or Chinese laborers or our opium matters, and let us bring just as many as we pleased, in consideration of \$1,200, to be paid him monthly in advance, the first payment to be made right then and there."

This, Blum says, was agreed to with the further agreement that Inspector Dillon should bother "us [them] no more, and, if Dillon got any information, Mulkey would communicate it to the company in time to enable them to let the Chinamen and opium get off." Blum further testified that this monthly payment of \$1,200 was paid during the continuance of the conspiracy. A number of letters, signed "John," addressed to John Quinlan, were received in evidence. Blum testified that these letters were in pursuance of an arrangement between himself and Mulkey, who was to address Blum under this name. The testimony of other witnesses (although the testimony was conflicting as to this) identified the writing as that of the defendant Mulkey. There was inherent conspiracy in these letters. One of them is as follows:

"It looks as though some local growlers were come into your city, to make trouble for your jay birds. I am not sure of this, but strongly suspect it. Under a lately-published pamphlet on the alighting of jay birds, if they are not laborers or working birds, and have been here before, they may alight. Have Jim quietly work along and land these he safely can, and let balance go to court. There has been a good deal of loose talk about John's going there so much, so he thinks he had not better go over there now. In case of a subsequent kick from the great mogul, he can and will save them. Do not make any deal with them; they will not do to trust. It took fine work,

and a liberal use of grease, to prevent a grand explosion in your vicinity last night and this morning."

According to Blum's testimony, "John" was Mulkey himself; the "great mogul" was the secretary of the treasury, whom the conspirators feared; "Jim" was the defendant James Lotan, collector of customs at this port, who is also referred to in other of the letters as "papa;" the "local growlers" who were making trouble, and who were not to be dealt with, because they could not be trusted, were treasury agents. In another of these letters reference is made to "that Jackling matter," and this is explained by Blum to refer to a complaint by Jackling that Inspector Dillon, whom Mulkey had agreed should be "pulled off" at Vancouver, was hounding Jackling all around the docks, and that Jackling was becoming nervous in consequence. The same letter also refers to "the 1,200" being paid Mulkey, with the statement, among others, that "our little side show will help you to recoup. If you don't understand this, I will explain when I see you." This reference to Jackling and to the little "side show" between the writer and Blum, which was to help the latter to recoup, tends to show agreement and co-operation with the Blum, Jackling, and Dunbar combination, and to render inadmissible the explanation that whatever of criminal relation the facts tend to establish between Mulkey and Blum was apart from such combination. The reference to a "side show" indicates that they were acting conjointly with others, and were at the same time engaged in transactions to which such others were not admitted.

The fact of the original criminal agreement between Blum, Dunbar, and Jackling is testified to by Blum and Jackling. The assent of the other defendants may be established as an inference by the jury from the other facts proved. Any joint action upon a material point or a collection of independent but co-operating acts, by persons closely associated with each other, is sufficient to enable the jury to infer concurrence of sentiment. *Archer v. State*, 106 Ind. 426, 7 N. E. 225. Without the proof of the original agreement, it was competent to prove the acts of the different defendants, and thus prove the conspiracy between them. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898. The evidence of joint action between the defendants covers a great many transactions, and extends over several months of time. It is not only sufficient to authorize an inference of guilt, but it is of a character, if believed, to make any other inference impossible. The evidence of knowledge and participation in the combination on the part of the defendant Mulkey does not, however, depend upon a collection of independent and co-operating acts, although the evidence of such acts is sufficient for such purpose. The formal agreement with Mulkey testified to by Blum directly tends to connect the former with the terms of the original combination. Blum testifies that after he had arranged for his meeting with Mulkey at the Portland it was agreed between himself, Dunbar, and Jackling that they would, if possible, make a "deal" with

Mulkey to bring him into this combination, and that when he met Mulkey by such appointment he "discussed this subject with him;" that he asked Mulkey "how much it would take to interest him in our business matters," and that the price was fixed at \$1,200 per month.

It is argued that the evidence is insufficient to sustain the verdict. I am of the opinion that such evidence is not only sufficient to sustain the verdict, but that the correctness of the conclusion reached by the jury does not admit of a reasonable doubt.

The point is also urged that Blum's plea of guilty is a conviction of crime that renders him incompetent to testify. The rule is well settled that there must be a judgment of conviction pronounced by the court to have that effect. *Rap. Wit.* § 16; *Blaufus v. People*, 69 N. Y. 108. And, besides this, it is a matter of doubt whether the charge to which the witness pleaded guilty is punishable by imprisonment in the penitentiary. The punishment provided is fine and imprisonment without hard labor. Section 5539 of the Revised Statutes provides that whenever any criminal convicted of any offense against the United States is imprisoned in the jail or penitentiary of a state, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated, and, while so confined therein, shall be exclusively under the control of the officers having charge of the same under the laws of such state or territory. Prior to this act, on March 3, 1825, congress had provided that, in every case where criminals convicted of any offense against the United States shall be sentenced to imprisonment to hard labor, it shall be lawful for the court passing the sentence to order the same executed in any state prison within the district where the court is holden, the use of which has been granted by the state for that purpose. The act of the legislature of this state passed October 29, 1870, authorizing the keeper of the state penitentiary to receive United States prisoners, recites this last act of congress, and appears to have been passed in contemplation of that act, and therefore to have had in view only persons who are sentenced to imprisonment at hard labor. All state convicts in this state are subject to hard labor, and may be bound by contracts for labor to private persons. This presents the question whether a person convicted of an offense that does not provide for a judgment requiring hard labor can be imprisoned in a penitentiary where such labor is required under the laws and regulations governing the same, and where the act of the state for the keeping of such prisoners appears to have been passed with reference to United States prisoners under sentence of imprisonment at hard labor.

The motions are denied.

H. W. JOHNS MANUFACTURING CO. v. ROBERTSON et al.

(Circuit Court, S. D. New York. March 31, 1894.)

1. PATENTS—CONSTRUCTION OF CLAIM—REFERENCE TO SPECIFICATIONS.

In a patent for an improvement in packing for steam joints, one claim was for the packing, composed of strands of asbestos with a saturated central core, "as hereinbefore set forth." The specifications described the packing, and the process of making it by means of external manipulation,—explaining at length the details of the treatment and materials, and the advantages of the packing over others,—and added that the central strand might be saturated with a solution of India rubber, imparting elasticity without affecting the solidity of the packing; this being the first suggestion of India rubber. *Held*, that the claim did not cover, as a separate invention, the saturation of the central core with India rubber, securing adhesion of the strands; such saturation being suggested merely as an incidental feature, and the central core not being described as a distinct invention, or as an element in a combination.

2. SAME—ANTICIPATION.

Such saturation of the central core with India rubber was anticipated by the previous use of asbestos and India rubber, in various forms, and with various solutions or coatings, for steam packing, the packing being made in the form of braid and ropes.

3. SAME—INFRINGEMENT.

A claim for a steam packing composed of strands of asbestos with a central core saturated with India rubber is not infringed by a packing using starch to secure adhesion of outside strands and the core; the twisting of asbestos, mixed with a glutinous or adhesive substance, into a rope, being previously known.

4. SAME.

The third claim of the Johns patent, No. 257,167, for improvements in packing for steam joints, must be limited by reference to the specifications, and, if not so limited, was anticipated.

This was a suit by the H. W. Johns Manufacturing Company against Henry M. Robertson and George T. Sinclair for infringement of a patent. On final hearing.

Wetmore & Jenner, for complainant.

Gallagher, Richards & Dodd, for defendants.

TOWNSEND, District Judge. This case is presented upon final hearing, on the usual bill for injunction for infringement of letters patent No. 257,167, granted to Henry W. Johns May 2, 1882, for improvements in steam packing for steam joints. As the decision of the questions involved chiefly depends upon the construction to be given to the claims in the light of the interpretation of the whole patent, it has seemed desirable to set it out fully. The specification is as follows:

"Be it known that I, Henry W. Johns, a citizen of the United States, residing at New York, county of New York, and state of New York, have invented new and useful improvements in steam packing, of which the following is a specification. My invention relates to certain new and useful improvements in packing for steam joints and similar uses. Prior to my invention, among other desirable materials suggested for the purpose, asbestos in the form of a rope has fulfilled the object sought, with considerable success. Its use, however, has been attended with the objection that in order to prevent the strands composing the rope from being rubbed away or disintegrated by handling it has been necessary to confine them with a cloth covering or

woolen netting. This feature of covering renders the structure expensive and laborious to produce, and the covering does not serve any purpose as a packing, but, on the contrary, being of a comparatively inflammable nature, soon becomes charred by the heat of the box in which it may be used. Asbestos has also been braided, but this is not only expensive, but fails of the object attained by my invention, because the strands cannot be separated when desirable. The object of my invention is to provide a rope composed of asbestos which shall be free from the objections named and highly desirable as a steam packing; and, with these ends in view my invention consists of a steam packing composed of a series of strands of asbestos twisted or 'laid' into the form of a rope, and having the ordinarily projecting fibers laid flat in the direction of the length of the rope, and also having the interstices between the several strands of which the rope is composed filled or built up practically even with the outside surfaces of the strands by a paste or sizing composed wholly or in part of asbestos, as will be hereinafter more fully explained. My invention also consists in a novel process by which the interstices are filled or built up and the strands bridged or tied, as will be hereinafter more fully explained. My invention further consists in the details hereinafter described and specifically claimed.

"In order that those skilled in the art to which my invention appertains may fully understand the same, I will proceed to describe in detail the peculiar characteristics of the rope and the process by which I am enabled to close the interstices between the strands, and in order that the differences between an ordinary rope and that forming the subject of my invention may be illustrated in the accompanying drawings I have shown at Fig. 1 a cross section of an ordinary rope devoid of the jacket or covering hereinbefore referred to; Fig. 2 illustrates a similar section of a rope embodying my invention; and Fig. 3 a plan view of the same, to more fully illustrate the tying or bridging of the interstices. At Fig. 1 it will be observed that short spurs or fibers a, project from the rope, and that the strands, b, composing the rope, are, when twisted into form, separated by V-shaped or similar interstices, while by reference to Fig. 2, it will be seen that the interstices are built up or filled to about level with the outside surface of the rope, as illustrated by the blackened spaces marked c. At Fig. 3 I intended by the short, straight lines marked d to illustrate how the ordinary spurs or fibers shown at a, Fig. 1, are laid across or bridge the helical spaces marked by the curved lines e. The fine lines branching off from the lines d, are intended to represent the felting or locking which takes place as hereinafter referred to, after the interstices have been filled with the cement or sizing. The process of manufacture which I have adopted as best calculated to accomplish the ends sought is, first to form a rope of the desired size and of any suitable number of strands of asbestos fiber in any well-known manner, but preferably by the use of double strands twisted together around strong central twisted strand, which may be of hemp or other material, though I prefer asbestos. This enables me to retain the 'spring' of the twist, which I find can be accomplished in no other manner so well as when using asbestos. It is then laid in such way that the exposed or outside surface of the several strands shall be slightly flattened to approach in their cross-section curvature as near as possible to a circle surrounding the whole number, and in this way to a considerable degree lessen the proportions of the interstices which naturally occur between the 'lay' of the strands. After the rope has been thus formed I then apply water or moisture in small quantities and in any suitable manner to the outside surface of the rope, and subject the same to rapid longitudinal manipulations. This manipulation removes small particles of asbestos, and the water serves as a vehicle to deposit the asbestos, in the form of a paste or sizing, within the interstices of the rope in an even and smooth condition. This paste or sizing, being composed of asbestos, will, according to the character of the asbestos, form a film or membranous coating of considerable strength when subjected to friction. The longer fibers or spurs, which are not removed and taken up by the water, are laid across or bridged over the filled interstices, and I have found that they are at the same time felted or matted together, as illustrated at Fig. 3. In manipulating the rope to accomplish these results I

have found the human hand best adapted for the purpose; but of course, I do not desire to confine myself in this particular, nor to the fact that I first apply the water or other moisture, as I may begin to manipulate the rope a little while before applying the moisture; nor do I wish to confine myself to the use of asbestos and water alone as the agents for filling the interstices, as other ingredients may be used so long as they are not of a character to be objectionable when placed within a steam joint. I have found that a successful paste or cement for the purpose may be made from asbestos flour, water, glue, paraffin, kerosene, or other oleaginous matter and ordinary flour, or any two or more of the above, a superior material being the two flours combined with a little paraffin and a small quantity of kerosene. I prefer that asbestos should always form one element of the paste. A packing, when made according to my invention, possesses one great advantage over any other that I am familiar with, except hemp packing, in that the strands of which it is composed may be readily separated so as to form a packing for very small joints, or they may be combined to make a rope or packing of any desired size or shape. The manipulation of this form of asbestos rope with water or sizing reduces its size and renders it more solid and compact than asbestos can be made by any other process, which is a great desideratum for heavy engines. The central strand may be saturated with a solution of India rubber which I find imparts a degree of elasticity which does not interfere with the solidity of the packing."

Infringement of the third claim, only, is alleged. Said claim is as follows:

"The asbestos-rope packing for steam joints, composed of a series of strands of asbestos, with a central core saturated with a solution of India rubber, as hereinbefore set forth."

The defenses are invalidity and noninfringement. In support of the defense of invalidity, the defendant introduced nine American patents and one British provisional specification. It is not necessary to refer to any of the patents in detail. They show that long before the date of the patent in suit the use of asbestos and India rubber in various forms, and with various solutions or coatings, for steam packing, was well known in the art; that, for this purpose, asbestos was coated, mixed, or otherwise combined with India rubber in solution, and with vulcanized or unvulcanized India rubber, and that such packing was made in the form of braid and ropes. The purposes for which the rubber was thus combined are not stated, but its utility is recognized, and various modes of combination are suggested in said patents.

Let us now inquire what object the patentee had in view, how he proposed to accomplish it, whether he succeeded, and whether he invented anything. The construction of the patent seems most suggestive in the disposition of the questions at issue. The patentee first refers to the previous uses of asbestos for packing, and explains that the objection thereto lies in the fact that a covering is required to prevent the strands from being rubbed away or disintegrated. The object of his invention was to dispense with the necessity of this covering, and the manner in which this result was to be secured is fully explained by him, and embraces an ingenious adaptation of certain familiar processes of manipulation to the development of certain peculiar properties of the asbestos. He first describes the manufacture claimed as consisting of an asbestos rope having the ordinarily projecting fibers laid longitudi-

nally flat, and the interstices between the strands built up even with the outside surfaces by an asbestos paste. The process is next described as consisting in the method by which said outside surface is built up, and said strands are tied together. The patentee states that these results are accomplished as will be thereafter more fully explained, and that his invention further consists in the details thereafter described and claimed. About 150 lines of the specification are then devoted to explaining the details of the treatment and material employed, by means of which the outer surface of the asbestos rope is felted or cemented, by a film or membranous coating of considerable strength when subjected to pressure. At the close of this description of the details of his alleged invention, the patentee describes the advantages of his packing over others. Finally, he adds: "The central strand may be saturated with a solution of India rubber, which I find imparts a degree of elasticity which does not interfere with the solidity of the packing."

This is the first suggestion of India rubber in the whole patent. In the description of the details of the alleged invention, the preferable process in forming a rope is stated to be by the use of strands twisted around a strong central strand of hemp, asbestos, or other material. This is the only suggestion concerning the interior construction of the rope, and it makes no reference to the use of any sticky solution or coating, or to the desirability of having the outer strands adhere to such core.

I have thus reviewed the statements contained in the patent, because of the contention of complainant's counsel "that the inventor intended to claim the specific feature of having the central strand of asbestos rope packing saturated with India rubber, which is a distinct improvement, of itself, independent of and unaffected by the presence of the improvement of the other claims." And complainant's expert says that the invention set forth in the third claim consists of an asbestos rope packing "composed of a series of strands laid around a central core saturated with a solution of India rubber or equivalent material, so that the solution contained in the core will partially secure the strands to it by the adhesiveness of the solution," etc. I cannot thus interpret this patent. It seems to me that its whole language, taken together, clearly indicates that it is for an asbestos rope to be held together from the outside, not from the inside, and that the theory suggested by complainant's expert and counsel does violence to the whole construction of the patent. The court would not be justified in enlarging the scope of the claim so as to cover an invention not specified on its face. *Wollensak v. Sargent*, 151 U. S. 221, 14 Sup. Ct. 291; *Day v. Railroad Co.*, 132 U. S. 98, 102, 10 Sup. Ct. 11. The patentee describes a covering to replace other coverings. The drawings of the patent show that the strands are to be protected from outside pressure. The means described is external manipulation. There is no suggestion of the use of India rubber, except to impart a degree of elasticity. It does not appear that its adhesive quality is recognized, or desired to be utilized. If such quality, so applied,

were patentable, in view of the prior art, it should have been covered by the claims of the patent. *Grant v. Walter*, 148 U. S. 547, 554, 13 Sup. Ct. 699.

The failure of the patentee to refer to the rubber solution, when, in describing the details of his invention, he explained the construction of the central strand; the omission of the suggestion until after the detailed description had been completed; the language in which the use of the solution is suggested,—all seem to support the view that the patentee did not intend to claim the saturation with India rubber as a part of his alleged invention. It may well be that, in view of the state of the art, with which he must not only be assumed to be, but was in fact, familiar, as shown by his disclaimer, he realized that such use of an India rubber solution was well known in the art, and did not involve invention. The failure of the patentee to state all the objects or results of such saturation does not interfere with his claiming such use, provided it is patentable. A patentee is entitled to all the uses for which his invention may be beneficially employed, and this rule equally applies to the construction of the patents introduced by defendant. *Pfeifer v. Dixon-Woods Co.*, 5 C. C. A. 148, 55 Fed. 390; *Roberts v. Ryer*, 91 U. S. 150; *Rob. Pat.* § 514. But the lack of any such statement in said specification, in connection with the other circumstances already noted especially in view of the fullness with which the objects and results of the external manipulation are stated, seems to indicate that he did not rely upon this solution as an essential element in his process or manufacture, but merely as an incidental feature which might be used in connection with his alleged invention, as it had been previously used in connection with other processes, and which would not interfere with its practical operation, by reason of the elasticity of the rubber. In other words, the patentee may be conceived of as saying: "While the elasticity of rubber might be supposed to interfere with the solidity of my packing, and to cause it to disintegrate, I find that its elasticity is not sufficient in degree to prevent its use as stated."

In the interpretation of a doubtful patent, it may be helpful to apply some of the recognized rules for the interpretation of the ambiguities of other contracts. It is true that, in the case of a patent, one party to the contract (the public) is represented by the imaginary mechanic, skilled in the art; but, bearing this in mind, the ordinary rules of construction and interpretation may be applied, in determining the question of the intention of the parties. The considerations already suggested show a statement by the patentee of the objections attendant upon the external coverings known in the art; a process designed to obviate those objections by means of external manipulation; a statement of the results thus accomplished. It must be presumed that it was the intention of the patentee to supply this need, and of the patent office to contract that he should be protected in the provision of means therefor, assuming a sufficient consideration by way of invention to support such contract. The public must have intended to be bound by such contract only within the scope specified and claimed by the

inventor. To extend its scope beyond such limitations to embrace a distinct invention, depending upon qualities in the material and operations in the process not suggested or described, would operate to create a contract not intended or made, to grant an unwarrantable right to the patentee, and to inflict a monopoly upon the public, without sufficient consideration, and against its consent. It is settled that distinct and formal claims are necessary to ascertain the scope of the invention. *Grant v. Walter*, supra; *Merrill v. Yeomans*, 94 U. S. 568; *Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447, 5 Sup. Ct. 941. The extent of the claim, and the objects contemplated by the patentee, are to be determined by the drawings and specifications. *Lace Co. v. Schaefer*, 1 U. S. App. 118, 120, 1 C. C. A. 488, 50 Fed. 106.

Finally,—although, in view of the conclusions reached, this suggestion may be immaterial,—it is questionable whether the alleged description of the process of saturation with a solution of India rubber, assuming it to be new in the art, is sufficiently definite to enable a person skilled in the art to understand how it is to be effected so as to secure the advantages claimed by complainant. *Howard v. Stove Works*, 150 U. S. 164, 14 Sup. Ct. 68; *Kilbourne v. W. Bingham Co.*, 1 C. C. A. 617, 50 Fed. 697; *Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447, 452, 5 Sup. Ct. 941.

Counsel for complainant, in support of the construction of the patent contended for by him, argues that the third claim must be restricted to a packing having a central core saturated with a solution of India rubber,—thus excluding all external treatment described in the specification,—and assigns the following reasons, namely: That such saturated central strand is a distinct improvement, by itself; that it is useful without the external treatment; that the claim omits all reference to such external treatment. If the specification described an asbestos rope packing consisting of the combination of such central core and external covering, either element of such combination might be protected by a separate claim, even though said element, alone, might not be capable of useful operation. *Roberts v. Nail Co.*, 53 Fed. 916; *Pfeifer v. Dixon-Woods Co.*, 5 C. C. A. 148, 55 Fed. 394. But the general answer to this argument is suggested by the construction already given to the patent. The specification describes no such central core as a separate and distinct invention, and no such combination. There is nowhere any suggestion of any construction which does not include the external treatment,—in fact, no suggestion of any essential construction, process, or operation, except the external one, or as embraced therein. The third claim is for the packing composed of strands of asbestos, with a saturated central core, as “hereinbefore set forth.” These words are clearly words of limitation, and they refer back to the descriptive specification for qualification of such general statement by what is therein specifically described. *Electric Light Co. v. Westinghouse*, 55 Fed. 498; *Van Marter v. Miller*, 15 Blatchf. 562, Fed. Cas. No. 16,863; *Snow v. Railroad Co.*, 121 U. S. 617, 7 Sup. Ct. 1343. While the court will uphold that which was

really invented, it will not enlarge the scope of the claim beyond what was allowed by the patent office. *Wollensak v. Sargent*, supra; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72; *Merrill v. Yeomans*, 94 U. S. 568; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Manufacturing Co. v. Greenleaf*, 117 U. S. 554, 6 Sup. Ct. 846; *Brown v. Manufacturing Co.*, 6 C. C. A. 528, 57 Fed. 731, and cases cited.

Another view of the question is suggested by the state of the art. If the prior patents and specification introduced by defendants do not show a direct anticipation, they certainly tend to show that it did not require the exercise of the inventive faculty to use the means and processes therein described in the manner claimed to be covered by the third claim. Thus, *Cleghorn & Paterson*, in their British specification, describe asbestos previously converted into a sort of paper by mixing it with suitable fibrous, glutinous, or adhesive substances, and cut into strips of suitable breadth, and then show how said strips, with or without being first coated with a solution of India rubber, may be twisted into strands, and then these smaller strands may be twisted into a larger rope, either with or without a core of vulcanized or nonvulcanized India rubber, or of other suitable elastic or flexible material, so that one or more of these strands may be used for steam packing. The suggestions of complainant's counsel and expert as to this specification do not seem to seriously affect its bearing upon the claim of lack of patentable novelty. The chief objection urged is that, as nothing is said about vulcanizing the packing so as to include the coatings of India rubber upon said strips, these coatings, when forced into the completed packing, will be in contact, and that as it is a well-known fact that India rubber, before vulcanization, has the property of uniting with adjacent surfaces of India rubber, said strands, upon the application of pressure, would become so firmly cemented together as to be practically a solid mass of unvulcanized India rubber, with a large percentage of ground asbestos mixed therein. But the patentee nowhere suggests in his patent the vulcanization of India rubber; and, if said property is well known in the art, and the use of vulcanized rubber was well known, in this connection, to *Cleghorn & Paterson*, as appears from the references to it in their specification and in the patents cited, it could not involve the exercise of invention to use it when desirable. The further objection that the alleged weakness of such asbestos paper, as compared with fiber, would prevent the separation of the individual strands, is answered by the statement in the specification that such asbestos paper may be made of pulp mixed with "suitable fibrous, glutinous, or adhesive substances."

It does not seem necessary to decide whether, as is further suggested by complainant, the packing described in said British patent would or would not be practicable. Said patent describes a core of twisted strands of asbestos paper, coated with a solution of India rubber, having other twisted strands, twisted on to said central core in the form of a rope, with or without the use of said solution. A core of rubber or other suitable elastic or flexible material, or "an elastic or flexible core," may or may not be used. This

description so strikingly suggests the alleged invention covered by the third claim that it does not seem necessary to further comment upon it. It seems to justify the application of the well-settled rule that, "that which infringes, if later, anticipates, if earlier." *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310; *Knapp v. Morss*, 150 U. S. 221, 228, 14 Sup. Ct. 81; *Grant v. Walter*, 148 U. S. 553, 13 Sup. Ct. 699; *Peters v. Manufacturing Co.*, 129 U. S. 530, 9 Sup. Ct. 389; *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. 1034. The only proof of infringement is an exhibit of defendants' packing, and the testimony that defendants have used starch in their packing to keep together the outside strands and the inside core. An examination of the exhibit in connection with said testimony does not show that the defendants use the article of manufacture covered by the third claim. But, giving to this evidence the greatest possible weight, and assuming that starch is the equivalent of India rubber, it does not appear that defendants have done anything more than to twist asbestos, mixed with a glutinous or adhesive substance, into a rope. This was described in the British patent; and the mere fact that they may have chosen to retain the adhesive substance for the inner core, and to reject it from the outer core, would not affect their liability, whether such construction were or were not described in said British specification.

Let a decree be entered dismissing the bill.

BOWMAN v. DE GRAUW et al.

(Circuit Court, S. D. New York. March 26, 1894.)

1. PATENTS—NOVELTY—FASTENING STARS TO FLAGS.

There is no novelty in fastening stars to the opposite sides of a flag by a method which had previously been employed to fasten letters to blankets, patterns to embroidery, and patches to fabrics.

2. SAME.

The Bowman patent, No. 469,395, for an improvement in the method of making flags, is void for want of novelty.

This was a suit by Henry A. Bowman against Walter N. De Grauw and others for infringement of a patent.

Campbell, Hotchkiss & Reilly and J. E. Maynadier, for complainant.
R. B. McMaster, for defendants.

TOWNSEND, District Judge. The questions herein are presented by a bill in equity for the alleged infringement of letters patent No. 469,395, granted to complainant February 23, 1892, for improvements in the method of making flags. The defenses are anticipation and lack of patentable novelty. The object of the alleged invention was to provide a practical and economical mode of so affixing stars or other emblems to the opposite sides of the field of a flag that they should accurately correspond in their respective relations without requiring especial care on the part of the operator. This was accomplished by temporarily fastening emblems, such as stars, on the face of the field, and unformed blanks, sufficient to cover the corre-

sponding area, on the back of the field. The cut-out star, or guide star, the field, and the blank were then stitched together by a zigzag or herring-bone stitch, which passed alternately through the raw edge of the guide star and the field and blank, and through the field and blank. The blank was then cut out around the lines of stitching so as to make stars of suitable proportions on the back of the field. "By this mode of operation the stars on both sides of the flag are made accurately opposite to each other. The zigzag stitching prevents the raw cut edges from wearing off, while the stars lie flat and smooth upon the field fabric, and do not present thick, bulky seams, nor give to the flag a stiffness such as comes from pasting stars." The claims of the patent are as follows:

"(1) The method of making flags herein described, consisting in affixing and accurately duplicating the emblems or stars on opposite sides of the field fabric by stitching through the field and an underlying blank fabric from the outlines of the superposed accurately formed star or emblem properly located on the face of the field and subsequently trimming the blank to the outline indicated by such stitching, whereby said stars for both face and back are given similarity of configuration and a smooth flat-laid attachment without unduly stiffening or encumbering the flag. (2) The method of making flags as herein described, which consists in locating and temporarily fastening accurately formed stars or emblems upon the face of the field fabric, then temporarily fastening an unformed fabric or blank upon the back of the field fabric covering the position and area of the face stars stitching through the several plies on the outlines of the accurately formed star by overseaming stitch embracing the raw-cut edges thereof, and then trimming away the outlying portions of the unformed blank fabric to conform to the stitched outlines of the face stars, substantially as set forth. (3) A flag having the emblems of stars with raw-cut edges affixed thereon in duplicate upon opposite sides of the field or ground fabric and secured by overseam stitching that embraces the raw-cut edges of the face stars by zigzag stitches and is carried through the fabrics of the field and back stars, and said back stars having their edges trimmed adjacent to but outside the line of stitching, in the manner set forth."

It will be seen that claims 1 and 2 cover the method, and claim 3 the article, described by the patentee. The patent in suit covers a form of what is known as appliqué, in which an emblem or design is applied in relief to a field or ground. It is admitted that the use of a zigzag stitch to secure a superposed fabric to a ground fabric, and to prevent the raw edge of the fabric from raveling, was not new, nor was it new to use such stitching to form a pattern on a blank underneath the ground fabric, and to cut away the portions of the blank around the lines of stitching. But complainant claims that he was the first to show how, by a single sewing operation, two stars could be practically sewed to a field so that the front and back stars should register exactly, raveling should be prevented, and a strip of each one of the three fabrics permanently united. In the present consideration of the questions at issue, it will be assumed that this statement, if limited to the flag-making art, is correct.

The evidence as to the state of the art shows that, in an English patent granted to William Madders in 1865, for improvements in embroidery, a class of single appliqué work is described, in which a face fabric cut in a certain pattern is first temporarily secured to a field, and is afterwards firmly fastened by buttonhole stitches passing

alternately through the field and across the edge of the face fabric, and then through both the field and the face fabric. As early as 1880, various samples of patching and embroidery by appliqué work, stitched by machine, with the same kind of herring-bone or zigzag stitches as are described in the patent in suit, and stitched in the same way in order to prevent raveling, were exhibited at fairs, and sent to manufacturers and others in this country in connection with descriptive circulars advertising the Wheeler & Wilson sewing machine. A similar method is shown in the Henderson provisional English patent of 1867 and the Lamprell provisional English patent of 1875. Lamprell claims by his stitch to have secured one of the results claimed by Bowman,—the avoidance of stiffness. Other exhibits show samples of double appliqué work, employed long prior to the alleged invention. In the Wheeler exhibit both patterns were cut out before being applied, and were then secured by a stitch passing first through all three fabrics, and then through the field alone. In the exhibit "Steward Sample No. 1" the double appliqué was used to unite a stamped paper pattern, a field fabric, and a blank by an ordinary stitch.

Various witnesses, experts in embroidery and other needlework, testify to having performed for 10 years last past this double appliqué work, with and without a zigzag stitch, upon face fabric, field fabric, and blank, for making single letters, monograms, and other designs, to register alike on both sides of the field fabric, and to having afterwards cut away the superfluous material from the blank. Mary J. Hewitt, for 15 years employed by the Wheeler & Wilson Manufacturing Company to make samples of their sewing-machine work for exhibitions and fairs, produced a sample showing a "W. & W." in cloth, stitched on both sides of a piece of flannel, and testified that, in 1887, she put such a "W. & W." on a horse blanket for the Wheeler & Wilson Company, and described how it was done. She first cut out a "W. & W." in blue cloth, and pinned it on the upper side of the blanket, and put a broad piece of cloth on the under side. Then she stitched them together around the edge of the upper pattern, and, turning the blanket over, cut the under piece of cloth out along the line of stitches, so that the letters on one side registered with those on the other side. Then, in order to make the design more firm and more ornamental, she made a second row of stitching like the first row. She testified that the blanket was used by the company until they sold their horses, and she produced what she testified were the patterns used in cutting out the design. She further testified that to carry a line of stitching across the surface of a superimposed material from one point to another, to unite two or more layers of material, was old and well known long before 1889, and was common in quilting and like operations. She also confirmed the testimony of other witnesses, that to secure a raw edge of material, and prevent it from raveling by a herring-bone or zigzag line of stitching, or whipping over the edges, was well known prior to 1879.

It appears that heretofore flags have ordinarily been made either by temporarily fastening stars on one side of a field, with the

edges turned in, then sewing them on by hand or machine, and repeating the process on the under side, or by cutting away the field on the under side after sewing the star on the other side. Patent No. 257,222, granted to John Holt May 22, 1882, for a device for attaching stars to flags, describes a device for adjusting and pasting stars on both sides of a field, but it does not suggest, or in any way detract from the merit of, the claimed invention of the complainant.

It is claimed that the method covered by complainant's patent produces a better flag at a reduced price, and that it is now in general use all over this country. I think these claims are sustained by the evidence. Upon the whole evidence, the complainant seems to be entitled to a finding that he believed himself to be the first inventor of the patented process and result, and first applied this patented mode of operation to the making of flags, and that the art, as applied to flagmaking, and the article, were new and useful, and had not been thus used or patented before the date of his application for a patent, and were an improvement on the methods and results which preceded them. The question is whether all these circumstances, taken together, are sufficient to constitute invention, or to show patentable novelty in view of the state of the art as hereinbefore set forth.

The theory of the patent law upon this question seems to disregard the individual knowledge, skill, or training of the alleged inventor, and the extent of the exercise of his individual inventive faculties. Whether the alleged invention was a mere accident or the result of years of experiment, the vital question is always the same: Is the thing claimed by him such as would not have occurred to a person skilled in the art to which it relates? For the purpose of determining this question, it must be assumed that the patentee was such a person, and had before him all the accumulated knowledge and experience of this country bearing upon the subject of inquiry disclosed to the public, from the working model in a related art which may border upon the field of abandoned experiment or lost art down to the embodiment of the principle in some other and distinct field, developed just before the inventive idea flashed upon the mind of the patentee. His application for a patent must, furthermore, be read in the light of all knowledge shed upon the world by foreign patent or printed publication. *Underwood v. Gerber*, 37 Fed. 682; *Id.*, 149 U. S. 224, 13 Sup. Ct. 854. It may be said that the application of this doctrine is productive of hardship in a case like the present one. But, whether this is so or not, the rule is settled by repeated adjudications since *Pearce v. Mulford*, 102 U. S. 112.

Applying this principle to the case at bar, we find the patentee claiming a method and result, in connection with fastening emblems to flags, which had been previously employed to fasten letters to blankets, patterns to embroidery, and patches to fabrics. It seems to me that, if there had been presented to practical needleworkers, such as those who have testified in this case, the problem of how to economically and methodically attach stars to

a flag, it must have occurred to them to repeat, with a cotton blank, the operation already performed with a woolen or paper blank. And, if the well-known zigzag stitch was better adapted than a double line of stitches to secure the edges, by having it sewed crisscross from the star to the fabric to prevent raveling, or if the surface of the star would lie flatter by stitching from point to point, as in the method claimed to be covered by the first claim, it seems to me it must have occurred to them to stitch stars in that way, just as it had occurred to them to stitch other fabrics, and to plush embroiderers to vary their stitching so as to make ornamental edges for fabrics. Mr. Steward, one of defendants' witnesses, testified that in 1880 he employed the method described in the patent in suit in attaching stars to flags for a dealer in flags, and that he kept samples of said work for a number of years, when they were destroyed, with a mass of other accumulated samples. Charles F. Herbert, an embroidery and needlework expert, another of defendants' witnesses, testified that for more than 10 years he had performed this class of work, both with straight and zigzag stitches, in applying designs and monograms to banners, and for other purposes. Neither of these witnesses produced any samples of the originals of such work. If the truth of this testimony were established, it would, perhaps, be sufficient to defeat the patent. But I do not understand that the presumptions of validity arising from the grant of the patent are to be rebutted by such unsupported testimony, nor that the presumption of knowledge of the art, applied in determining the question of patentable novelty, extends to an abandoned experiment, such as was testified to by Steward.

But the evidence of these apparently disinterested witnesses is relevant and persuasive in support of the claim that the application of their experience and knowledge to produce what may have seemed invention to Bowman, the flagmaker, should have occurred to him, and would have occurred to any person skilled in the art of appliqué work. *Lace Co. v. Schaefer*, 1 U. S. App. 118, 1 C. C. A. 488, 50 Fed. 106. Such an application of old processes to the new result of affixing emblems to flags seems to be referable to the skill of the workman rather than to the genius of the inventor, and to be, therefore, an analogous use. The fact that the new form of result has not previously been contemplated or achieved is not sufficient to support the claim of patentable novelty unless such result is substantially distinct. Such a result is "only the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." *Holister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717; *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. 1042; *Underwood v. Gerber*, *supra*.

In *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, the complainant's patent claimed a process of tempering wire for furniture springs. The same process had previously been applied

to different purposes, but it was claimed that the application of it by the patentee produced better results and covered a wider range of subjects than had been previously known. It further appeared that the patentee, being a manufacturer of furniture springs, had observed certain defects therein, had discovered that they could be obviated by the patented process, and that this discovery had revolutionized the art of making furniture springs. But the court, reviewing the previous cases on this question, held that, the principle involved having been already developed, the new application was merely another use of the knowledge possessed by those skilled in the art. It seems to me that the reasoning of this decision is conclusive against the first two claims of the patent in suit. This view is also supported by the following recent cases: *Aron v. Railway Co.*, 132 U. S. 89, 10 Sup. Ct. 24; *Johnson Co. v. Mills Co.*, 2 C. C. A. 506, 51 Fed. 762; *Fox v. Perkins*, 3 C. C. A. 32, 52 Fed. 205; *Lace Co. v. Schaefer*, *supra*; *Wilson v. Copper Co.*, 4 C. C. A. 484, 54 Fed. 495; *Underwood v. Gerber*, *supra*.

That a more thorough doing of what had been done before, or the production of a new fabric with higher finish, tighter weaving, or greater beauty of surface, due to the observation or skill of the workman, is not sufficient to sustain a patent, is held in *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601; that the mere carrying forward of an original conception resulting in an improvement in degree simply is not invention, is settled. *Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292; *Trimmer Co. v. Stevens*, 137 U. S. 423, 11 Sup. Ct. 150. These decisions seem to determine the nonpatentability of the article covered by the third claim.

These views render it unnecessary to consider the evidence as to the general use of the patented process and article. In a doubtful case, such evidence may suffice to turn the scale in favor of the patentee, but not in a case where there is clearly no patentable novelty. *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850; *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76.

Let a decree be entered dismissing the bill.

BAIN et al. v. SANDUSKY TRANSP. CO. et al.

(District Court, E. D. Wisconsin. March 29, 1894.)

ADMIRALTY JURISDICTION—TORTS—ARREST OF SEAMEN ON SHORE.

Where seamen have deserted, and are found on shore, their wrongful arrest and imprisonment there by procurement of the master is a tort not maritime in character, and admiralty has no jurisdiction of a libel to recover damages therefor.

Libel by John Bain and others against the Sandusky Transportation Company and another to recover damages for wrongful arrest and imprisonment.

Libel in personam against the Sandusky Transportation Company, as owner of the schooner S. L. Watson, for alleged tortious acts of the master. The master was also named as respondent in the libel, but is not before the court, as he was not served, has not appeared, and no ownership is shown in him. The libelants are four seamen who shipped on board the schooner S. L. Watson, at Sandusky, in September, 1889, for a voyage described in the so-called "shipping articles" as "from Sandusky to Toledo, Buffalo, and other ports, and back to Lake Erie port." They claim that these articles were signed on shipboard, after leaving port, and without reading, while the master states otherwise. The vessel was loading grain at Toledo for Buffalo. Arriving at Buffalo, she took on coal for Milwaukee, and was thence to proceed to Escanaba for iron ore for a Lake Erie port,—designated in the testimony as a "triangular trip." After arrival at Milwaukee, it appears that the libelants were persuaded by members of a union organization to become dissatisfied with the rate of wages fixed in their agreement, and left the vessel without notifying the master of their intention; but they testify that they informed the mate, and he said "All right." Later, the master met them on shore, and urged their return to the vessel, but they refused. The master then, upon advice of counsel, placed the matter before a United States court commissioner; and a complaint was thereupon sworn out by the master against the libelants, charging desertion, under section 4596, Rev. St. U. S. They were arrested, bound over for trial, and, in default of bail, were committed, and held in jail two months, until hearing was had in the district court upon demurrer to the information. The court ruled thereupon (*U. S. v. Bain*, 40 Fed. 455) that section 4596 was not applicable to navigation on the lakes; therefore, no offense was charged, and demurrer sustained. The men were then released, but navigation had closed, and they were left, without employment, among strangers. The libel asserts that this imprisonment was wrongful and illegal, and claims damage against the owners of the vessel, as for false imprisonment. The elements or measure of damage are stated in the brief of libelants as follows: (1) The wages earned and unpaid; (2) wages at the going rate during the period of detention in jail; (3) necessary expenditures occasioned by the detention; (4) and suggestion that libelants be permitted to amend their libel to claim punitive damages. There is no showing that the owners advised, authorized, or approved this action by the master, and they expressly deny any such sanction.

O. T. Williams, for libelants.

M. C. Krause and A. A. Krause, for respondents.

SEAMAN, District Judge (after stating the facts). A question of jurisdiction is raised at the threshold of this inquiry; and, if it is determined that the alleged cause of action is not of admiralty cognizance, the further interesting questions argued at the hearing—including that of liability of the owners for torts of the master—will not require consideration. The gravamen of the action is the wrong or tort alleged to have been committed in the imprisonment of the libelants. It is not founded upon any breach of contract, for the libelants had repudiated any contract, and had quit the service. There was no disturbance or interference by the master with contract rights. The fact that the measure of damages may refer to the contract does not change the subject of the action. Jurisdiction over torts, in admiralty, is clearly limited to maritime torts, of which the test is locality; and the tort must be committed on the water, and not on land. *The Plymouth*, 3 Wall. 20; *Leathers v. Blessing*, 105 U. S. 626; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25; *Thomas v. Lane*, 2 Sumn. 1, Fed. Cas. No. 13,902; *The Mary Stewart*, 10 Fed. 137; *The C. Accame*, 20 Fed. v.60r.no.6—58

642; *Milwaukee v. The Curtis*, 37 Fed. 705. The alleged wrongs in this case were commenced and consummated upon land. There does not appear even to have been an altercation on shipboard between the master and the libelants. The only grounds asserted for admiralty jurisdiction are the relationship of master to the vessel and crew, and the fact that the libelants had been seamen on the vessel, and were charged, as such, as deserters. These are elements for establishing a contract relation as maritime, but do not serve to establish a tort as marine, because that depends entirely upon the locality,—whether or not the wrong was committed upon water. The cases cited in behalf of libelants as supporting jurisdiction are all founded upon contract, either express or implied, and not applicable here. *Sheppard v. Taylor*, 5 Pet. 675, is the leading decision relied upon, and there the seamen had contracted for a legal voyage, were carried on one which was illegal, and thereby subjected to imprisonment in a foreign port. It was held that they were entitled to their wages up to the time of their return to this country, less intermediate earnings. Decisions holding the right of seamen to wages, and expenses back to ports of shipment, where the voyage has been interrupted, or where wrongfully discharged, and to wages when refused admission to the vessel after contracting to ship, are all aside from the question here. There is no pretense that the libelants offered or wished to return to the vessel, and it is undisputed that they refused to do so, both before and after arrest. It must be held, therefore, that a court of admiralty is without jurisdiction in the premises, and that remedy for the injury suffered by the libelants belongs wholly to the courts of common law. The evidence presents a case of great hardship, but, in the view here taken, it is unnecessary, and perhaps improper, to comment upon the merits, or consider any questions of liability.

Counsel for libelants suggests that they are at least entitled to wages up to the time they left the service, deducting advances made to them. If the power rested with the court to permit this libel for tort to be turned into one for enforcement of contract, it could not avail the libelants here, for the reason that they left the vessel before completion of their contract, which unmistakably called for a return to a Lake Erie port. This contract holds for forfeiture of wages in case of abandonment, under the general maritime law, without regard to the statute or its form. *The Crusader*, 1 Ware, 437, Fed. Cas. No. 3,456; *Jameson v. The Regulus*, 1 Pet. Adm. 212, Fed. Cas. No. 7,198; *Cloutman v. Tunison*, 1 Sumn. 373, Fed. Cas. No. 2,907. The libel is dismissed, for want of jurisdiction, and without costs.

THE ALEXANDER.

UNITED STATES v. THE ALEXANDER.

(District Court, D. Alaska. February 6, 1894.)

1. FISHERIES—SEA OTTERS—ALASKAN WATERS—FORFEITURE.

Rev. St. § 1956, prohibits the killing of fur-bearing animals within the limits of Alaska territory, "or in the waters thereof," and provides that

any vessel "engaged in violating this section" shall be forfeited. *Held*, that a vessel equipped for hunting sea otter, and cruising in Alaskan waters for that purpose, is "engaged in the violation" of this section, although the animals have to be captured by boats sent out, often to considerable distances from the vessel.

2. SAME—ALASKAN WATERS—LIMITS.

The schooner *A.* was seized and libeled for violating Rev. St. § 1956, which prohibits the capture of fur-bearing animals within the territory of Alaska, "or in the waters thereof." It was shown that she had made several captures of sea otter, and that her position, at all times, was within a line drawn from the southern end of Tugidak Island to Chirikoff, thence in the direction of the mainland, through the Semidi group, on to Sutkwik Island, and thence to the mainland; and that when within this line she was less than 12 miles from land. *Held*, that this was within the territorial waters of Alaska, and the schooner was liable to forfeiture under the said section.

In Admiralty. On final hearing. Libel by the United States against the schooner *Alexander*. Decree for libellant.

C. S. Johnson, U. S. Dist. Atty.
John S. Bugbee, for claimant.

TRUITT, District Judge. The libel of information in this case was duly filed July 11, 1893. It alleges that the schooner *Alexander* was seized, on or about the 2d day of July, 1893, at or near Chirikoff island, within the district of Alaska, by Capt. C. L. Hooper, commander of the United States revenue steamer *Rush*, and was then in proper custody at Sitka, Alaska. The cause of seizure, as set out in the libel, is as follows:

"That the said vessel, her master, officers, and crew, had been engaged in killing, and did on the 5th day of June, 1893, in latitude 56° 16' north, longitude 154° 24' west, near the south end of Tugidak island, kill two sea otters; and on the 13th day of June, 1893, in latitude 56° 45' north, longitude 154° 52' west, near Kadiak island, did kill one sea otter; and on the 25th day of June, 1893, in latitude 56° 12' north, longitude 156° 11' west, near Sutkwik and Afhgak islands, did kill six sea otters and one fur seal,—all of said animals having been unlawfully killed within the limits of Alaska territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes and the regulations thereunder."

A decree of forfeiture is asked for in the usual terms. The Pacific Trading Company, a corporation under the laws of the state of California, intervening as bona fide owners of the *Alexander*, her boats, tackle, apparel, furniture, and cargo, filed an answer in the case on the 15th day of September, 1893. In this answer it is specifically denied that at the times alleged, or at any other time, the vessel, her master, officers, or crew, were engaged in killing, or did kill, any sea otter or fur seal at the places designated in the libel, and then makes a general denial of having killed any of such animals at any time or place within the limits of Alaska territory, or in the waters thereof, or within the admiralty or maritime jurisdiction of the United States. The killing of these animals is not denied by the answer, and on the trial the witnesses for claimant admitted that the hunters of the *Alexander* did kill the number of said animals named in the libel, on the respective dates therein alleged. These facts are also shown by the log book of the vessel,

which was put in evidence by the libelant. The main question, therefore, to be determined, is whether the proofs show that the killing of these animals, or any of them, was a violation of section 1956, under the regulations of the secretary of the treasury. If any of them were killed within the "limits of Alaska territory or in the waters thereof," then the statute was violated, for it is not claimed that these hunters had any right or license to kill fur-bearing animals within such limits. If these limits were well defined, then the case would be a very simple one under the facts, and would turn wholly upon them. But they are not generally understood to be defined, or in any manner determined by competent authority, so far as they relate to Alaskan waters. Section 1956 of the Revised Statutes confers the power to authorize and regulate the killing of fur-bearing animals, except fur seals, within the limits of Alaska territory, or in the waters thereof, upon the secretary of the treasury, and said officer has at divers times issued written or printed regulations upon the subject. The regulations in force at the time the animals named in the libel were killed are contained in a circular duly issued by the secretary of the treasury under date of April 14, 1893, the direction and full text of which is as follows:

"To Collectors and Other Officers of the Customs, and to Officers of the Revenue Marine:

"Section 1956 of the Revised Statutes of the United States provides that no person shall, without the consent of the secretary of the treasury, kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animals, within the limits of Alaska territory, or in the waters thereof, and that any person convicted of a violation of that section shall for each offense be fined not less than \$200, nor more than \$1,000, or be imprisoned not more than six months, or both; and that all vessels, with their tackle, apparel, furniture, and cargo, found engaged in violation of that section, shall be forfeited. No fur-bearing animal will be allowed to be killed by persons, other than natives, within the limits of Alaska territory, or in the waters thereof. The killing by any one of fur seals, except upon the Pribyloff islands, by such party or parties as are permitted so to do, pursuant to the terms of a contract between the government of the United States and such party or parties, is prohibited. White men married to natives, and residing within the territory, will not be entitled to the privilege of natives under this order. The use of nets by the natives in taking sea otter is hereby prohibited. The master of any vessel having on board skins of otter, mink, marten, sable, fur seal, or other fur-bearing animals taken in Alaska or Alaskan waters, before unlading the same, shall report to the collector of customs at the first port of arrival of such vessel in the United States, and shall file a manifest of such skins with said collector. Masters of vessels failing to comply with these regulations will be considered as having violated the provisions of section 1956 of the Revised Statutes, and will be liable to the penalties prescribed therein. It will be the duty of the officers of the United States who may be in the localities where sea otter, mink, marten, sable, or fur seal, or other fur-bearing animals are taken, or who may have knowledge of any such offense committed, to take all proper measures to enforce the penalties of the law against persons guilty of a violation thereof. These regulations supersede all others previously in force.

J. G. Carlisle, Secretary."

As I have already stated, the testimony of claimant's witnesses shows that the number and species of animals named in the libel were killed, by hunters belonging to the Alexander, on the dates therein alleged; and in fact the answer does not make an issue on these points, but it does deny that the animals were killed at the

respective places designated in the libel, and the evidence sustains the answer in this respect. It is not possible, from the evidence, to determine the exact point where any of said animals were actually taken, though the locality of the hunting was along the coast of Alaska, near Tugidak island, or between that island and Chirikoff island. The Alexander reached this locality on the 4th day of June, 1893, and her log book designates it as "the hunting ground." It appears that after arriving there, on the certain days named in the libel, the hunters, none of whom were natives of Alaska or Indians, went off from the vessel in boats used for that purpose, as soon as they could get away in the morning, and, after hunting for sea otter such time as seemed proper or advisable to them, returned to it with their catch in the afternoon or evening. The vessel, during that time, was either lying to, or kept headed in the direction the boats had taken, and allowed to beat or drift along slowly after them. The mate, who remained in charge of her, testified that the aim was to always keep in sight of the boats while they were out, but sometimes, in foggy or rough weather, they might, for a time, get out of sight. The bearings given in the libel to locate the respective points where fur-bearing animals were killed were taken from the log book. They are not where the animals were actually killed, but are the bearings of the schooner at 9 o'clock p. m. of the days named. None of the animals were killed nearer than five or six miles distant from these points, and perhaps even further away than that. As the mate, who was in a position to know, says he did not, from the schooner, see any of them killed, nor hear gunshots fired at them, they must have all been killed quite a distance away from it, though I do not think the boats went so far from it on these trips as the master estimates in his testimony, for he makes his estimate upon the supposition that the boats traveled three miles an hour while out hunting. I do not think they averaged that rate of speed. The mate gives it as his opinion that they traveled about two miles an hour, and this seems much nearer correct, as it is not reasonable that they would row along very fast while on the lookout for seals or otter. But, as I view the matter, these questions are of no material importance. I do not think the case turns upon the distance from the schooner to where the animals were killed, nor that it is necessary to prove the exact point or points in the water where such killing took place. Neither does it make any difference whether the boats were further out to sea than the schooner, or between it and the nearest land. A view of the case so narrow and technical would, in effect, make the statute a dead letter. It says, in defining the penalty so far as it relates to vessels: "All vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited." Now, the question upon which this case turns is whether the Alexander was "engaged in violation" of this statute or not. Webster defines "engage" as: "To embark; to take a part; to devote attention and effort." It is admitted that the Alexander was engaged in sea-otter hunting. That was her business on the cruise. These ani-

mals are not usually killed from the deck of a schooner. To successfully hunt them it is necessary to send out the hunters in small boats or bidarkas, the latter always being used by the Aleuts. I think, where a vessel is out on a hunting voyage, her master, officers, and crew, or hunters on board, are all to be considered as engaged in a common enterprise or business, and every necessary action for the effectuation of the common purpose constitutes an essential part of the *res gestae* of any violation of law committed by any one of the party, and the vessel must be held responsible for such violation. If the *Alexander* was in Alaskan waters while the boats were out under control of her master, killing said animals, or received their catch while in such waters, then she violated the statute.

And just here we reach the pivotal question in the case: Was the *Alexander* within the waters of Alaska while engaged in hunting, or were the animals named in the libel, or any of them, taken therein? The evidence proves that none of them were killed within four leagues of the nearest shore, and even the points designated by the libel as the places where they were killed are more than that distance from land, except that of June 5th, which is about ten miles from Tugidak island. These places, however, as I have stated, are only the bearings of the schooner, taken at about 9 o'clock p. m. of the respective days mentioned, and are not where any otter or fur seal was actually killed. But I do not understand that this case is one that is to be tried and determined by the four-league rule. That rule is purely statutory, and relates only to the customs or revenue service. It does not attempt to extend the general maritime jurisdiction of the United States. This would involve an international question, and would disturb our friendly relations with other nations, unless done by mutual agreement and mutual concessions. The marine belt over which jurisdiction of the municipal laws of the adjacent land extend is generally understood and agreed upon among nations. It is determined by the law of nations, and the extent of such jurisdiction out over the open seas is three miles from shore, or what, at one time, was the range of a cannon shot. As that range is now extended to about twelve miles, some writers on international law claim that the marine belt ought to reach out that far. But, be this as it may, there have always been exceptions and modifications to this law. Even within this limit the waters are considered as a part of the common highway of nations, and the jurisdiction of the local authorities exists only for the protection of the coast and its inhabitants, not to subject passing vessels to the local laws of the government of the shore. On the other hand, nations at various times have asserted the right to protect their coasts from illicit trade, and prevent a violation of their laws by seizures on the high seas beyond the one-league zone. In *Church v. Hubbard*, 2 Cranch, 187, it is held that nations have this right, and that there is no fixed rule prescribing the distance from the coast within which seizures for violation of territorial laws must be made. In *U. S. v. The James G. Swan*, 50 Fed. 108, upon the question of jurisdiction raised therein, Judge Hanford says:

"National dominion and sovereignty may be extended over the sea as well as over the land. Should circumstances render it necessary, a nation having the power to do so may assert its dominion over the sea beyond the limits heretofore admitted by the powers of the earth to be lawful."

But in the case at bar I do not think it is necessary to invoke any unusual doctrine in order to give this court jurisdiction. It may be maintained by a fair construction of the statute, and by principles of law well established by judicial precedents. The object of the statute was and is to protect and prevent the destruction of fur-bearing animals in Alaska. The general facts of natural history are within the judicial cognizance of the courts. *Lyon v. Marine*, 5 C. C. A. 359, 55 Fed. 964. In the revised Encyclopædia Britannica it is stated that:

"Sea otters are only found upon the rocky shores of certain parts of the North Pacific ocean, especially the Aleutian islands and Alaska; * * * but owing to the unremitting persecution to which they are subjected for the sake of their skins, which rank among the most valuable known to the furrier, their numbers are greatly diminishing, and unless some restriction can be placed upon their destruction, such as that which protects the fur seals of the Pribyloff islands, the species is threatened with extermination."

This authority shows that these animals are not accustomed to the open sea, but "are only found upon the rocky shores of certain parts of the North Pacific ocean." In the history of the fur trade in Alaska it appears that, when the business was first commenced, sea otters in large numbers were found along the coast from Bodega bay in California, all the way up to the northern islands of Alaska, and westward to the furthest part of the Aleutian range. They were only found in bays, inlets, and about the numerous islands along the coast; never far out in the open sea. So numerous were they in 1758 that Capt. Tolstych, a Russian trader, secured over 5,000 skins on a single visit to Attoo island. Since that time they have been gradually disappearing, and their range becoming more limited, until now only a few, as compared with their former numbers, are left, and they are most all found about the islands, inlets, and banks along the Alaskan coast from Cook's inlet to the Semidi islands. This district is designated on the Alexander's log book as "the hunting ground," and has numerous islands within its limits. Sea otters are found between these islands, and between them and the mainland. The localities where they more commonly stay or resort are called "otter banks" by the hunters, and are designated as "otter-killing grounds" in treasury department circular of April 21, 1879. The master of the Alexander testified on this point, and his evidence is important in its bearing upon the habitat of this animal. He stated he had hunted sea otter in Japan and in Alaska, and that hunting them differed in the two countries in this: that in Japan they are hunted along the shore, while in Alaska they are hunted off shore. He was then asked to explain this difference in the manner of hunting, and his answer was: "There are banks in Alaska, and in Japan there are none where the otter keep themselves." The mate testified that the boats were out hunting on the occasion named, either between Tugidak and Chirikoff islands, or between these islands and the mainland. If, then, sea otters

along the Alaskan coast are off shore only because of the banks to which they resort, or because they are protected by the islands about and between which they are generally found, I think our laws should protect them, though they may, in such localities, be out more than three miles from the nearest land. The principle of *contra bonos mores*, suggested by Minister Phelps in the Bering sea controversy, might be urged to prevent foreign vessels from hunting sea otter in these waters, for it could hardly be considered good manners for them to do so. The *Alexander* belongs in the United States, and therefore no international question is involved in this case; but, unless the statute can be enforced against foreign vessels hunting in those otter grounds, it would be unjust and futile to enforce it against our own vessels. The case of *The Kodiak*, 53 Fed. 126, was a prosecution under the same section for the violation of which a forfeiture is sought in this case, and was tried in this court. The animals were killed about 20 miles from the nearest land, and it was contended by the claimant that the court had no jurisdiction to enforce the law beyond a marine league from the shore. The facts touching the question of jurisdiction in that case were similar to the facts in this, but jurisdiction was maintained. Among other reasons therefor, it is stated in the decision:

"If this position is correct, congress did a vain and useless thing when it enacted the statute under which this prosecution is had; for, from the nature and habits of the sea otter, if hunters are allowed to come with their vessels, and hover along the coast within a few miles of shore, though beyond a marine league therefrom, and kill them without molestation, then the laws for their protection are futile, and might as well be repealed. But the position is not correct."

The map or chart introduced in evidence, marked "Exhibit I," shows soundings and a chain of islands extending from Albatross bank along the coast, but far out from the shore of the mainland all the way down to the Shumagin bank, and inside of this chain, or of a line drawn from one of these banks to the other, the animals in question were killed. But the hunting grounds of the *Alexander* in this case may be included in much narrower limits, for if a line be drawn from the southern end of Tugidak island to Chirikoff, thence in the direction of the mainland through the Semidi group, on to Sutkwik island, and thence to the mainland, it will inclose the positions of the vessel on the days when these animals were taken, except that of the 5th of June, which is less than 12 miles from land. I think the evidence shows that such a line would inclose the hunting ground on which all of said animals were killed; and, from a fair construction of the law, I conclude they were taken in the territorial waters of Alaska, and within the jurisdiction of this court. The log book of the *Alexander* shows that on the 1st of July, 1893, she was on the hunting ground, and the testimony is that she was still there, and within one mile or less from Chirikoff island, on the 2d of said month, when seized, with hunters, guns, boats, and all appliances for sea-otter hunting, together with the skins of the animals previously killed, on board; and if it was necessary to decide the case upon a technical or limited construction of

the statute, I believe, from its language and the usual definition of the word, that she was "engaged" in violating the law at that time, but I prefer to base my decision upon the broader facts and principles already stated. A decree of forfeiture in accordance with the prayer of the libel must therefore be entered against the Alexander, her boats, tackle, apparel, furniture, and cargo.

COMPAGNIE COMMERCIALE DE TRANSPORT A VAPEUR FRANCAISE et al. v. CHARENTE STEAMSHIP CO., Limited, et al.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1893.)

No. 144.

1. SALVAGE—WHAT CONSTITUTES SALVAGE SERVICE.

A steamship broke her propeller shaft while on her way from Tampico to New Orleans. A strong norther had been blowing the day before, but both wind and sea were moderating. Her sails were set, but, owing to insufficient wind, it was difficult to keep her upon her original course, and she was consequently kept off to the eastward. Her captain was confined to the cabin by an accident, but he had efficient officers, and the sails, rudder, and steering gear were in perfect condition. Under these circumstances, a passing steamship was asked for towage, and, at some risk to herself, a wire hawser and heavy chain cable were got aboard, and the vessel towed to New Orleans. The towing vessel was delayed two days in arriving at that port. *Held*, that while the danger to either vessel was not extreme, yet the service was a salvage service requiring a liberal reward.

2. SAME—COMPENSATION.

A salved vessel was insured for \$1,400,000, but her value, as fixed by a survey after arrival in port, was \$110,000. The district judge accepted the full amount of the insurance as her value, which, added to the value of the cargo, gave \$379,800. Of this amount, one-twelfth was allowed as salvage. *Held*, that it was error to accept the amount of the insurance as against the positive valuation, and that sufficient compensation would be given by taking the latter amount, and allowing the same rate, which would give \$18,716.

3. SAME—DISTRIBUTION—CARGO OF SALVING VESSEL.

Cargo carried by a salving vessel is not entitled to share in the salvage when it receives no damage or injury because of the service; nor does any implied agreement to share therein arise from the acceptance of a bill of lading in which the right to render aid to vessels in distress is specially reserved. The *Persian Monarch*, 23 Fed. 820, followed.

4. SAME.

The giving of a liberal proportion of the salvage awarded to the officers and crew, the direct actors in the service, is considered the better policy, and of \$18,716 given as salvage \$5,275 was decreed to them.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel for salvage filed by the Charente Steamship Company, Limited, and others, against the steamship Dupuy De Lome, of which the Compagnie Commerciale de Transport a Vapeur Francaise and others are claimants. There was a decree for libelants, finding the salved property to be worth \$379,800, and awarding one-twelfth thereof as salvage (55 Fed. 93), and the claimants appeal.

The steamship Dupuy De Lome, belonging to the appellant company, while on a voyage from Antwerp, via Tampico, to New Orleans, at about half-past 2 on the morning of May 22, 1892, and while 97 miles on her course from Tampico towards New Orleans, broke her propeller shaft. There had been a strong norther blowing at Tampico the day before, causing quite a heavy sea, but both wind and sea were moderating. At the time of the accident the master, who was confined to his room by a lame ankle, called a consultation of his officers and the principal members of the crew, and it was determined to endeavor to reach Tampico under sail. All sail was made, but from insufficient wind it was difficult to put her on her course to the westward, she keeping off to the eastward. At about 8 o'clock a. m. the steamship Engineer, belonging to the appellee company, which had left Tampico about six hours after the Dupuy De Lome, bound also to New Orleans, hove in sight, a boat was lowered from appellant's steamship and sent on board, and towage asked. The only understanding had was that the Engineer was to take the disabled ship in tow to New Orleans, the compensation to be settled by arbitration. The greater part of the day was spent in getting hawser and chains run between the vessels, one wire hawser having been parted, and one of the heavy cable chains of the Dupuy De Lome run in its place. At about half-past 4 that afternoon they got under way, and reached South Pass Thursday, the 26th, having occupied two days longer, on account of the towing, than was usually required for the voyage. In addition to the libel for salvage filed by the appellees, an intervening libel was filed by Rousseau, Latour & Co., owners of a portion of the cargo of the Engineer, the salving steamship, who claimed a portion of any salvage awarded on account of the risk which their property had incurred on account of rendering such service. The district court found the value of the property to be \$379,800, and awarded one-twelfth of it for salvage, and dismissed the intervening libel. From the judgment, the claimant company and the interveners have appealed.

W. W. Howe and S. S. Prentiss, for Compagnie Commerciale, etc.
 John D. Rouse and William Grant, for Rousseau, Latour & Co.
 J. McConnell, for Charente Steamship Co.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge (after stating the facts). This steamship was so far disabled as to be in need of assistance to enable her to complete her voyage, and, although not in immediate peril, was so in distress as to justify the use of the term "salvage" in designating the aid she required. We fail, though, to find anything in her condition or position that would justify the belief that she was in danger of being driven ashore, as is claimed. It was remarked by the learned judge in the case of *The Colon*, 4 Fed. 469:

"It is speculation and conjecture to assume that disaster would have overtaken the *Colon* because of her location, or of her drifting, or of a change of weather, or of her being deprived of the use of her steam machinery. Anything may happen, but there is no evidence on which to found a reasonable belief that disaster would have happened to the *Colon* or her cargo from any of these causes."

We consider such language is peculiarly applicable to the case at bar. Although the master was, for the time, confined to his room, it appears that he had efficient officers, and his holding a consultation with them and the crew as to what was most advisable to do under the circumstances, instead of being an evidence of his knowl-

edge of the danger to which they were exposed, was but in compliance with the marine law of his nation. The rudder and steering gear of the vessel were in perfect order, as were also the sails, and with the weather that is shown to have followed for the next four days we do not consider there would be a question of her ability to avoid any dangerous place on the coast until she could come to safe anchorage or procure other assistance. Although there has been some question as to the course in which she was moving, we are satisfied that the record shows that she was making to the eastward, and going further from the coast, at the time, which was the reason of taking in the sails. She could have unquestionably continued that course until a change of wind, which is shown to have soon taken place, would have enabled her to either make Tampico or some other safe anchorage. The norther which had been blowing had greatly moderated, both wind and sea had in a great degree subsided, and a small boat had no difficulty in carrying the lines back and forth between the vessels.

But although it does not appear that the peril was great or immediate, yet the future was uncertain, and it was the part of wisdom to procure aid as soon as possible. The danger encountered by the Engineer in lying by the Dupuy De Lome while taking the hawser and cable on board and in the towing, was more than that of ordinary navigation, and a risk that steamship owners should not be called upon to encounter without a liberal compensation. The *Daniel Steinman*, 19 Fed. 918, and cases there cited. The size of the chain cable in this case which had to be taken in over the quarter necessitated extra diligence, skill, energy, and labor to avoid disaster, and it was carefully and successfully handled.

There is no question regarding the value of the cargo of the Dupuy De Lome, but in regard to her value there appears to be one of importance, particularly as the salvage awarded has been a proportionate amount of the entire value of the property saved. Upon that question there are two items of evidence: First, the fact stated by the master that she was insured for \$1,400,000, of which the owners took \$350,000, or one-fourth; and, second, the evidence of the valuation placed upon her by a board of survey after her arrival in this port, and the testimony of Conway & Baker, surveyors, upon that point. The two amounts so testified to differ by a large amount, the surveyors finding the value to be but \$110,000. It is the value of the property which is restored to the owners that is to be considered, and of which a proportion is to be awarded as salvage in salvage cases, and not the original value imperiled.

While the amount for which a vessel may have been insured may be considered as a circumstance in arriving at its value after marine disaster, it is not direct testimony to that effect, nor can it be considered as conclusive as against a positive valuation. There was no appraisal asked of the court by libelants, nor did they introduce any evidence to show a different value of the property, at the time when it became subject to salvage, than that stated by the witnesses. In accepting as the true value of the vessel the full

amount of the original policy of insurance (of which the owners bore one-fourth, and which must have covered all prospective earnings for the voyage, as they were not permitted to further insure the freight), and ignoring the testimony of their surveyors, we consider the learned judge below inadvertently erred. It is true, as contended, that appellate courts dislike to disturb salvage awards in amount, yet it has always been held that, where there has been any clear and palpable mistake, it is the duty of such court to correct it. *The Blackwell*, 10 Wall. 1; *The Bay of Naples*, 1 C. C. A. 81, 48 Fed. 737. Perhaps the true value of the vessel exceeded that put upon it by the board of survey, but, if so, we consider that the very liberal rate given would be an ample award for the service rendered, even though there might be an increased value beyond that. The exact value of the property saved, where large, is but a minor element in computing salvage, and, as it increases, the rate per cent. given is rapidly reduced. It is a compensation for actual service rendered, and a reasonable gratuity for the benefit of commerce, that is contemplated, and not a fixed percentage of the property saved. In considering an amount to be awarded herein, cases of similar class and character to this one are not infrequent, and precedents are numerous. Wherever the very large amounts, as cited in behalf of libelants, have been awarded, there have been peculiar circumstances to justify them that are not found in this case.

In the case of *The City of Berlin*, Mitch. Mar. Reg. April 28, 1882, where £8,000 was given, the value of the salvaged property was £237,198, the salvor ship £88,000, and there was a detention of 10 days. In the case of *The City of Richmond*, Id. Feb. 27, 1880, where £7,000 was awarded, the value of the property aided amounted to £509,929, and the disabled steamer had nearly 500 passengers on board. In the case of *The Silesia*, Id. June 25, 1880, where £7,000 was likewise given on a value of £108,000, the salvaging vessel had on board a large number of passengers, and deviated from her course six days. In *The Camona*, Ship. & Mer. Gaz. Feb. 20, 1885, the disabled vessel had on board, as a part of her cargo, more than 800 head of cattle, with provisions for but a few days, and it had been decided to throw a large number overboard if help did not soon appear. The salvaging vessel had on board 350 passengers, and the towage was a distance of 700 miles. In that case £6,000 was given on a value of £64,000. In *The Daniel Steinman*, 19 Fed. 918, the disabled vessel had 335 steerage passengers, with a crew consisting of but 14 all told. She had but two masts, and could spread but a small amount of canvas for a vessel of her size. The opinion of Judge Benedict shows plainly that the presence of the large number of passengers was considered by him an element which entered largely into his determination of that case, and a salvage of \$25,000 was given.

In *The Italia* both steamships, the salvaged and the salvor, were carrying a large number of passengers. The value of the *Italia* was \$473,421, and that of the salvaging vessel \$400,000. The weather, at the time of towing, was at times stormy, and the path over which

they had come subsequently swept by severe gales. The towage occupied the same time as in this case. 42 Fed. 416. In the case of *The Severn*, which, after having been driven about the ocean for 35 days with her main shaft broken, and mail and passengers on board, was picked up and towed into port with some difficulty, a salvage of £3,500 was given on a valuation of £66,700. *Mitch. Mar. Reg.* July 28, 1882. *The Bywell Castle*, with her shaft broken, was towed into Halifax in five days,—a distance of 876 miles. The salvor steamship had upwards of a thousand persons on board as crew and passengers. £3,000 was given on a valuation of £31,118. *Id.* Aug. 12, 1881. In *The Colon*, 4 Fed. 469, where the time occupied in the towage was the same as in this, but the actual detention was 12 hours less, and where the value of salved vessel and cargo was \$480,000, a salvage of \$10,000 was given, with a further amount of \$2,200 for damage sustained by the salving vessel. In the case of *The Gallego*, 30 Fed. 271, valued at \$476,764, towed into Havana with some difficulty, \$2,500 was given, and in that of *The Alaska*, 23 Fed. 597, \$26,039, or $2\frac{1}{2}$ per cent. of the value of the salved vessel and cargo.

Numerous other instances are found where amounts have been given much less than we think may be allowed in this case; but it is unnecessary to review or compare them, as each has its peculiar circumstances which have tended to increase or diminish the amounts awarded, in the view of the tribunal deciding it. In this case we find none of the elements of what may be termed a high grade of salvage service, and we think the judgment of the court below should be modified, certainly to the extent that we consider an error was made in determining the value of the property saved. We consider the rate given sufficiently liberal to compensate fully for any excess in value that there may have possibly been. The rate allowed in the court below upon the value, as testified to by the witnesses, would give \$18,716, which is as much as we consider the circumstances of the case will justify. In the court below the amount awarded was distributed, five-sixths to the steamship, and one-sixth to the master and crew. Salvage after the compensation for the actual service rendered is a bonus—a gratuity—for the benefit of commerce, as an encouragement for like services and efforts, and, as was forcibly declared in the case of *The New Orleans*, 23 Fed. 909, “no amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion;” and we consider public policy is better served by a larger proportion given to the direct actors. We find from the very convenient compilations of the amounts of salvages awarded steamers for rendering services in towing other steamers when disabled, found in *Pritchard's Admiralty Digest* (volume 11, pp. 2119, 2120), that in the distribution of such awards the portion given the officers and crew has varied from a fourth to a third,—very seldom less than the former proportion, and more frequently the latter. In this case we consider that the one-third

would not be an unreasonable share; but in this case there has been no appeal on behalf of the officers and crew from the decree fixing their amounts, and, although we consider a larger proportion might well have been given them, we do not desire to increase the amount decreed them by the court below. The sum of \$5,275 (the same amount given in the former decree) will be awarded to the officers and crew of the steamship Engineer in the same proportions as were awarded them therein, and the sum of \$13,441 to the Charente Steamship Company, Limited, owners of the steamship Engineer.

In the matter of the intervening libel of Rousseau, Latour & Co. et al., we consider the reasoning of the learned judge in the case of *The Persian Monarch*, 23 Fed. 820, which we cordially approve, is conclusive. The property of the interveners in no way assisted in rendering the service, nor received any damage or injury from it. It would be most strongly against public policy, upon which salvage is founded, to permit the owner of every shipment in a cargo to claim a portion of any salvage award earned by the efforts of the officers and crew, and the use of the machinery and power of the ship in which it was carried. The accepting a bill of lading in which was specially reserved the right to render aid to vessels in distress was no such consent on their part to the rendering of such service as could entitle them to a portion of what was so earned. *The Persian Monarch*, 23 Fed. 820; *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032; *The Waterloo*, 1 Blatchf. & H. 114, Fed. Cas. No. 17,257; *The Colon*, 10 Ben. 60, Fed. Cas. No. 3,024; *The Brixham*, 54 Fed. 540. The decree dismissing the intervening libel is so far affirmed.

It is ordered that the decree upon the libel below be reversed, and the cause be remanded with directions to enter a decree for the libelants for the sum of \$18,716, with costs, and of said amount \$5,275 be awarded to the officers and crew of the steamship in the proportion of their rank and pay, as before decreed, and the sum of \$13,441 to the Charente Steamship Company, owners of the steamship Engineer; and that appellees pay the costs of the appeal.

THE ALFRED J. MURRAY.

AMERICAN TOWING & LIGHTERING CO. v. THE ALFRED J. MURRAY.

(District Court, D. Maryland. March 9, 1894.)

1. MARITIME LIENS—INNOCENT PURCHASERS—TAKING VESSEL FOR DEBT.

One who takes a barge in payment of a debt is not an innocent purchaser, so as to entitle him to the benefit of the rule that, when the business in which a vessel is engaged is divided into distinct seasons of activity, old claims must be enforced before the debts growing out of the next season are incurred.

2. SAME—EXTINGUISHMENT—TAKING NOTE.

The taking of a note does not extinguish the lien, unless such was the understanding of the parties.

Libel by the American Towing & Lightering Company against the barge Alfred J. Murray.

Robert H. Smith, for libelant.

R. M. McSherry and Alan McSherry, for respondent.

MORRIS, District Judge. If the claimants of the barge were the same owners who contracted the debts for which maritime liens are asserted by the libelant and petitioners, there would be no doubt of the respective rights of the libelant and petitioners to enforce their liens in rem against the barge. The only ground of defense is that, by laches in allowing their respective claims for towage and supplies to run on, accumulating during the year preceding the sale to the present owners, they have been guilty of such laches as estops them from now asserting the lien against the barge in the hands of her present owners.

The present owners obtained title May 9, 1893, from J. A. and C. Griffin, who owned the barge at that date, and who were the owners when the claims of the libelant and petitioners were contracted. They had failed in business in April, and owed the claimants a debt, in payment of which they had nothing to offer except their interest in the barge, and the claimants, in their effort to secure something, obtained their title to the barge. The claimants were creditors of J. A. and C. Griffin, just as the libelant and petitioners were, except that they had no lien on the barge for their debt. The claimants were not, therefore, purchasers for value who paid money on the faith of their purchase, but simply unsecured creditors seeking to get what they could on account of their debt.

The rule which applies to the case of a purchaser for value does not apply to them. They knew, from specific information, that there were some small unpaid claims for supplies, and they took the chances as to there being others. They acquired only the interest of their debtors. *The Key City*, 14 Wall. 660; *The James T. Easton*, 49 Fed. 656. Undoubtedly, there are many cases in which so long a delay in enforcing a maritime lien as in this case would properly be held to be laches, but the circumstances which excuse the nonenforcement are always to be considered.

With regard to the libelants, they could not conveniently have caused the arrest of the barge, except when she was in the prosecution of a voyage, and as to the petitioners, although she was frequently in her home port, in New Jersey, where they lived, it was only for a brief interval, when she was discharging or loading, and from December to March she was laid up for the winter at a distance on a remote river of Virginia. Their claims were all small compared to the value of the barge, and were for items of a continuing account. When barges and vessels are used in a business in which the year is divided into distinct seasons of activity, it is a wise rule which requires that, as against purchasers for value or meritorious lien claims, old claims must be enforced before the debts growing out of the next season are incurred; but

the claimants in this case were not purchasers for value, and are not entitled to the benefit of that rule.

The taking of a promissory note by the libelants does not affect their rights to maintain their lien. It is established law that the taking of a note does not extinguish the lien of the claim for which it was given unless such was the understanding of the parties.

The first item—\$60.09—of Tunison's account is disallowed.

The claims are allowed, without interest and without costs.

THE SHARPEE SHE.

BRALEY v. BELL.

(District Court, S. D. New York. March 24, 1894.)

COLLISION—ANCHORED VESSEL—BREAKING ADRIFT—INSECURE ANCHORAGE.

When the owner of an anchored vessel has reasonable notice of the insufficiency of his anchorage, and the danger of drifting in a storm, he takes the risks of such drifting, and a collision caused thereby is due to his neglect, and cannot be held to be inevitable.

Stewart & Macklin, for libellant.

John J. Roach and Peter S. Carter, for respondent.

BROWN, District Judge. During the storm of the night of September 13 to 14, 1892, the defendant's yacht Growler, anchored upon the grounds of the Pavonia Yacht Club, at Communipaw, dragged and fouled the libellant's yacht Sharpee She, causing her some damage. The owners of both yachts were members of the same yacht club. There were no rules of the club concerning the mode of anchoring; and the sufficiency and responsibility of each must, therefore, be judged by the ordinary rules of law.

I must find, upon the evidence, that the anchorage ground was an unsafe one in storms, by the usual methods of anchoring, and was known to be so. The ground was soft mud, beneath which were oyster shells, under which was again mud. Anchors would not take a firm hold. Drifting and fouling in storms had been previously frequent; and the insecurity of the anchors was, I must find, so generally known that reliance upon them in storm was at the risk of the owner that used them. Many of the yachts were made fast to poles driven from six to eight feet into the mud. The libellant's yacht was made fast in that way, and held both yachts through the remainder of the storm after the Growler had fouled and remained pounding her. The storm in this case was not of any extraordinary severity; and where there is reasonable notice of danger of drifting in storms that are liable to arise, the owner takes the risk of reliance on means known to be of doubtful sufficiency. No accident in such cases can be held to be "inevitable." Many authorities to this effect are cited in the recent case of *The Anerly*, 58 Fed. 794.

Decree for the libellant, with costs.

WILCOX & GIBBS GUANO CO. v. PHOENIX INS. CO. OF BROOKLYN.
 CHARLESTON BRIDGE CO. et al. v. AMERICAN FIRE INS. CO. MT.
 PLEASANT & S. I. FERRY CO. v. HOME INS. CO. OF CITY OF NEW
 YORK. CHARLESTON BRIDGE CO. et al. v. SAME. SAME v. PHOE-
 NIX INS. CO.

(Circuit Court, D. South Carolina. April 5, 1894.)

1. **REMOVAL OF CAUSES—TIME OF REMOVAL—EXTENSION OF TIME TO PLEAD.**
 When the time within which defendant is required by the state statute to answer or plead is extended by special order of the court, a removal may be had under the act of 1888, within the extended period. *Spangler v. Railroad Co.*, 42 Fed. 305, disapproved.
2. **SAME—CITIZENSHIP—CORPORATIONS.**
 When the petition shows that defendant is a corporation of another state, it need not allege that it is a nonresident of the state in which the suit is brought, and of which plaintiff is a citizen. *Shattuck v. Insurance Co.*, 7 C. C. A. 386, 58 Fed. 609, followed.
3. **SAME—EFFECT OF REMOVAL—DEFAULT FOR ANSWER.**
 An order was entered in the state court February 5th, extending the time for answer to March 10th. The petition for removal was filed February 10th, the ground being diverse citizenship. The state court was not asked to approve the petition and bond until March 20th, when it was immediately done, and the record thereafter filed in the federal court. *Held* that, as the ground of removal was diverse citizenship alone, the mere filing of the petition and bond worked a change of jurisdiction, and that, as defendant had allowed the time for answer to expire before filing the record in the federal court, that court must hold him in default for answer.
4. **PRACTICE—EXTENDING TIME FOR ANSWER.**
 Enlarging the time for answer does not operate as a "stay of proceedings," within the meaning of the South Carolina statute (Code Proc. § 402, subd. 6), and hence no notice to the adverse party is required, but the order may be made on *ex parte* motion and affidavit, under section 405 of the Code.

These actions were brought in a state court, and thence removed to this court by defendant. They are now heard together on motion to remand.

Bryan & Bryan, Ficken & Hughes, and Buist & Buist (Mitchell & Smith, of counsel), for plaintiffs.

Trenholm, Rhett & Miller, for defendants.

SIMONTON, Circuit Judge. These are motions to remand the causes to the state court. In each of them the same question is presented. In the second case an additional ground for removal peculiar to it is suggested. The plaintiff began several actions in the court of common pleas for the county of Charleston, S. C., against the several defendants, by summons and complaint. The complaint of the Mt. Pleasant & Sullivan's Island Ferry Company was served on the defendant named therein on 25th January, 1894. The complaints in all the other cases were served on the defendants named in them, respectively, on 27th January, 1894. On 5th February, 1894, his honor, D. A. Townsend, a circuit judge of the state of South Carolina, out of term extended the time in which the defendants could file their answers in these several cases to 10th March, 1894.

The petitions for removal into this court were each filed with the clerk of the court of common pleas for Charleston county more than 20 days after the service of the several complaints upon the defendants, but within the period to which Judge Townsend had extended the time for answering; that is to say, some on 24th February, others on 5th March, 1894. The petition and bond in each case were presented to the court of common pleas at Charleston, were approved, and an order removing the cause entered. No further steps having been taken by the defendants, the plaintiffs, on 23d March, 1894, filed a transcript of the record in this court in each case, and thereupon, in each case, made a motion to remand the cause. Various grounds were set up in support of the motions.

First. The act of congress of 1887-88 (25 Stat. 435, § 3) requires the person desiring to remove a suit from the state court to this court "to make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration of complaint of the plaintiff." The Code of Civil Procedure of South Carolina requires a defendant to make his defense to a complaint within 20 days after the service thereof, and, in order to secure a removal of the cause, the petition and bond must be filed within this period. The extension of time allowed by the judge does not extend the period within which the petition for removal must be filed. In *People's Bank of Greenville v. Aetna Ins. Co.*, 53 Fed. 161, a motion similar to these was made upon grounds essentially the same, and the motion was not granted. Counsel have asked a reconsideration of this case. The grounds upon which that case was decided have been carefully reconsidered; all the authorities quoted by counsel and others within reach have been examined. When is a defendant required, by the laws of South Carolina, to answer or plead to the complaint of a plaintiff? The Civil Code of Procedure has these provisions on this subject:

"The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of a copy of the complaint." Section 164.

"The time within which any proceeding in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged upon an affidavit showing grounds therefor by a judge of the circuit court." Section 405.

When, then, is a defendant required, by the laws of South Carolina, to file his defense; that is, any defense whatever? *Gerling v. Railroad Co.*, 14 Sup. Ct. 538. "Required;" that is to say, when is this act "rendered necessary or indispensable?" Cent. Dict. Until that period has elapsed he is not in default. Therefore, one test by which this question can be answered is, when does the defendant come in default? One is required to do an act when he must do it or suffer consequences. Up to the expiration of the time within which he may do the act he is safe. When that time expires he suffers the penalty. Under the laws of South Carolina, if a defendant, during the 20 days after service of the complaint,

obtain no order enlarging the time for making defense, he will be in default if he do not file it within that period; but, if he have an order enlarging that time, he is not in default until the end of the time allowed him. Until then he is not obliged to make any defense whatever. He is not in default. He suffers no consequences. His right of removal has not been lost. This is the conclusion reached by this court as the law of the circuit in the case of *People's Bank of Greenville v. Aetna Ins. Co.*, 53 Fed. 161. The same rule prevails in the second circuit, where the same Code of Procedure exists as in South Carolina. *Rycroft v. Green*, 49 Fed. 177. This would also seem to be Judge Hammond's opinion in *Turner v. Railroad Co.*, 55 Fed. 689. And if the test be, when is the defense due? this would seem to be the result of *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306. The point made has not been decided by any court of paramount authority. The learning and research of counsel have brought to the attention of the court a number of cases in circuit courts of the United States, nearly all of them in the eighth and ninth circuits. An examination of these cases shows that in very few of them, not exceeding two, the precise question involved in this case was decided, although the learned judges in many of them indicate opinions valuable indeed, but not conclusive on the point. Thus, in *Delbanco v. Singletary*, 40 Fed. 177, Judge Sabin, of Nevada, holding the circuit court, held that when defendant had filed a demurrer to a complaint which was sustained, and, the plaintiff having had leave to amend, leave was given to defendant to file his answer to amended complaint in 20 days, and the amended complaint was filed, and thereupon defendant filed his petition to remove, he was too late. We see in this case that, defendant having, during the period within which he was allowed to make his defense, an election of his forum, and having selected the state forum, the right of election ended. The right of removal was lost, and the indulgence of the state court could not restore it. To the same effect is the case of *McDonald v. Mining Co.*, 48 Fed. 593. The supreme court of the United States in the case of *Gerling v. Railroad Co.*, 14 Sup. Ct. 533, above quoted, construes the removal act, when it uses the words, "within which to file answer or plea," as meaning not the technical answer or plea, but any defense whatever; and so, when a plea in abatement or other dilatory pleading is used, or a demurrer filed, this act terminates the right of removal after the period has expired. In *Velie v. Indemnity Co.*, 40 Fed. 545, Judge Jenkins, eastern district of Wisconsin, remanded a cause, it appearing that the petitioner allowed the statutory period to elapse before putting in his petition for removal, relying on a stipulation with the plaintiff. The act of congress limits the time as provided by laws of the state. The stipulation between or consent of parties cannot repeal the law of the state, or give this court jurisdiction. In *Hurd v. Gere*, 38 Fed. 537, the defendant, after the time to answer had expired, obtained, contrary to the practice of the court, an ex parte order extending his time to answer, and then filed his petition. The case was remanded. The defendant having come within the terms of the act of congress, the state courts

could not assist him by a valid order, still less by one that was invalid. In *Austin v. Gagan*, 39 Fed. 626, Sawyer, J., California, very properly held that a stipulation between parties could not extend the time fixed by act of congress, and by its terms limited to the provisions of the laws of the state. So, also, *Martin v. Carter*, 48 Fed. 596, decides the same point in the same way; and in *Rock Island Nat. Bank v. J. S. Keator Lumber Co.*, 52 Fed. 897, the same judge (Knowles), in the same court, held that a stipulation between parties, made after the time for answering had expired, could not give the right to remove. In *Dixon v. Telegraph Co.*, 38 Fed. 377 (Sawyer, J.), not only had the time for answering expired, but no order for extension of time was shown. But one of the cases quoted by counsel is on all fours with the case at bar,—*Spangler v. Railroad Co.*, 42 Fed. 305 (Philips, J., W. D. Missouri). There an action was brought in the state court, returnable to October term, 1889. Under the state statute, defendants are required to answer on or before the third day of the term, unless longer time be granted by the court. On the first day of the term, defendant obtained an enlargement of the time to answer until 1st of November following. On 30th October he filed his answer, and on the same day filed a petition to remove. The case was remanded. With all deference, the reasoning of the learned judge is not satisfactory. He is misled by the supposed analogy of the act of 1875 and the decisions thereunder; and in this he follows the obiter dicta of many of the judges in the cases above referred to. The act of 1875 required the petition for removal to be filed at or before the first term at which the case could be tried. This is a distinct, fixed, inflexible period, unaffected by any indulgence allowed in the state statutes for want of ability to try at the first term. Indeed, it is fixed without reference to any such statutes. Of course, no order of the state court indulging the defendant could affect this rule. The very fact of the granting such indulgence by order shows that but for it the case could have been tried, and that nothing prevented the trial but the convenience of parties. But in the case before us there is no such positive, inflexible provision. The period is that within which the defendant is required—within which it is necessary or indispensable for him—to answer or plead. This period the laws of the state leave, in some measure, within the discretion of the judge; and the defense is due (*Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306) at the end of the time allowed by the judge under the provisions of the law.

The next ground upon which the motion to remand is made is that it does not appear affirmatively that the defendants are not residents of this state. The defendants are sued in each complaint, respectively, as corporations of the state of New York. The petition states that at the time suit was brought, and at the time of the filing of the petition, the corporation is a corporation of the state of New York. It does not in any case state that it is a nonresident of the state of South Carolina. Some cases on circuit hold that this last fact should have been stated, for non constat it may, since the filing of the complaint, have become a corporation of the state of

South Carolina. Apart from the fact that, even were this the case, the South Carolina corporation was not sued, and that, if it had been called into existence after suit commenced, it could not be bound by the suit without amendment, and apart, also, from the maxim, "*conclusio unius exclusio alterius*," the very question has been authoritatively settled in the circuit court of appeals. *Shattuck v. Insurance Co.*, 7 C. C. A. 386, 58 Fed. 609. The point is not well taken. A corporation is a resident only in the state of its creation. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935.

The next point is that the petition is for the removal into the circuit court of the United States for the eastern district of South Carolina. Strictly, it should have been into the district of South Carolina, the circuit court having jurisdiction over the whole district of South Carolina. But the plaintiffs themselves have filed the record, and have made their motions in this court. They have not been misled. The record is here. This court has been asked by the plaintiffs to take cognizance and jurisdiction over it. The defendants have fulfilled one of the conditions, the main condition, of the bond. The defendants have also submitted themselves to the jurisdiction, and the addition of the word "eastern" will be treated as surplusage.

One other objection has been stated, and that is that the order enlarging the time was granted on *ex parte* motion and affidavit, under section 405 of the Code of Procedure; that section 402, subd. 6, provides that no order to stay proceedings for a longer time than 20 days shall be granted by a judge out of court, except on notice to the adverse party. The words are "to stay proceedings,"—all proceedings evidently. An answer is a proceeding. Enlarging the time to answer does not stay a proceeding, nor does it in any sense stay or prevent any provisional remedy plaintiff may apply for. *Sisson v. Lawrence*, 25 How. Pr. 435. The complaints, as we have seen, were filed 25th January, 1894. The order for the extension of time to answer was made 5th February, 1894, and the time was extended to a day certain,—10th March, 1894. The petitions for removal were filed 24th February, 1894, and, the only ground for removal being diversity of citizenship, the state court at once lost jurisdiction. The defendants took no steps in bringing the matter before the state court until 20th March, 1894. The state court then gave its sanction to the bond and its approval of the petition. The records were filed in this court by plaintiffs March 23, 1894, and by the defendants 2d April, 1894. The cause comes into this court in the same plight in which it left the state court, and all orders therein of force before removal are of force here. *Duncan v. Gegan*, 101 U. S. 810. When the record was filed here, the time for answering had expired. The defendants had cut themselves off from any further extension of time in the state court, but could have filed their answers in the state court between the 5th and 24th February; and after the 24th February, 1894, they could at any time have filed in this court copies of the record, and given this court the right to act. The petition and bond, as we have seen, under the ground of removal, work the change of jurisdiction, independent of any

action on the part of the state court. *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Railroad Co. v. Koontz*, 104 U. S. 5. The cause comes into this court undefended. It must be docketed, and be marked for trial. The answer may be put in on terms.

The motions to remand are refused. The defendants have leave to file their answers forthwith. Let the cases be called for trial at this term.

The special ground set up in the second of the cases heading this opinion is this: that the order enlarging the time was granted on the condition that the cause be docketed at that February term of the state court. But, before the answer was required, the cause was removed. This case, in principle, does not differ from the others, and will follow the same course.

UNITED STATES v. E. C. KNIGHT CO. et al.

(Circuit Court of Appeals, Third Circuit. March 26, 1894.)

No. 6.

MONOPOLIES—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.

The purchase of stock of sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States does not involve monopoly, or restraint of interstate or foreign commerce, within the meaning of the act of July 2, 1890.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill in equity filed by the United States against the E. C. Knight Company, the Spreckels Sugar Refining Company, the Franklin Sugar Refining Company, the Delaware Sugar House, the American Sugar Refining Company, and numerous individuals, to have canceled and declared void certain contracts made by the American Sugar Refining Company with the other defendants, as being the result of a combination or conspiracy to monopolize or restrain interstate and foreign commerce. There was a decree for defendants in the court below, and complainant appeals.

Ellery P. Ingham and Samuel F. Phillips (Robert Ralston, Asst. U. S. Atty., on the brief), for the United States.

John G. Johnson (John E. Parsons and Richard C. McMurtrie, on the brief), for appellees.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

DALLAS, Circuit Judge. There are three assignments upon this record. The first two aver, in general terms, that the court below erred in dismissing the bill of complaint, and in not granting the relief thereby prayed. The third, alone, specifies the alleged error with particularity, and is in these words: "That the court erred in holding that the facts in this case do not show a contract, combination, or conspiracy to restrain or monopolize trade or com-

merce among the several states or with foreign nations." This assignment correctly presents the only question which the case involves.

The bill filed on behalf of the United States is founded wholly upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Proceedings, such as have been instituted and pursued in this instance, "to prevent and restrain violations of this act," are authorized and directed by its fourth section; and these defendants are charged with violation of its first two sections, which are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

These sections relate, respectively, to restraint of trade and to monopoly, but, as to both, with respect only to "trade or commerce among the several states, or with foreign nations;" and upon the application of this restrictive language of the law to the facts of this case we base our judgment. The learned judge who heard the cause in the circuit court states, in the opinion filed by him, that:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent. of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained, and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, un-

derstanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries, and continue the business, if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana, and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence, or more perfect control, over the business of refining and selling sugar in this country."

This statement of the facts is quoted at length merely for the purpose of showing the general nature of the case; the only essential fact—and of that there is no doubt—being that the questioned conduct of the defendants does not, according to our view of the law, concern interstate or foreign commerce. There is no evidence whatever that the defendants have directly monopolized, or have attempted, combined, or conspired to directly monopolize, any part of the trade or commerce among the several states or with foreign nations; or that they have contracted, combined, or conspired in direct restraint of such trade or commerce. The utmost that can be said—and this, for the present purpose, may be assumed—is that they have acquired control of the business of refining and selling sugar in the United States. But does this involve monopoly, or restraint of, foreign or interstate commerce? We are clearly of opinion that it does not. The particular language of the act which is now under consideration was manifestly derived from the clause of the constitution by which congress is empowered to "regulate commerce with foreign nations and among the several states;" and the authorities are distinctly to the effect that this grant of power does not include the regulation of manufactures or productive industries of any sort, even where their product is made, or is intended or contemplated to be made, the subject of commerce beyond the territory of the state where the manufactory or other producing industry is situated or operated. Manufacture and commerce are two distinct and very different things. The latter does not include the former. Buying and selling are elements of commerce, but something more is required to constitute commerce, which, "strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

Enough has been said to indicate the ground upon which our conclusion in this case has been reached, and we do not deem it necessary to say more, inasmuch as the subject has very recently been considered and passed upon in the Case of Greene, 52 Fed.

104, by Judge Jackson (now one of the justices of the supreme court), in whose opinion the earlier cases are sufficiently referred to. The decree of the circuit court is affirmed.

REORGANIZED CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. CHURCH OF CHRIST et al.

(Circuit Court, W. D. Missouri, W. D. March 3, 1894.)

1. RELIGIOUS ASSOCIATIONS—TITLE TO LAND—INCORPORATION.

The general conference of a religious association directed that articles of incorporation be drawn up and filed in accordance with the laws of the state, and one of these provided that all property held in trust for the church should vest in the corporation, to whom the trustees were directed to transfer it, and that the corporation might sue for and recover the same. *Held*, that this constituted a valid transfer of the equitable interest of the members of the association to the corporation, and authorized the corporation to maintain suits relating to former church property in its own name.

2. SAME—FOREIGN CORPORATIONS.

Const. Mo. art. 2, § 8, provides that "no religious corporation can be established in this state, except such as may be created under a general law, for the purpose only of holding title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries." *Held*, that this does not prohibit a foreign religious corporation from holding land in Missouri for the purposes specified.

3. SAME—COLLATERAL PROCEEDINGS.

The question whether a foreign religious corporation has attempted to acquire more land than it is allowed to hold (Rev. St. Mo. § 2833) is one which can be determined only in a direct proceeding by the state.

4. TRUSTS—CONSTRUCTIVE—WHAT CONSTITUTES.

Land was conveyed to an individual in his own name, but it was shown that he was a bishop in a certain church or religious body; that money was raised by its members to purchase land whereon to build a temple, which money was given to him for that purpose; that for many years the land in question had been known as the "Temple Lot;" that it had been dedicated with religious services by the head of the order; and that, when the grantee left the state, he executed what purported to be a declaration of trust upon such land in favor of the church. *Held*, that the original grant was impressed with a trust in favor of the church.

5. EVIDENCE—DOCUMENTS—DEEDS—ACKNOWLEDGMENT.

Rev. St. Mo. § 4860, authorizes a copy of a recorded deed to be read in evidence, although it was not recorded within a year after execution, upon such evidence as, together with the certificate of acknowledgment, shall satisfy the court that the instrument was executed by the person named therein as grantor. A deed executed in 1839 was not recorded until 1870, but it purported to have been acknowledged, when executed, before an officer who was a member of the church in which the grantor was a bishop. *Held*, that a copy of the recorded deed was admissible.

6. TRUSTS—DECLARATION—INTERPRETATION.

An instrument purporting to be a declaration of trust recited that C. had given the grantor money to buy land for the benefit of a church, and that he had bought such land in his own name; and, in consideration of \$1,000, paid to him by C., he thereby granted such land to certain of C.'s children, it being intended for the use of the church. *Held*, that this consideration had reference to the money whose receipt was recited in the premises, and it in no wise discharges the land from the trust.

7. BONA FIDE PURCHASER—EVIDENCE.

A subsequent purchaser, to entitle him to hold as against a prior unrecorded deed, must show that he purchased without notice of the prior

deed, and for a valuable consideration, and the mere recital in the deed under which he claims of the receipt of the purchase money is not sufficient proof of the fact of payment as against third parties.

8. RELIGIOUS ASSOCIATIONS—SCHISMS—TITLE TO LAND.

As between two opposing factions of a religious association, land acquired by the association before any schism arose will be adjudged the property of that faction which abides by the doctrines, principles, and rules of church government which the united body professed when the property was acquired.

9. EQUITY—LACHES—WHAT CONSTITUTES.

A certain religious body was driven from a state by military force, and such was the popular hostility against it that for many years thereafter its members would not have been allowed to return. Some 40 years afterwards, land within the state, which was held in trust for this body, was occupied by an adverse claimant, and within 10 years thereafter its representatives filed a bill against such occupants to establish the trust. *Held*, that the claim was not stale, nor was there any laches on complainant's part.

This was a suit by the Reorganized Church of Jesus Christ of Latter-Day Saints against the Church of Christ and others to declare a trust as to certain real estate in favor of the complainant.

This is a bill in equity to declare a trust in favor of the complainant, a religious body, as to certain real estate situate at Independence, county of Jackson, state of Missouri, known as the "Temple Lot." The controversy is between two divisions of what is popularly known as the "Mormon Church." The lot in controversy was bought in 1832 by one Partridge, bishop of the then Church of Jesus Christ of Latter-Day Saints, with its central organization at Kirtland, Ohio, with funds furnished by said church for such purpose. In the view of the church this spot was to be the future site on which was to be erected the great temple of the church, and was to be to it the New Jerusalem. In 1839 said Partridge made the following deed, declaratory of said trust:

"Know all men that whereas there was money put in my hands, to wit, in the hands of Edward Partridge, by Oliver Cowdery, an elder in the Church of Latter-Day Saints, formerly of Kirtland, state of Ohio, for the purpose of entering lands in the state of Missouri, in the name of and for the benefit of said church; and whereas, I, Edward Partridge, was bishop of and in said church, he took said money and funds thus put in his hands and entered the land in his own name, in the county of Jackson, state of Missouri, in the name of Edward Partridge, the signer of this deed: Now know ye, for the furthering the ends of justice, and as I have to leave the state of Missouri by order of Governor Boggs, and with me also our church, I do, for the sum of one thousand dollars, to me in hand paid by said Oliver Cowdery, do give, grant, bargain, and sell to John Cowdery, son of Oliver Cowdery, now seven years old, and Jane Cowdery, three years, and Joseph Smith Cowdery, one year old, all the lands entered in my name in the county of Jackson, in the district of Lexington, in the state of Missouri. Said Edward Partridge, the first party, and signer of this deed, does also sell, alien, and confirm to the aforesaid John Cowdery all real estate and lands he hath both entered as aforesaid, and all he owns in his own name by private purchase and holds by deed of gift, being intended for the use of the Church of Latter-Day Saints or otherwise. This sale is to embrace all lots of all sizes, situated in Independence, and to embrace the lot known as the 'Temple Lot,' and all other lands of whatever description said Partridge, the first party, is entitled to in said Jackson county, in the state of Missouri. Said Partridge also agrees to amend this deed to said Oliver Cowdery at any time for the purposes aforesaid.

"Given under my hand and seal on the date above written.

"Edward Partridge. [Seal.]

"E. G. Gates, Witness."

"State of Missouri, Caldwell County—ss.:

"Be it remembered, that on the 25th day of March, 1839, before the undersigned, one of the justices of the county court in and for said county, came Edward Partridge, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and did acknowledge the same to be his act and deed for the purposes therein mentioned.

Elias Higbee, J. C. C. C."

"The foregoing deed, with the acknowledgment thereon from Edward Partridge to Jane Cowdery et al., was filed and duly recorded in my office on the 7th day of February, A. D. 1870.

A. Comingo, Recorder,

"By H. G. Goodman, Deputy."

Partridge left the state about that time, and died in 1841. One Poole, who lived at Independence, Mo., in 1848 hunted up the heirs, five in number, of said Partridge, in the state of Iowa, and obtained from three of them a purported deed (acknowledged in Missouri) to the 63 acres of land at Independence, so deeded by said Partridge to Oliver Cowdery, including the temple lot, which lot contains about 2½ acres. The said trust deed from Partridge was not put on record in said Jackson county, Mo., until 1870. Other mesne conveyances of this property were made under the Poole deed. The lot in question remained vacant and unoccupied until 1882, when the respondent church took possession of it, claiming title thereto under deeds made to one Hedrick in trust for the respondent church, and by adverse possession. This action was brought within 10 years after respondent took possession of the property. The evidence in the case tends to show that the said grantees under the Partridge deed died during their minority, and that one Marie Louise Johnson is the sole surviving sister and heir of said Cowdery children. On the 9th day of June, 1887, she and her husband, Charles Johnson, executed and delivered a deed of quitclaim to said lot to George A. Blakeslee, bishop of the complainant church, in trust for the benefit of said church, which deed was duly acknowledged on the 9th day of June, 1887, and filed for record on the 10th day of June, 1887, in the recorder's office of Jackson county, Missouri. The complainant church was thereafter duly incorporated under the laws of the state of Iowa. The other important facts of the case will sufficiently appear from the opinion herein.

P. P. Kelley, Geo. Edmunds, and L. Traber, for complainant.

John N. Southern and Jas. O. Broadhead, for respondents.

PHILIPS, District Judge (after stating the facts). 1. Question is made, at the threshold of this case, as to the power of the complaining corporation to maintain this suit. The broad proposition is asserted that a foreign corporation has no right, under the laws of Missouri, to hold or own real estate in the state. Under the statutes of Iowa, where complainant was incorporated, most liberal and plenary provisions are made for the incorporation of all manner of beneficent, charitable, and religious associations. St. Iowa, c. 2, tit. 9, p. 275. Section 1095 provides that "any three or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this state, who desire to associate themselves for benevolent, charitable, religious or missionary purposes, may make, sign and acknowledge before" a prescribed officer, "and have recorded in the office of the recorder of the county in which the business of such society is to be conducted, a certificate in writing," etc., "in which shall be stated the name or title by which such society shall be known, the particular business and objects of such society, the number of trustees, directors," etc. Section 1096 declares that upon the filing for record such certificate the persons so signing and their

associates and successors "shall by virtue hereof be a body politic and corporate, * * * and by that name they and their successors shall and may have succession, and shall be persons capable of suing and being sued, and may have and use a common seal," etc.; "and they and their successors by their corporate name shall be capable of taking, receiving, purchasing and holding real and personal estate." Section 1097 provides that such religious associations may nominate and appoint such trustees, directors, or managers for the corporation, "according to usages of the appointing body," etc. Section 1101 declares that "any corporation formed under this chapter shall be capable of taking, holding or receiving property by virtue of any devise or bequest contained in any last will or testament." And the only limitation imposed by this statute upon the power of such corporation to take and hold property is contained in the last clause of the last-named section, which declares that "no person leaving a wife, child or parent, shall devise or bequeath * * * more than one-fourth of his estate after the payment of debts." Section 1102 declares that the trustees, etc., of existing religious corporations may, by conforming to the requirements of said section 1095, "reincorporate themselves, or continue their existing corporate powers, and all the property and effects of such existing corporation shall vest in and belong to the corporation so reincorporated or continued." This association was incorporated in conformity to this statute. But it is insisted by respondents that the mere incorporation of the religious association did not have the effect, ipso facto, to vest the property of the church in the corporation, so as to authorize the legal entity to sue therefor. The case of *Catholic Church v. Tofbein*, 82 Mo. 418, is relied on. Tofbein, by his will, devised the property "to the Catholic Church at the city of Lexington, Missouri." Afterwards said church was incorporated under the General Statutes. It was held that, as the devise was to the church, and took effect before the act of incorporation, the mere fact of an incorporation by that name, without more, did not have the effect to transfer to the corporation the property devised to the church, as such, any more than if the incorporators had taken some other name; citing the case of *Frank v. Drenkhahn*, 76 Mo. 508, as "directly in point." In the latter case the conveyance was to a number of individuals, directors of a voluntary joint-stock association, "and their successors in office, in special trust for the use of the shareholders in said company." Afterwards the members of said company were incorporated by act of the legislature under the name of the "St. Louis and Birmingham Iron Company." Under judgment obtained against the corporation this property was sold, and ejectment was brought, predicated of the sheriff's deed. The court held that, as no transfer was shown from the grantees in the deed, or from the shareholders in the joint-stock company to the corporation, there was nothing to show succession of right in the corporation to the property. But the case here is essentially different.

The theory of the complainant is that this property was acquired originally with church funds, and was and is held in trust for the use of the Church of Jesus Christ of Latter-Day Saints, which later

took the name of the "Reorganized Church of Jesus Christ of Latter-Day Saints." This church, according to its ecclesiastical polity, rules, and system of government, at its annual general conference, April 6, 1891, directed and authorized the articles of association and incorporation. This conference represented the ecclesiastical body in its entirety. And, as stated in the deposition of Bishop Kelley:

"The church at Lamoni [Iowa], effected the articles of incorporation, because that is the central church, and all others are simply branches of that church. It is the headquarters,—the principal place of business,—and was made the principal place of business by the common consent of the body, which is the rule of action of the body."

The articles of association were presented to, voted on and adopted by, the authorized delegates of the church, by the sixth article of which it is provided that:

"All property now held or owned by said church in the name of any person or persons, as trustees or otherwise, including the publication establishment at Plano, Illinois, shall vest in said corporation; and all persons holding such property in trust for said church are hereby directed and required to transfer and convey the same to said corporation as the property of said church; and said corporation shall, by operation of law, succeed to all property now owned by said church, or held for its use, and may sue and recover the same in the name of said corporation."

This was the act of transfer of the equitable interest of the members of the church association—the beneficiaries of the trust estate—to the corporation. Such religious bodies are *sui generis*, and this was the only method by which this equity could be conferred upon the incorporators,—by articles in writing, duly adopted and attested at its church meeting. This equity being held by the incorporators, it certainly was competent for them, in adopting the articles of incorporation, to provide and declare, as they did in the sixth article thereof, that the property held or owned by the church in the name of any person or persons, as trustees or otherwise, should vest in said corporation.

2. I understand the law of comity to be well established that a corporation of one state, if not forbidden by its charter, may exert its powers in any other state of the Union, so as to take and hold real estate therein, unless interdicted by the positive law or declared policy of such other state. *Wright v. Lee* (S. D.) 51 N. W. 706, 55 N. W. 931; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477. This question was fully considered and settled in the case of *Christian Union v. Yount*, 101 U. S. 352. See, also, *Lancaster v. Improvement Co.* (N. Y. App.) 35 N. E. 964. The respondents invoke section 8, art. 2, of the state constitution of Missouri for the position that a foreign corporation has no right to hold or own lands in this state. Said section is as follows:

"That no religious corporation can be established in this state, except such as may be created under a general law, for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."

This is not inhibitory of the existence of religious corporations in the state, nor is it a denial of their right to hold real estate. It simply limits their creation to "a general law," conformably with an-

other specific provision of the constitution prohibiting special legislation, and restricts such corporations to the purpose of holding title to real estate for church edifices, parsonages, and cemeteries. Its purpose was and is to prevent the incorporation of such bodies for the purpose of acquiring real estate for other purpose or use than the reasonable requirements for the prescribed purposes. The fact that the legislature of the state has not prescribed the maximum limit of the quantity of real estate to be held by such corporations gives no color to the contention that the state has refused to recognize the right of foreign religious corporations to hold property or transact business within the limits of the state. *Cowell v. Springs Co.*, 100 U. S. 59, 60; *Stevens v. Pratt*, 101 Ill. 206; *Thompson v. Waters*, 25 Mich. 224; *Merrick v. Van Santvoord*, 34 N. Y. 221. But the state statute (article 10, Rev. St. 1889) authorizes the incorporation of such religious bodies or associations, and in a spirit of marked public liberality section 2825 provides that:

"Any association, congregation, society or church organization formed for religious purposes, and any association formed to provide or maintain a cemetery, * * * and in general any association, society, company or organization which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate and politic by complying with sections 2821 and 2822."

Section 2828 declares:

"Corporations may be formed, under the provisions of this article, to execute any trust, the purpose whereof is within the purview of this article, and may receive and take, by deed or devise, in their corporate capacity, any property real and personal, for the use and purposes of such trust, and execute the trust so created."

Section 2833 provides that:

"Any corporation, the purposes whereof are included in section 2825 hereof, may acquire and hold in its own name such real estate and buildings as may be necessary for assembly, library, laboratory and other rooms requisite for its purposes, and may receive income from such other rooms as may be requisite to the completeness of such buildings; but such income shall be applied to the purpose of such corporation as defined in section 2825."

And section 2835 makes specific provisions for a proceeding by quo warranto for inquiring into any misuser of the franchise of such corporation.

The property in question was originally acquired by an agent of this church, for the purpose of erecting thereon a temple, designed to be the New Jerusalem of this religious order, from which the eyes and yearning desires of this people, through 60 years of exile and wandering, have never been turned nor diverted. To them it has been as the New Jerusalem to the Israelite and as Mecca to the Moslem. For 62 years it has been known to this sect and the people of western Missouri as the "Temple Lot," on which, in the fullness of time and the fulfillment of prophecy, was to be erected a splendid temple for the gathering of the believers for religious worship and exaltation. Whether the 2½ acres contained in this lot be more than is necessary for the erection of such temple is a question the court would not undertake to determine in this collateral

proceeding. Such question belongs to the state. *Lancaster v. Improvement Co.*, supra; *Railroad Co. v. Lewis*, 53 Iowa, 101-113, 4 N. W. 842; *Bank v. Matthews*, 98 U. S. 621; *Chambers v. St. Louis*, 29 Mo. 576; *Land v. Coffman*, 50 Mo. 252; *Cowell v. Springs Co.*, 100 U. S. 56; *Jones v. Habersham*, 2 Sup. Ct. 336. "The acts of a foreign corporation which has not complied with the requirements of the constitution and laws of the state in relation to such corporations transacting business, owning and disposing of property, * * * are not void and unenforceable; and said foreign corporation can only in a direct proceeding by the state be prevented from exercising its franchise within the state until it has complied with the constitution and the laws." *Wright v. Lee* (S. D.) 51 N. W. 706. And in the same case (55 N. W. 931) the supreme court of Dakota hold that: "Although transacting business in this state by such noncomplying foreign corporation is a usurpation of power by such corporation, with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it."

3. Was this property, in its acquisition, impressed with a trust in favor of said church? As both parties claim under Edward Partridge, both are precluded from invoking any other source of title, and it is only necessary to inquire into the character of his tenure. Although the deed to Partridge did not, on its face, express any trust estate, the legal title may be impressed with a use for a third person by evidence aliunde. That he bought this property with funds contributed by the members of the church, and held the title in recognition of the trust, is too clear, to my mind, to admit of debate. In the first place, its acquisition by him was in fulfillment of the revealed will of God, as accepted by him, as a member of the church, in the Book of Doctrine and Covenants. He was a bishop of the central church, then at Kirtland, Ohio. As such he looked after its temporalities. After such a lapse of time it may be difficult to find this and that witness to testify to placing so much money in his hands. But the substantive facts appear in this case in persuasive clearness. The stress of this religious sect's environments rendered it expedient that they should seek asylum in the then remote west, where, as they supposed, unvexed by those who despitefully used them, they might tabernacle in peace. Witnesses testify to the fact of making contribution to this fund, and to the common notoriety of raising the money for this purpose. It was discussed in the public assemblies, and report was made to the church, showing that \$3,000 had been raised for this purpose; and Bishop Partridge came to Independence, Mo., to acquire lands for the temple, and settlement of the people of his religion. From the day of the acquisition of this property by Partridge, he and his church, to the day of his death, in 1841, recognized this lot as church property. It was known as the "Temple Lot." Proof conclusive of this issue is furnished in the fact that Joseph Smith, the founder and head of the church, its recognized prophet and seer, himself came to Missouri, and in 1832 held religious services on this site, and solemnly dedicated it as the spot where the temple was to rise and shine. Partridge himself participated in this ceremony. And,

to "make assurance doubly sure," Partridge, on the eve of the expulsion of himself and the people of his church from the state by military force at the command of the governor, in 1839, made a deed, embracing this property, to the minor children of Oliver Cowdery, his co-worker in the church, and companion in misfortune, in which he recited the fact that "there was money put in my hands by Oliver Cowdery, an elder in the church of Latter-Day Saints, formerly of Kirtland, Ohio, for the purpose of entering the lands in the state of Missouri in the name and for the benefit of said church." This, no doubt, from the evidence, was the money placed in his hands and reported to the church at Kirtland, Ohio.

4. This deed from Partridge to the Cowdery children is assailed on various grounds. It is objected that there is not sufficient evidence of its delivery. The deed proper bears no date, but it was acknowledged on the 25th day of March, 1839. Presumptively it was executed prior thereto or contemporaneously therewith. Under the ruling of the state supreme court the presumption is that the deed was delivered the day of the acknowledgment. *Fontaine v. Institute*, 57 Mo. 552. It is also the settled rule of the state that the recording of a deed, duly acknowledged, is presumptive evidence of delivery. *Kane v. McCown*, 55 Mo. 198. There are also in this case other reasonable presumptions of delivery. The evidence shows that Partridge and his flock were, in 1839, in peril. They fled, under military menace, from Caldwell county, in this state. Filled with apprehension and uncertainty, and anxious for the execution of his sacred trust respecting this property, he fell upon the plan of declaring the trust in this deed, and of making the children of Oliver Cowdery, his tried friend, and an elder in the church, the depositaries of the title, believing no doubt that, on account of their tender years, they would be less exposed to violence and harm, and that, on account of their training in the church, they would be worthy and faithful trustees. It is therefore reasonable to conclude that he delivered the deed to some one of them, or to some one for them, before fleeing the state. It is quite inferable, from all the facts and circumstances in evidence, that these children died in their minority. Presumptions in equity should be more liberally indulged after such a long lapse of time, where the loss of witnesses by death and removals and disappearance often renders direct proof impossible. The recording act of the state statute during this period prescribed no time inter partes within which a deed should be admitted to record. The writer of this opinion sought unsuccessfully, as counsel in *Sappington v. Oeschli*, 49 Mo. 244, to have the court, on general principles of equity as to third parties giving credit to the ostensible owner of the fee on the faith thereof, hold that a deed should be recorded at least within a reasonable time. Even had there been no actual delivery of this deed, there is high authority, on sound principle, for holding that, where a trustee, in order to secure a trust obligation, makes a deed, even to himself as trustee, regularly executed, except recording it, and dies, leaving the deed among his papers, it will bind the land effectually as a declaration of trust, and it would be sufficiently delivered for such purpose. *Carson v.*

Phelps, 40 Md. 73. The state statute (section 4860) authorizes a copy of such recorded deed to be read in evidence, although not recorded within one year after execution, "upon proof of such facts and circumstances as, together with certificate of acknowledgment or proof, shall satisfy the court that the person who executed the instrument is the person therein named as grantor." Aside from the circumstances already recited, the evidence shows that the grantor lived in Caldwell county, Mo., where the acknowledgment purports to have been taken. He was a conspicuous character there, and naturally enough was known to the county judge, who himself was a member of the grantor's church. The law always presumes that a public officer does his duty. It is therefore to be presumed that the recorder of Jackson county, in admitting the deed to record, inspected it, and was satisfied of its original character. I therefore admit the deed in evidence.

5. This deed clearly enough declares a specific trust for the church. The criticisms made by counsel in this connection are strained. They do violence to the declared honest purpose of the grantor. It is contended, for instance, that the description of the land is uncertain. After other particularities, the deed concludes as follows:

"This sale is to embrace all lots of all sizes situated in Independence, and to embrace the lot known as the 'Temple Lot,' and all other lands of whatever description said Partridge, the first party, is entitled to in Jackson county, in the state of Missouri."

The temple lot was thus not only susceptible of ascertainment and identification, but the evidence shows it was as well known to the people of Independence as the public square.

It is next suggested that the grantor acknowledged in this deed the receipt of \$1,000 from Oliver Cowdery as purchase money for the land, and that this discharged the land from the trust, as the church presumably received the benefit of the money, and it cannot both hold the money and the land. This, it seems to me, is a non sequitur. If Oliver Cowdery in fact saw fit to pay Partridge \$1,000 to so convey the land in trust, how does that destroy the existence of the trust, even if it had been made to appear by the evidence (which it does not) that Partridge turned the money over to the church? But the deed, taken in its entirety, shows clearly enough that the meaning of this acknowledgment was not that the grantor was then receiving \$1,000 from Cowdery, but it is to be read and understood in connection with the opening sentence of the instrument, which declares that said Cowdery, as elder of the church, had put money in the grantor's hands. Cowdery knew as well as any living man that the temple lot had been bought by Partridge for the church, and that Partridge had come to Missouri as the bishop and agent of the church to acquire lands for its benefit and use. The deed shows on its face that it was very inartificially drawn, but shows throughout the purpose of the grantor to secure this property to the church. It winds up with the significant sentence: "Said Partridge also agrees to amend this deed to said Oliver Cowdery at any time for the purposes aforesaid."

6. The respondents claim title—First, through a deed of conveyance from three out of five of the heirs of Edward Partridge; and, second, by adverse possession. As the basis of the record title they offered in evidence a certified copy from the recorder's office of Jackson county of what purports to be a deed from three of said heirs, of date May 5, 1848, to one James Poole. The first objection to this deed is that it was not acknowledged properly. The point of this objection is that the clerk of the circuit court certified the acknowledgment under his private seal, there being no seal of the court provided. By section 16, p. 221, tit. "Conveyances," Rev. St. 1845, in force when this acknowledgment was taken, it is provided that:

"Every instrument in writing whereby any real estate is conveyed, or may be effected in law or equity, shall be acknowledged or proved and certified in the manner hereinafter prescribed.

Section 19 prescribed that such certificate shall be—

"When granted by a court, under the seal of the court, when granted by the clerk of the court, under the hand of the clerk and seal of the court of which he is clerk; when granted by an officer who has a seal of office, under the hand and official seal of such officer, when granted by an officer who has no seal of office, under the hand of such officer."

We will not pursue this matter further than to say that it would seem the statute is quite explicit that, where the acknowledgment is taken by a clerk of court, it must be "under seal of the court of which he is clerk." The deed should not be admitted in evidence, because neither the original was offered in evidence, nor any affidavit or other proof of its loss, or that it was not in the defendants' possession. *Crispen v. Hannavan*, 72 Mo. 548.

A yet more fatal objection to this deed as a valid conveyance against the unrecorded deed from Partridge of 1839 is the fact that no evidence whatever was offered tending to show that Poole paid a valuable consideration for this deed, or that any subsequent purchaser paid any valuable consideration. To constitute an innocent purchaser in such case, it is not sufficient that it should appear that a deed was executed, but the proof must go further, and show affirmatively that a valuable consideration was paid, and that, too, before the prior deed was placed of record. The recital of the receipt of alleged purchase money in the deed is not sufficient proof of the payment of the purchase money as against third parties. *Coal Co. v. Doran*, 142 U. S. 417-437, 12 Sup. Ct. 239, and cases cited; *Bishop v. Schneider*, 46 Mo. 473; *Sillyman v. King*, 36 Iowa, 207-213.

7. The respondents next rely upon 10 years' adverse possession of this property. Conceding that the Poole deed, and others following thereon, constituted color of title, there must be joined with it adverse possession. *Avery v. Adams*, 69 Mo. 603. Such possession must not only be adverse, but it must be unbroken for a period of 10 consecutive years. *Moore v. Harris*, 91 Mo. 617, 4 S. W. 439; *Olwine v. Holman*, 23 Pa. St. 279; *Malloy v. Bruden*, 86 N. C. 251. The statute of this state (section 6768) is but expressive of the better common-law rule that a possession of a part of a tract of land under color of title, to extend to other lands not actually occupied, must

be in the name of the whole tract claimed, coupled with the exercise of usual acts of ownership over the whole tract claimed. The evidence in this case shows that about 1851 Woodson and Maxwell platted that portion of the 63-acre tract lying north of Walnut street, and containing about one-fourth of the whole tract, laying it out into streets and alleys and lots, which included the temple lot; and it may be conceded to respondents that a part of this 63 acres outside of the temple lot was fenced, and perhaps some of the lots sold; but it is not sufficient that a party under a colorable deed should occupy one lot, where a tract is divided up into lots with separate streets, and acquire title by limitation to a lot not connected, and not occupied, by merely claiming title thereto. The segregation of the land into parcels and distinct lots with dividing streets, broke the continuity of the tract of 63 acres, and necessitated some open, visible acts of ownership over each parcel. *Leeper v. Baker*, 68 Mo. 402. It is too clear for debate that this temple lot in controversy was never fenced nor occupied until these respondents entered in 1882, and began to put a wire fence around it. It is true there are some witnesses who testify to mere impressions about a fence being somewhere about this lot in 1847. If so, it was not put there by Poole, or anyone claiming under him. The statements of these witnesses are entirely too indefinite and conjectural to predicate an adverse holding thereon. It is not sufficient that improvements should be shown to have been on or about the lot. It must appear affirmatively that they were made "by a party claiming adversely," and it must be continuous for the 10 years. *Doolittle v. Tice*, 41 Barb. 181. The platting of the land into lots and streets was an act of ownership, but, as the streets lay outside of the temple lot, little importance can be attached to that, unless followed up with some visible acts of dominion over that lot. The mere payment of taxes by separate parties on separate lots, without more, did not amount to an adverse holding. *Chapman v. Templeton*, 53 Mo. 465; *Raymond v. Morrison*, 59 Iowa, 371, 13 N. W. 332; *McDermott v. Hoffman*, 70 Pa. St. 31. It does not appear that Maxwell, who bought from Poole in 1848, did any act of ownership on this property outside of the fact that he and Woodson, by some arrangement not disclosed in the evidence, laid off the tract of 63 acres into lots and streets about 1851. It next appears from a decree made in the circuit court of Jackson county in 1859 that Woodson claimed to have made a contract of purchase with Maxwell for that portion of the tract lying south of Walnut street, which did not embrace the temple lot. Maxwell died in 1856, so he could not have held possession for 10 years; and there is no evidence of any possessory act by his heirs, or any one else, under him. The suit of Woodson was against the heirs of Maxwell in a partition proceeding. And how the court got into the decree therein made in 1859 any part of the temple lot, against the express finding that Woodson had bought from Maxwell only the land south of the street running south of the temple lot, is inexplicable. That part of the decree was a mere brutum fulmen. Recitations made in the partition proceedings and deeds are not binding on strangers. *Warren v.*

Syme, 7 W. Va. 474. No deeds were made under this partition sale until 1867. During all this time there is nothing shown to satisfy the mind of the court of a single act of ownership over a foot of the temple lot. About the time of the making these deeds under the partition proceeding, one J. R. Hedrick began to buy up these lots in the interest of Granville Hedrick, president of the defendant church, in trust for said church, who, as it will appear hereafter, had notice of the trust on said temple lot, and did not take actual possession thereof until 12 years after the trust deed from Partridge was put upon record, and without taking any steps to remove said cloud on the title.

8. Even if the Poole deed were admitted in evidence, it would only affect three-fifths of the lot, and it is impossible to reasonably escape the conclusion that he and all the parties claiming under him had notice of the trust character of the temple lot. It is a wise rule, predicated of sound public policy, and nearly always promotive of the ends of justice, announced by the supreme court in *Benoist v. Darby*, 12 Mo. 206:

"Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they. It is next to impossibility in very many cases to fix a positive knowledge of a fact upon an individual, notwithstanding the interest he may have in being correctly informed, and doubtless is informed thereof; and we cannot see the injustice of permitting a party to raise a presumption of knowledge in such case by showing that the community are informed on the subject, and hence the party interested may also have similar knowledge."

Courts will take judicial notice of matters of public history. They will also admit, for the purpose of notice, a matter of local history on proof aliunde tending to show its truth. The appearance and location of the "Mormons," so called, at Independence, Mo., and the selection of the temple lot, was as notorious in western Missouri as the famous "Order No. XI." of the late Civil War. The local community was stirred to its depths with intensest excitement over the fact of the proposed erection on this site of the central temple of this sect as their New Jerusalem, and the gathering around it, on the contiguous 63 acres, of the believers. It led to open, armed hostilities between them and the gentiles. The testimony of quite a number of old residents, gentlemen of the highest character, as well as the testimony of many of respondents' witnesses, shows indisputably that this lot was generally known and recognized in that community as the "Temple Lot." Its public dedication as such by Joseph Smith, the founder, prophet, and seer of the church, was itself an event so noteworthy that it is incredible it should not have been known, and been long the subject of common talk in the community. Partridge was a conspicuous character in the church, and his children were followers. The name "Temple Lot" has adhered to this piece of property, on one of the principal thoroughfares of the city of Independence, through all these years. And the circumstances detailed by Emily, the daughter of Partridge, under which the deed was executed to Poole, carry persuasive evidence to my

mind that he knew he was after acquiring this property covertly, and that he was really acting in the matter in the interest of Maxwell, to whom he at once conveyed. When Woodson and Maxwell, themselves old settlers, and conspicuous characters of the county, platted this ground, they designated the street bounding this lot on the east, "Temple Street." They must have known they were trying to reduce to speculative interest a spot sacred to this church. They assumed, doubtless, that those people, violently expelled from the state, and under popular odium, would not have the temerity to claim their own, and to carry out the purpose of the dedication of this lot. Granville Hedrick, the head and founder of the respondent organization, was himself, up to 1857, a conspicuous member and minister of the complainant organization. He knew all about the trust character of this property, and his purpose was, in buying up these supposed outstanding titles, to preserve the property to its trust use. So impregnated with this thought were his followers that the leader and the trustee for this property testified in this case as follows:

"Q. Is it true that you claim and hold, and have always so claimed and held since you have been the trustee, to hold the property in trust for the legal succession of the church that was organized in 1830? A. In no other way have we held it than for the church, and we claim to be the church, in legal succession, from 1830 down to the present. We are holding it in trust for the church which is represented by us, and which we claim is the church that was organized by Joseph Smith on the 6th day of April, 1830, as history records it. We claim to hold the property in that way, as being part and parcel of the church organized at that time."

The respondent Hill, who holds whatever title the respondents have to this property, testified that he came to Independence, Mo., in 1868, "not because of any special temporal benefit," but because "the saints were to gather here in Independence, or Zion, as it is called. I had read the revelation in the Book of Doctrine and Covenants in reference to the temple property here in Independence, beginning with July, 1831. * * * I did not have to try to find it [the lot], for it was here plain enough to be seen. I found the temple property myself, and it was known as the 'Temple Lot' when I came here." While it is true that a person purchasing land from one who appears by record deed to be the owner in fee is not bound by equities in favor of a stranger to the deed, yet, if he have notice of equities dehors the record, he is as effectually bound thereby as if such equities were incorporated in the deed. "The taking of a legal estate after notice of a prior writing makes a person a mala fides purchaser; * * * and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice." *Coal Co. v. Doran*, 142 U. S. 437, 438, 12 Sup. Ct. 239. There is perhaps not a Mormon on the American continent, possessed of any intelligence, who has not known, from his connection with the church, the history of the temple lot at Independence; and it would be about as reasonable to suppose that an Israelite could become the purchaser of a lot in Jerusalem, and claim that he was

an innocent purchaser against the design of his people to re-establish there the New Jerusalem, as to say these respondents are innocent purchasers.

9. It remains to be ascertained who are the true beneficiaries of this trust. It is a mere play on words, a clutching after shadows, for respondents to quibble about the precise name by which the Mormon Church was known in its early history. As well say that the denomination of Christians now known as "The Christian Church" had lost their identity, because in their early history they were called "Campbellites." The identity, unity, and sameness from 1830 to 1844 of the Mormon Church are too clear for debate. Now and then, by this and that person, it was called "The Church of Christ," "Church of Latter-Day Saints," and "The Church of Jesus Christ of Latter-Day Saints." The terms were employed interchangeably. As applied to this issue, it is rather a question of identity of doctrine. The temple built at Kirtland, Ohio, the central rendezvous between 1830 and 1835, was inscribed on the portal with the words, "The Church of Jesus Christ of Latter-Day Saints." This was the public authoritative recognition of the name by which they chose to be known. Beyond all cavil, if human testimony is to place any matter forever at rest, this church was one in doctrine, government, and purpose from 1830 to June, 1844, when Joseph Smith, its founder, was killed. It had the same federal head, governing bodies, and faith. During this period there was no schism, no secession, no "parting of the ways," in any matter fundamental or affecting its oneness. The only authorized and recognized books of doctrine and laws for the government of the church from 1830 to 1846 were the Bible, the Book of Mormon, and the Book of Doctrine and Covenants. The Book of Doctrine and Covenants, which consisted principally of claimed divine revelations to Joseph Smith, was the edition published at Kirtland, Ohio, in 1835, and at Nauvoo in 1845. No possible question could be made that, had this church, with its central governing power resident at Nauvoo, asserted right of control over this property up to 1845, it would have been recognized by the ecclesiastical body and by courts of chancery as the beneficiary of the trust recognized by Edward Partridge from 1832, and declared by him in his trust deed of 1839. Joseph Smith was killed at Carthage, Ill., in June, 1844. He was the president and the inspiring spirit of the church. His violent death struck with dismay the hearts of his followers, and out of the confusion incident thereto was born disorder, schism, and ambition for leadership. Disintegration set in, and the church split into factions, which, under the lead of different heads, scattered to different parts of the country. Among the "Quorum of Twelve"—representing the apostles—was one Brigham Young, a man of intellectual power, shrewd and aggressive, if not audacious. Naturally enough, such a man gathered around him the greater numbers, and it was an easy matter for him to seize the fallen reins of the presidency. He led the greater portion of Mormons out to what was known as "Winter Quarters," near Omaha, and thence to Salt Lake valley, in Utah, then a dependency of old Mexico.

From this settlement has sprung the powerful ecclesiastical body known as the Salt Lake or Utah Church. While the respondents are wary of claiming alliance with this Salt Lake Church, it is evidently "the power behind the throne" in the defense of this suit; and claim is made by respondents' counsel that it in fact absorbed the Mormon Church, and is the real successor to the ancient church. There can be no question of the fact that Brigham Young's assumed presidency was a bold and bald usurpation. The Book of Doctrine and Covenants (printed in 1846), page 411, containing a revelation to Joseph Smith, January 19, 1841, gave unto them "my servant Joseph, to be a presiding elder over all my church, to be a translator, a revelator, a seer, and prophet. I give unto him for councillors my servant Sidney Rigdon, and my servant William Law, that these may constitute a quorum and first presidency, to receive the oracles for the whole church. I give unto you my servant Brigham Young, to be a president over the twelve traveling council." So that Brigham Young was but president over the "twelve," a traveling council. The book clearly taught that the succession should descend lineally, and go to the first born. Joseph Smith, so taught, had, before his taking off, publicly proclaimed his son Joseph, the present head of complainant church, his successor, and he was so anointed. The book also contains the following, when referring to Joseph Smith:

"But verily I say unto you that none else shall be appointed unto the gift, except it be through him, for if it be taken from him he shall not have power, except to appoint another in his stead; and this shall be a law unto you: that you receive not the teachings of any that shall come before you as revelations or commandments; and this I give unto you that you may not be deceived, that you may know they are not of me. For verily I say unto you that he that is ordained of me shall come in at the gate, and be ordained, as I have told you before, to teach those revelations which you have received, and shall receive through him whom I have appointed."

Brigham Young's assumption of this office (under the claim of something like a transfiguration) was itself a departure from the law of the church. The Book of Mormon itself inveighed against the sin of polygamy. True it is that Brigham Young taught that these denunciations of the book were leveled at the Indians,—the Lamanites. But I confess to an utter inability to interpret human language if this be correct. In chapter 1, Book of Jacob, in speaking of the people of Nephi, the favored people, they are arraigned for growing hard of heart, and "indulge themselves somewhat in wicked practices, such as like unto David of old, desiring many wives and concubines; and also Solomon, his son." And in chapter 2, same book, after alluding to the filthiness—evidently of the Indian tribes—it says: "Behold, the Lamanites, your brethren, whom ye hate, because of their filthiness, and the cursings which have come upon their skins, are more righteous than you, for they have not forgotten the commandment of the Lord, which was given unto our fathers, that they should have save it were one wife; and concubines they should have none. * * * And now this commandment they observe to keep, wherefore because of this observance in keeping this commandment the Lord God will not destroy them; and one day

they shall become a blessed people." How it can be that the Lamanites please God in sticking to one wife, and the Nephites displeased Him by imitating David and Solomon in multiplying wives, and yet polygamy is to be a crown of righteousness in the teachings of the Angel Mormon, challenges my power of comprehension. It requires transfiguration to do so. Conformably to the Book of Mormon, the Book of Doctrine and Covenants expressly declared "that we believe that one man should have but one wife, and one woman but one husband." And this declaration of the church on this subject reappeared in the Book of D. and C. edition of 1846 and 1856. Its first appearance as a dogma of the church was in the Utah Church in 1852. Claim is made by the Utah Church that this doctrine is predicated of a revelation made to Joseph Smith in July, 1843. No such revelation was ever made public during the life of Joseph Smith, and under the law of the church it could not become an article of faith and belief until submitted to and adopted by the church. This was never done. No more complete and caustic refutation of this claim, made by Brigham Young, can be found than that in Exhibit W in this case, in a book entitled "The Spiritual Wife System Proven False," issued by Granville Hedrick, the head of the respondent church, in 1856. He ridiculed the pretension of Brigham Young that he had this revelation, unproclaimed, locked up in his private chest for nine years: He says:

"Now, how strangely inconsistent that the revelation should be given nine or ten years before its time, and have to lie eight or nine years under his patent lock before it would be time to proclaim it. Here, then, we have a specimen of an abortive revelation, come before its time, and had to be put in the sacred desk, under a patent lock, for eight or nine years, and shown occasionally,—just often enough to get the thing used to it, so that when it got old enough it could go abroad. So much for this curious revelation, come in an abortion, got burned up, then locked up, and now has gone forth to damn everybody that don't believe in it. Why, it is a perfect phoenix."

When the present president of the Salt Lake Church, Wilford Woodruff, was on the witness stand, he testified that on the 15th of November, 1844, there was no marriage ceremony in the church except that published in the edition of 1835. He was then asked why the church, of which he is president, in the publication of the Book of Doctrine and Covenants in the Salt Lake edition of 1876 eliminated the section on marriage as found in the 1835 edition, and in all editions thereof published up to 1876, and inserted in lieu thereof the claimed revelation on polygamy of July, 1843. "Answer: I do not know why it was done. It was done by the authority of whoever presided over the church, I suppose. Brigham Young was the president then." The Utah Church further departed from the principles and doctrines of the original church by changing in their teaching the first statement in the Article of Faith, which was, "We believe in God, the Eternal Father, and in his Son, Jesus Christ, and in the Holy Ghost," and in lieu thereof taught the doctrine of "Adam—God Worship," which, as announced in Journal of Discourses by Brigham Young, is as follows: "When our Father, Adam, came into the garden of Eden, he came into it with a celestial body, and brought Eve, one of his wives, with him. He helped

to make and organize this world. He is Michael, the archangel, the Ancient of Days, about whom holy men have written and spoke. He is our Father and our God, and the only God with whom we have to do." It has introduced societies of a secret order, and established secret oaths and covenants, contrary to the book and teachings of the old church. It has changed the duties of the president and of the twelve, and established the doctrine to "Obey Counsel," and has changed the order of the "Seventy, or Evangelists."

10. The next important and interesting question is, does the complainant church represent the beneficiaries of this property? In controversies of this character, respecting the rightful ownership of church property, the civil judicatories have nothing to do with the question as to which faction expounds the sounder theology or moral philosophy, and which best accords with reason and common sense. A good chancellor may be an indifferent theologian, and when he should lay aside the ermine for the surplice he might prove more bigot than justiciary. As said in *Smith v. Pedigo* (Ind. Sup.) 33 N. E. 777:

"Religious doctrines and practices are listened to by the courts solely as facts upon which civil rights and the right to property are made to depend, regardless of the ultimate truth or soundness of such doctrines, practices, and beliefs."

In case of disorganization and factional divisions of an ecclesiastical body, the settled rule of the civil courts is that "the title to church property * * * is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws and usages, customs and principles, which were accepted among them before the dispute began, and the standards for determining which party is right." The right of ownership abides with that faction, great or small, which is "in favor of the government of the church in operation with which it was connected at the time the trust was declared." *McRoberts v. Moudy*, 19 Mo. App. 26; *Roshi's Appeal*, 69 Pa. St. 462; *Baker v. Fales*, 16 Mass. 488; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136. The courts will adjudge the property "to the members, however few in numbers they may be," who adhere to the form of church government, or acknowledge the church connection, for which the property was acquired. Judge Strong's lecture on *Relation of Civil Law to Church Property*, pp. 49-59. Justice Caton, in *Ferraria v. Vasconcellos*, 31 Ill. 54, 55, aptly states the rule to be:

"That, where a church is erected for the use of a particular denomination or religious persuasion, a majority of the members cannot abandon the tenets and doctrines of the denomination, and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if but a single member adheres to the original faith and doctrine of the church. This rule is founded in reason and justice. * * * Those who adhere to the original tenets and doctrines for the promulgation of which a church has been erected are the sole beneficiaries designed by the donors, and those who depart from and abandon those tenets and doctrines cease to be beneficiaries, and forfeit all claim to the title and use of such property."

No matter, therefore, if the church at Nauvoo became a prey to schisms after the death of Joseph Smith, and presented as many

frightful heads as did the dragon which the Apostle John saw in his vision on the Isle of Patmos, if there was one righteous left in Sodom, the promise of the covenant and of the law of the land is to him. It is neither good law nor Bible history to say that, because the saints became scattered, and without an organism, the faithful lost the benefit of the church property. Forsooth the children of Israel were carried captive to Babylon, "the mother of harlots, and the abomination of the earth," they did not cease to be children of the covenant, nor lose their interest in Jerusalem. A considerable number of the officers and members of the church at Nauvoo did not ally themselves with any of the factions, and wherever they were they held on to the faith, refused to follow Brigham Young to Utah, and ever repudiated the doctrine of polygamy, which was the great rock of offense on which the church split after the death of Joseph Smith. In 1852 the scattered fragments of the church, the remnants of those who held to the fortunes of the present Joseph Smith, son of the so-called "martyr," gathered together sufficiently for a nucleus of organization. They took the name of "The Reorganized Church of Jesus Christ of Latter-Day Saints," and avowed their allegiance to the teachings of the ancient church; and their epitome of faith adopted, while containing differences in phraseology, in its essentials is but a reproduction of that of the church as it existed from 1830 to 1844. To-day they are 25,000 strong.

It is charged by the respondents, as an echo of the Utah Church, that Joseph Smith, "the martyr," secretly taught and practiced polygamy; and the Utah contingent furnishes the evidence, and two of the women, to prove this fact. It perhaps would be uncharitable to say of these women that they have borne false testimony as to their connection with Joseph Smith, but, in view of all the evidence and circumstances surrounding the alleged intercourse, it is difficult to escape the conclusion that at most they were but sports in "nest hiding." In view of the contention of the Salt Lake party that polygamy obtained at Nauvoo as early as 1841, it must be a little embarrassing to President Woodruff of that organization, when he is confronted, as he was in the evidence in this case, with a published card in the church organ at Nauvoo in October, 1842, certifying that he knew of no other rule or system of marriage than the one published in the Book of Doctrine and Covenants, and that the "secret wife system," charged against the church, was a creature of invention by one Dr. Bennett, and that they knew of no such society. That certificate was signed by the leading members of the church, including John Taylor, the former president of the Utah Church. And a similar certificate was published by the Ladies' Relief Society of the same place, signed by Emma Smith, the wife of Joseph Smith, and Phoebe Woodruff, wife of the present President Woodruff. No such marriage ever occurred under the rules of the church, and no offspring came from the imputed illicit intercourse, although Joseph Smith was in the full vigor of young manhood, and his wife, Emma, was giving birth to healthy children in regular order, and was enceinte at the time of Joseph Smith's

death. But if it were conceded that Joseph Smith, and Hiram, his brother, did secretly practice concubinage, is the church to be charged with those liaisons, and the doctrine of polygamy to be predicated thereon of the church? If so, I suspect the doctrine of polygamy might be imputed to many of the gentile churches. Certainly it was never promulgated, taught, nor recognized as a doctrine of the church prior to the assumption of Brigham Young.

It is next charged against complainant church that it has added to the articles of faith other revelations of the divine will, alleged to have been made to Joseph Smith, the present head of complainant church. If so, how can this be held to be heretical, or a departure, when, in the epitome of faith of the ancient church, is this article: "We believe all that God has revealed, all that He does now reveal, and we believe that He will yet reveal many great and important things pertaining to the kingdom of God." And in the Book of Doctrine and Covenants (paragraph 2, § 14) it is taught that such revelations might come through him whom the prophet might ordain. In the very nature of the doctrine of the church, that God, in the fullness of time, makes known his will to the church by revelation, additional revelations were to be expected. No specification is made by learned counsel as to wherein the alleged new revelations declare any doctrine at variance with that taught in antecedent revelations.

It is next charged that the complainants have a new Bible. The basis for this is that Joseph Smith, the founder of the church, was, as early as 1830, engaged in a translation of the Bible, which he is alleged to have completed about 1833 or 1834. This work seems to have been recognized also in a revelation in section 13, paragraph 15, and in section 58. The evidence shows that this manuscript was kept by his wife, and delivered to the present Joseph Smith, her son, and was published by a committee of the church. It is not claimed by Joseph Smith that this translation is a substitute for the King James translation, nor has it been made to appear that it inculcates any new religious tenet different from that of the ancient church. In this day of multifarious and free translations of the Bible, it should hardly be imputed a heresy in this church to take some liberties with the virgin Greek and Hebrew. It is also charged that the complainant church has only eleven representing the Quorum of Twelve. I believe the New Testament records it as a historical fact that "Peter stood up with the eleven" after the apostacy of Judas Iscariot. There is nothing in the Code of the present church to prevent the filling out of the "twelve." There are some other minor objections to the present organization, the answer to which is so obvious that it scarcely need be made.

11. Who are the respondents, and in what do they believe? Looking at their answer in this case, and their evidence, the idea occurs that in theory they are ecclesiastical nondescripts, and in practice "squatter sovereigns." They repudiate polygamy while looking to Salt Lake City for succor. They deny in their answer that this property was ever bought for the church, or impressed with a trust therefor, and yet, when their head men were on the witness stand,

they swore they are a part and parcel of the original church, founded and inspired by Joseph Smith, "the martyr," and that to-day they hold the property in question in trust for that church. They are commonly called "Hedrickites," because their head is Granville Hedrick, who himself was a member of complainant organization as minister, and participated actively in its general conference as late as 1857, receiving "the right hand of fellowship," and moving the conference to works of evangelization in his region of the country. It is inferable from the testimony in this case that they reject measurably the standard Book of Doctrine and Covenants, and, according to the testimony of respondent Hill, they "repudiate the doctrine taught by the church in general after 1833, 1834, and 1835;" and also the law relating to "Tithes and Offerings," and the doctrine of baptism for the dead, which were taught by the mother church. They also seem to reject the law relating to the presidency, and of "the Twelve—Traveling High Council," and also "the Quorum of Seventy Evangelists." They are but a small band, and their seizure of the temple lot, and attempt thus to divert the trust, invoke the interposition of a court of equity to establish the trust, and prevent its perversion.

12. Laches. It is urged by respondents that the claim of complainant is stale, and that a court of equity will not afford relief where the party complaining has been guilty of laches. There are several answers to this objection. In the first place, this is an express trust in favor of complainant, arising on the Partridge deed of 1839. The statute of limitation does not run against an express trust. There was no repudiation of the trust by the trustees. Laches is a question determined by the circumstances of the particular case. The delay in bringing this action is not inexcusable. The beneficiaries of the trust were driven from the state in 1838-39 by military force, and were not permitted to return to the state. A public hostile feeling and sentiment were excited against them, which would have blazed up from the slumbering fires at any time thereafter prior to the Civil War, had they returned here, and attempted to occupy this property. No one better knew this than the respondents when they laid hands to this property. The complainants were not here "to stand by" while parties were giving and receiving deeds to this property. No improvements were made on, and no visible possession taken of, the temple lot, until 1882, within 10 years of the institution of this suit, and when the trust deed had been of record 12 years. Up to this hostile action of respondents the complainants had a right to assume that the trust character of this property was intact, and that the lot was open for their entry at any time when the auspicious hour came to build on it. In the language of Chief Justice Fuller in *Coal Co. v. Doran*, 142 U. S. 444, 12 Sup. Ct. 239: "There was no delay, therefore, in the assertion of its rights after they were invaded." See, also, *Burke v. Backus* (Minn.) 53 N. W. 458.

13. A court of equity has jurisdiction in this case. It belongs to it to remove clouds from title, "the relief being granted on the principle of *quia timet*." It is peculiarly its province, in a case like

this, to vindicate the trust, to determine the real beneficiaries of the trust estate, and to prevent its diversion.

Decree will go in favor of complainant, establishing the trust in its favor against respondents, removing the cloud from the title, enjoining respondents from asserting title to the property, and awarding the possession to the complainant.

WALLA WALLA WATER CO. v. CITY OF WALLA WALLA et al.

(Circuit Court, D. Washington, S. D. March 20, 1894.)

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS — FEDERAL JURISDICTION — MUNICIPAL CORPORATIONS.

A city was authorized by its charter to grant waterworks privileges to private companies, to itself erect waterworks, or to purchase or condemn waterworks erected by others. It granted the right to a corporation, and stipulated that it would not itself erect competing waterworks for a period of 25 years, but this was not to prevent it from purchasing or condemning the plant at any time. *Held*, that the stipulation was valid; and that a breach thereof by the city would impair the obligation of the contract, within the meaning of the federal constitution; and that, therefore, a federal court would have jurisdiction to enjoin the city from constructing waterworks, or issuing bonds therefor.

2. MUNICIPAL CORPORATIONS — LIMIT OF INDEBTEDNESS — ANNUAL PAYMENTS FOR WATER SUPPLY.

A city, whose limit of indebtedness was fixed at \$50,000, contracted with a water company for a supply of water for municipal purposes, in consideration of an annual payment of \$1,500, for 25 years. The city, however, had the right to determine the contract for any default on the water company's part. *Held* that, as the city was only obliged to make the annual payment when it was earned, the aggregate of such payments could not be considered as a debt of the city, which, added to other debts, would exceed the limit allowed, and render the contract void.

This was a bill for an injunction by the Walla Walla Water Company, a corporation, against the city of Walla Walla, to restrain the latter from proceeding to construct and establish works for supplying the city with water, and issuing negotiable bonds whereby to obtain money for that purpose. Application for injunction pendente lite granted, and demurrer to bill of complaint overruled.

George Turner, for complainant.

W. T. Dovell and L. C. Gilman, for defendants.

HANFORD, District Judge. The city of Walla Walla is a municipal corporation of the state of Washington, having a charter granted to it by a special act of the legislature of the territory of Washington in the year 1883 (Laws Wash. T. 1883, p. 270). The powers conferred upon the city by said charter include the following:

"Sec. 4. The city of Walla Walla shall have power * * * to provide fire engines and other apparatus and a sufficient supply of water, and to levy and collect special taxes for these purposes, not to exceed in any year three-tenths of one per centum upon the taxable property within the city."

"Sec. 10. The city of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes

intended to furnish the inhabitants of said city with light, or water to any persons or association of persons for a term not exceeding twenty-five years: * * * provided, always, that none of the rights or privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others. Sec. 11. The city of Walla Walla shall have power to erect and maintain water works within or without the city limits or to authorize the erection of the same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, * * * and to enact all ordinances and regulations necessary to carry the power herein conferred into effect, but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein, on not less than five hundred dollars' worth, of property, shall at a general or special election vote for the same. Sec. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof." (Sec. 103. The rights, powers and duties and liabilities of the city of Walla Walla and of its several officers shall be those prescribed in this act and none others, and this is hereby declared a public act." "Sec. 105. The limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars."

The bill of complaint alleges that, in the year 1887, the city, pursuant to an ordinance authorizing the same, entered into a contract with the complainant, whereby the complainant was authorized to lay pipes for conducting water in the streets of the city, and to supply the inhabitants with water, and the complainant undertook to supply water for use of the city in extinguishing fires, flushing sewers, and all other municipal purposes for a period of 25 years. The contract also contains the following provisions:

"The city of Walla Walla shall have the right to erect in a proper and workmanlike manner, and maintain at its own expense, in such manner as to prevent leakage, as many fire hydrants on the mains of the water company as it shall see fit, not exceeding one (1) at each street intersection; and, in case of fire, the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water, mains, and reservoirs for the extinguishment thereof, and, for the purpose of drilling fire companies, may use such water as may be necessary therefor, not oftener than once in two (2) weeks for each fire company; and the city may also use such water as may be necessary and convenient in and about its engine houses and other city buildings, and to supply any and all city fire cisterns. The city of Walla Walla agrees to pay to said Walla Walla Water Company for the matters and things above enumerated, quarter yearly, on the 1st days of July, October, January, and April of each year, at the rate of fifteen hundred dollars (\$1,500) per annum, for the period of twenty-five (25) years, from and after the date and passage of Ordinance Number 270, the first quarterly payment to be made on the 1st day of October next (October 1, 1887).

"The city of Walla Walla will during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, and not oftener than once in each week. For all the purposes above enumerated, said Walla Walla Water Company will furnish an ample supply of water for domestic purposes, including sprinkling lawns, and an ample supply of good wholesome water, at reasonable rates, to consumers, at all times during the said period of twenty-five years; and this contract is voidable by the city of Walla Walla so far as it requires the payment of money upon the judgment of a court of competent

jurisdiction whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the water company to keep or perform any agreement or contract on its part herein specified, or in this contract herein contained; but accident or reasonable delay shall not be deemed such failure, and, until this contract has been so avoided, the city of Walla Walla will not erect, maintain, or become interested in any waterworks except the one herein referred to, save as hereinafter specified. Neither the existence of this contract, nor the passage of Ordinance Number 270, shall be construed to be, or be, a waiver of or relinquishment of any rights of the city to take, condemn, and pay for the water rights and works of said company or any company at any time; and, in case of such condemnation, the existence of this contract shall not be taken into consideration in estimating or determining the value of the said waterworks of the said Walla Walla Water Company."

In June, 1893, an ordinance was passed providing for the creation of waterworks and the laying of pipes by the city for supplying the city and inhabitants thereof with water, and for issuing bonds to the amount of \$160,000, to provide the necessary funds for such purpose; and, pursuant to the provisions of said ordinance, an election was held, whereby the propositions embraced in said ordinance were approved by a sufficient majority of the legal voters. Without providing for the purchase, or condemnation of the works established by the complainant, the city is now proposing to sell the bonds so authorized, and to become a competitor of the complainant in the business of supplying the inhabitants of the city with water, although the complainant has on its part fully complied with all the requirements of said contract. At the time of entering into said contract, it was impossible for the city to have procured sufficient funds for the construction of waterworks sufficient to afford an adequate supply of water, either by taxation or by incurring debts, without exceeding the limitations fixed by its charter, and no individual or private corporation could have been found willing to invest the large amount necessary for constructing said works without obtaining concessions such as this contract contains. It will be impossible for the complainant to successfully compete against waterworks created and maintained at public expense; therefore the present scheme of the city, if carried out, will be destructive of the complainant's property, and equivalent to confiscation thereof. The complainant contends that proceedings having such effect, if authorized by the laws of the state, violate the clause of the constitution of the United States prohibiting laws which impair the obligations of contracts, and on that ground invokes the jurisdiction of a national court for its protection. In their argument upon this hearing, counsel for the defendants have admitted that, if the contract set forth in the bill of complaint is not unlawful, the case is within the jurisdiction of this court, and the complainant is entitled to the relief prayed for on the ground above specified.

Their contention is that said contract is void for the following reasons: First. The power to construct and maintain waterworks, conferred upon the city by its charter, is a part of its legislative and governmental functions, which cannot be abrogated by any act or contract of the city. Second. The contract to pay for supplying the city with water for municipal purposes in quarterly install-

ments, at the rate of \$1,500 per annum for 25 years, created a debt which, together with other existing indebtedness, amounted to a sum exceeding \$50,000, contrary to the 105th section of the charter. The arguments on both sides are well supported by authorities, but it is not practicable for me at this time to attempt a review or analysis of them. I think they can all be harmonized with the conclusion which I have reached. To establish and operate works for gathering and storing a sufficient supply of water, to protect the same from pollution, and to distribute the same to all parts of a city, requires a large expenditure of capital and labor, and such expenditures are expected to yield remunerative profits to investors. It is also necessary, for the purposes mentioned, to exercise the power of eminent domain and the police power of the state. Therefore such works combine the character of a governmental agency and of a private business enterprise. In the case of the city of Walla Walla, the legislature invested the corporation with ample power to exercise all the governmental functions necessary for the purpose, and also authorized it to absorb the business of furnishing water for the public and private uses of the city, and secure the profits. The city was not, however, required by its charter to at once construct or acquire its own waterworks. The limitations upon the taxing power and right to incur debt contained in the charter rendered such an undertaking on the part of the city impossible at the time when this contract was made. In view of the conditions existing under said limitations, the provisions of the charter granting to the city power to authorize individuals or a private company to construct and operate waterworks are quite as important as, and of greater practical utility than, the power conferred upon the city to engage in the water business on its own account. It was undoubtedly intended that, by means of such a contract as the one pleaded in this case, the city should secure a supply of water at least during the time necessary for it to acquire sufficient means to own its water system. The city, in making this contract with the complainant, exercised a power granted to it expressly and specifically by the legislature, and the wisdom or reasonableness of its action in this regard cannot be questioned in the courts. 1 Dill. Mun. Corp. § 328.

In further refutation of the argument, it is to be observed that the contract reserved to the city the right to acquire the property of the water company, and absorb its business, on fair and just terms; so that the contract itself is in no sense obnoxious to the objection that it deprives the city government of power conferred by the legislature. Having, by means of this contract, induced the water company to make large investments of capital in improving and enlarging its plant, the city cannot at this time honestly destroy the value of the plant, instead of purchasing or condemning and paying for the same according to its promise. The city has not divested itself of any of its powers, and the contract constitutes no bar to the exercise thereof; but it has bound itself to take over the plant now in service, and render just compensa-

tion therefor, whenever it does elect to furnish water by means of works owned by it. The present scheme is therefore unlawful, because it is an attempted repudiation of a binding promise.

The aggregate amount to be paid under the contract by the city cannot be regarded as a debt incurred in excess of the amount limited by the 105th section of the charter, for, by the terms of the contract, the city became obligated to pay in quarterly installments, as the same should be earned by compliance with the contract on the part of the water company. If any part of the money is not earned, the city will not have to pay it. If the money shall be earned, the city will avoid an accumulation of debt by paying according to the contract. Notwithstanding the very respectable authorities cited by counsel for the city, I hold that, while the contract creates a binding obligation, it does not create a debt. The item of expense for water under this contract stands precisely the same as other items of regular current expenses incidental to running the government, and provided for by contracts or ordinances of the city.

Let an injunction issue as prayed for.

MOORE v. CITY OF WALLA WALLA et al.

(Circuit Court, D. Washington, S. D. March 20, 1894.)

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF WATERWORKS—INJUNCTION BY PROPERTY OWNER.

When a city has power under its charter to construct waterworks, the fact that, by so doing, it would violate contract rights of an existing water company, gives individual property owners no right to enjoin it on the ground that their taxes would be increased thereby.

2. SAME—LIMIT OF INDEBTEDNESS—GENERAL LAWS—SPECIAL CHARTERS.

The general laws of Washington fixing the limitation of indebtedness which may be incurred by municipalities apply to cities holding charters granted by special acts of the territorial legislature. *Yesler v. City of Seattle*, 25 Pac. 1014, 1 Wash. St. 308, followed.

3. SAME—ELECTIONS—NOTICE—PUBLICATION.

Publication of notice of a city election from June 26th to July 26th, both days inclusive, is sufficient compliance with an ordinance directing publication for 30 days, although the official paper in which publication is made is not issued on Sundays or on the 4th of July.

4. SAME—PUBLIC IMPROVEMENT BONDS.

The laws of Washington giving municipal corporations authority to provide means for constructing works of public utility by issuing and selling negotiable bonds includes authority to make such bonds payable in gold coin of the present standard weight and fineness.

This was a bill for an injunction by Julia A. Moore, a nonresident taxpayer of the city of Walla Walla, to prevent the incurring of a bonded indebtedness for waterworks. Application for injunction pendente lite denied, and demurrer to bill of complaint sustained.

George Turner, for complainant.

W. T. Dovell and L. C. Gilman, for defendants.

HANFORD, District Judge. The grounds set forth in the bill of complaint in this case for an injunction against the city and its officers are the same as in the case of the Walla Walla Water Company against the same defendants. The complainant in this case, however, is especially interested only by reason of the fact that she will be liable to increased taxation if the city shall incur a debt as proposed; therefore, the grounds upon which my decision in favor of the complainant in the Case of the Walla Walla Water Company is based are not sufficient to justify an injunction in favor of this complainant. I hold that there is no lack of power in the city to construct and maintain the water system, but the scheme as proposed is an invasion of the rights of the Walla Walla Water Company under its contract with the city, which gives that company, but no other party, a right to complain.

The other grounds relied upon, to which no allusion is made in my opinion in the preceding case, are also insufficient. The point made, that the limitation upon the power of the city to incur debt contained in the 105th section of its charter has not been repealed by the general laws of this state fixing a different and more liberal measure, has been passed upon by the supreme court of this state in the case of *Yesler v. City of Seattle*, 1 Wash. St. 308, 25 Pac. 1014. That decision bears directly on the point, holding that the general laws of the state fixing the limitation of indebtedness which may be incurred by municipalities apply to cities holding charters granted by special acts of the territorial legislature, as well as to cities incorporated under the general law of the state.

The point that the voters at the special election which authorized the city to construct waterworks and issue bonds to the amount of \$160,000 were not registered is also met and answered by the decision of the supreme court of this state in *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077. The same decision also determines adversely to the complainant the contention of her counsel that the vote of the city merely authorized the city council to provide for the construction of waterworks, and that the ordinance under which the city is proceeding having been passed before the vote, and not being dependent on the vote, is void. These decisions declare the law of this state, and are of binding force in this court. The ordinance under which the city is proceeding was approved June 20, 1893, and by its terms it took effect upon the expiration of publication thereof for five days consecutively in the official newspapers of the city. This provision of the ordinance is consistent with the provisions of the city charter to the effect that ordinances of the city shall not take effect until five days after publication thereof, and that, after an ordinance has been passed six days, it shall be presumed to have been published five days. I must presume, therefore, that this ordinance went into effect on the 26th day of June. Notice of the proposed election was published in each issue of the official newspaper from June 26th to July 26th, both days included. I hold that this notice was legal, and a sufficient compliance with the direction contained in the ordinance directing the city clerk to give at least 30 days'

notice of the time, place, and purpose of said election by publication in the city official paper for 30 days next preceding such election, although there was no issue of the official paper on Sundays nor on the 4th day of July.

The last proposition advanced by counsel for the complainant is that "the ordinance is invalid because the proposed bonds are to be payable in gold coin of the present standard weight and fineness." As to this, I hold that the authority given by the laws of the state to municipal corporations, to provide means for constructing works of public utility, by issuing and selling negotiable bonds, includes authority to redeem such bonds in money of equal value to that which they shall have received. True, if gold coin of the present standard advances in value, and if the city shall be hereafter compelled to receive its income in money of less value, a debt under such a contract may be found to exceed the legal limit. But there is no greater probability of such changes than there is of assessments being made by persons whose judgment may require them to greatly undervalue property subject to taxation as compared with appraisements made by the present officials, and in that way change the ratio of city indebtedness to the assessed value of property subject to taxation. Application of the rule contended for by counsel for the complainant would require the city to not only keep within the limits, but to maintain a considerable margin to avoid possibility of an excess of debt consequent upon changes in standards of value. Such a policy in the conduct of municipal business may be wise, but taxpayers cannot by legal process compel the city officials to follow it. Whether or not a contemplated debt is prohibited by reason of the amount being in excess of the legal limit can only be determined by computing according to existing standards. The demurrer to the bill of complaint will be sustained, and the application for an injunction denied.

BANGS et al. v. LOVERIDGE.

(Circuit Court, D. New Jersey. March 27, 1894.)

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

In a suit against an administrator there must be diversity of citizenship between him and the complainant; and the fact that his decedent possessed the requisite citizenship at the time of the transactions giving rise to the suit, and at the time of his death, is immaterial.

2. LACHES—PLEADING—DEMURRER.

A bill against an administrator alleged that complainants loaned money to defendant's decedent upon his representation that he owned certain lands in New Jersey, and his promise to give a mortgage thereon; that he never gave the mortgage, and in fact did not own any such lands; and that this fact was not suspected by complainants until the filing of the bill, ten years after the loan was made. By the New Jersey statute the claim was barred in six years, and there was no allegation of a subsequent promise. *Held* that, as title is a matter of record in New Jersey, so that a single inquiry would have disclosed the fraud, complainants were so

manifestly guilty of laches as to require a dismissal of the bill upon demurrer; and, furthermore, that the allegations in respect to the discovery of the fraud were too vague to sustain the bill.

This is a bill by George P. Bangs and others against James W. Loveridge, administrator of the estate of Henry Loveridge, to enforce payment of a claim for \$2,000.

F. C. Woolman, for complainants.

Vredenburg & Garretson, for defendant.

GREEN, District Judge. This bill was filed to enforce, if possible, the payment by the defendant, as administrator of Henry Loveridge, deceased, of the sum of \$2,000, with arrears of interest, alleged to have been loaned by the complainants to Henry Loveridge in his lifetime. It seems from the allegations in the bill of complaint that in August, 1881, Henry Loveridge borrowed of the complainants the sum of \$2,000, and as an inducement to the complainants to make the loan, and to secure the payment thereof, agreed with the complainants to make, execute, and deliver to them a mortgage upon certain real property at Orange, in this state, which he claimed to own; that in fact Loveridge did not, at the time he made the agreement, own or hold the title to any property at Orange, and therefore did not fulfill his agreement; that nothing seems to have been done by the complainants in the matter until May 1, 1891,—nearly ten years after the making of the loan,—Henry Loveridge having, in the mean time, died, when they filed with the present defendant, who had been appointed administrator of Henry Loveridge, a claim, duly verified, for the sum due. This claim the administrator refused to pay, and so notified the complainants, upon the ground that it was barred by the statute of limitations, more than six years having elapsed since the money had been borrowed, and the promise to secure the payment of the same by a deed of mortgage had been made. The complainants then filed their bill of complaint in this court, setting up the facts as stated, alleging fraud in the inducing statements of Loveridge, and praying that the defendant “be directed to pay from the funds in his possession belonging to the estate of Henry Loveridge, deceased, the full amount of said loan, with interest from August 31, 1881.” To this bill of complaint the defendant has filed a demurrer.

The first question raised by the demurrer goes to the jurisdiction of the court. The defendant insists that there is no proper allegation in the bill showing that the suit is between citizens of different states. This objection is well taken. The complainants describe themselves as citizens and residents of Massachusetts, but they make no allegation whatever as to the citizenship, nor, for that matter, the residence even, of the defendant. They do allege, indeed, that the defendant's intestate, Henry Loveridge, was at the time of the transaction referred to, and at the time of his death, a resident and citizen of New Jersey; but such allegation does not confer ju-

risdiction upon this court. The test of jurisdictional authority is to be found in the citizenship of the parties who are actually before the court; and, if either of such parties sue or is sued in a representative capacity, his own citizenship, and not the citizenship of him whom he represents, is the determining factor. *Coal Co. v. Blatchford*, 11 Wall. 172. As the sole ground for the jurisdiction of this court in the present case is based upon diversity of citizenship, the failure to spread upon the record averments of facts necessary to show such diversity is fatal upon demurrer. It is possible, however, that it lies in the power of the complainants to cure this defect in their case by amendment.

I will therefore consider the next ground of demurrer, which is that it appears upon the face of the bill that the debt in question is barred by the statute of limitations. The loan which is the basis of this suit was made in August, 1881. No demand for payment seems to have been made until May, 1891. There is no allegation in the bill that Henry Loveridge, in his lifetime, ever promised a payment after the loan was made. The statute of New Jersey provides "that all actions of debt founded upon any lending or contract without a specialty, and all actions for accounts, and upon the case shall be commenced and sued within six years next after the cause of such action shall have accrued, and not after." Clearly, the action for money loaned by the complainants is barred, and they could not maintain an action at law to recover it. Nor can they successfully call to their aid the assistance of a court of equity. It is true that the complainants charge fraud on the part of Henry Loveridge in his claim of ownership to certain lands, and assert that they were not cognizant of the fraud until after the filing of their original bill in this court; but such allegations alone do not relieve them of laches, nor give them the right to override the statute of limitations. A party seeking to avoid the bar of the statute on the ground of fraud must aver and show that he used due diligence to detect the fraud, and, if he had the means of discovering it, he will be held in equity to have known it. The fraud in this transaction consisted in a statement of Henry Loveridge that he had title to lands in New Jersey, upon which he would give a mortgage to the complainants to secure a loan, when in fact he did not have title to the lands referred to. Title is a matter of record in New Jersey. Such records are public, and open to the inspection of every one. A simple inquiry of the officer who has the custody of those records would have informed complainants whether the statement of Henry Loveridge was true; but for nearly ten years the complainants have lain by without taking one step to find out the facts. For ten years they have permitted a loan to remain outstanding and unpaid, without demanding the collateral which they now insist they were to receive as security,—without doing anything, indeed, which would inform them as to the ability of the borrower to fulfill his agreement. Such laches must weigh heavily against those so indifferent as to be guilty of it. Stale demands are not favored in courts of equity. It might well be said, also, in respect to this branch of the case, that the allegations and state-

ments of the bill as to the discovery of the fraud are extremely vague, and very far from complying with the rule which obtains in respect thereto in equity pleading. The averments in the bill are as follows:

"And your orators further charge and aver that your orators were not aware, until after the filing of the original bill of complaint in this case, that the said Henry Loveridge was not, and never had been, the owner, in fee, of the premises in Orange, but thought and hoped that the said Henry Loveridge had, during his lifetime, executed the bond and mortgage, the promise to do which had induced your orators to advance the money as aforesaid. Your orators therefore expressly charge and aver that such sum of \$2,000 was obtained by the said Henry Loveridge from your orators by fraudulent representations, and that such fraud was not ascertained or suspected by your orators until after the death of the said Henry Loveridge and the filing of the original bill in this case, and that by reason of such fraud the said sum of \$2,000 and large arrears of interest are still due and owing unto your orators, notwithstanding the period elapsed, as such fraud was not discovered by your orators until a period within the statute of limitations."

In cases of this character the complainants are held to strict rules of pleading; and especially must there be definite averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery really is, so that the court may clearly see whether, by ordinary diligence, the discovery might have been made before. A general allegation of ignorance at one time, and knowledge at another, are of no effect. The discovery of fraud, if made, should be given with full particulars, including the time of discovery, what the discovery was, how it was made, and why it was not made sooner. *Wood v. Carpenter*, 101 U. S. 141, and cases cited. In all these respects this bill of complaint is deficient and faulty. Nor do the allegations of the bill afford any reason for disregarding the effect of the statute as pleaded. When the case, as presented by the bill of complaint, shows that the claim upon which it is founded is barred by the statute of limitations, advantage of the statute may be taken by demurrer. *Bird v. Inslee*, 23 N. J. Eq. 363; *Bank v. Carpenter*, 101 U. S. 567. There must be a decree for the defendant upon demurrer.

AMES et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, E. D. Nebraska. March 29, 1894.)

1. RAILROAD COMPANIES—RECEIVERS—ASSUMPTION OF CONTRACTS.

Receivers of a lessee railroad company are not bound, merely by virtue of their appointment, to perform the obligations of all its executory contracts and leases; but they have a reasonable time in which to determine whether they will assume or renounce them. And in the case of a great system like that of the Union Pacific Company, where numerous contracts are to be examined, and a determination reached in respect to each of them, a delay of 65 days before renouncing a lease is not unreasonable.

2. SAME.

Nor does the continued operation by the receivers of the lessee of a leased road during the reasonable period in which they are coming to a determination impose upon them the obligation to perform, for this period, the company's contract guarantying interest on the bonds of the lessor.

8. SAME—LEASED ROADS—APPOINTMENT OF SEPARATE RECEIVERS.

Where the chief consideration moving to the lessee company is that the road of the lessor shall be operated in harmony with and practically under the supervision of the lessee, the appointment of a separate receiver for the lessor of the leased road, and his assumption of independent possession and control, operates as a withdrawal of the consideration, and of itself is sufficient to justify the receivers of the lessee company in renouncing the lease from that time.

4. SAME—APPOINTMENT IN DIFFERENT DISTRICTS—JURISDICTION.

The receivers of a railroad system must report to and be governed by the circuit court sitting in the district of their original appointment, in all matters relating to their general management of the trust, their general accounting, and the general operation of the road within the circuit. But the circuit court sitting in the other districts, where the same receivers were afterwards appointed, have jurisdiction to determine the validity and amount of claims of citizens thereof against the receivers and the corporation; and citizens of one district will not be required to go into another district to assert their claims.

This is a bill filed by Oliver Ames, 2d, and others, against the Union Pacific Railway Company and others, for the appointment of receivers, etc. The cause is now on rehearing in respect to certain questions on which conflicting decisions were rendered by this court while sitting for the district of Nebraska and for the district of Colorado, respectively. For the latter decision, see 60 Fed. 674.

John M. Thurston, Willard Teller, and John C. Cowin, for receivers of the Union Pac. Ry. Co.

Henry W. Hobson and A. E. Pattison, for receiver of the Union Pac., Denver & G. Ry. Co.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. January 11, 1894, the United States circuit court for this circuit, sitting at Omaha, in the district of Nebraska, confirmed the election of the receivers of the Union Pacific Railway Company to renounce and disregard the executory provisions of the traffic agreements of April 1, 1890, and July 5, 1893, between that company, hereafter called the "Pacific Company," and the Union Pacific, Denver & Gulf Railway Company, hereafter called the "Gulf Company," and held that the receivers, while in possession and management of the property of the Pacific Company, under the orders of this court, were not bound by these provisions. February 8, 1894, the circuit court for this circuit, sitting at Denver, in the district of Colorado, held that the receivers of the Pacific Company were bound by and subject to, and ordered them to comply with, all the provisions of these contracts, except those relating to the payment of compensation for the services that should be rendered under the contracts of April 1, 1890, and July 5, 1893. The payment of this compensation was suspended by order of the court, and it was ordered that the amount thereof should be subsequently determined by the court, after the report of a master, who was appointed to ascertain the proper amount, should be filed with the court. Applications for a rehearing of the petitions upon which these orders were based were filed in each of the districts of Nebraska, Colorado, and Wyoming, and the petitions ordered to be

reheard before us at Omaha. The matters presented by these petitions have now been heard, and we proceed to state the result at which we have arrived.

October 13, 1893, by order of this court, sitting in the district of Nebraska, S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson were appointed receivers of the Pacific Company, the Gulf Company, and many other railroad companies, that under leases, traffic, and other arrangements had been operated by the Pacific Company, and that together formed that great aggregation of railroads called the "Union Pacific System." The petition on which these receivers were appointed alleged that the Pacific Company was insolvent. November 13, 1893, the attorney general of the United States filed a petition in this court, in which he prayed on behalf of the government that two additional receivers be appointed to represent the interest of the United States in the management of this property, and by order of this court John W. Doane and Frederick R. Couderc were appointed additional receivers to co-operate with those already appointed. We do not now seek to state the indebtedness of the company, or to marshal its liabilities. It is sufficient that it appears from the petitions on file that the railroad of the Pacific Company proper, comprising about 1,800 miles, with the lands and property appurtenant to it, is incumbered by liens on various parts of it, aggregating more than \$117,000,000. By an agreement dated April 1, 1890, and a supplemental agreement dated July 5, 1893, the Pacific Company and the Gulf Company covenanted with each other that the lines of railroad they owned or controlled or should thereafter control should be operated as one continuous line, in harmony with each other, and never in hostility or antagonism to each other, or in the interest of any other line or road to the injury of either; that switching between the parties at all connecting points should be free; that all traffic and travel to and from the east to and from Denver should pass over the line of the Gulf Company between Julesburg and La Salle, except that which comes and goes by way of the Kansas Pacific; that the earnings from the business passing over any part of the lines of both should be divided, in the first instance, in proportion to the distances actually hauled by each, except that neither party should be required to accept a less proportion in the division of any joint rate than 20 per cent.; that the Gulf Company would maintain and operate its roads in good working order, and keep them fully equipped; that it would apply all of its net earnings to the payment of the interest on its first mortgage bonds, and the balance, if any, to the payment of dividends on its stock; that the Gulf Company would join with the Pacific Company and the Denver, Leadville & Gunnison Railway Company to erect shops for the joint use of said companies in the city of Denver, at an expense of not less than \$500,000; that the Pacific Company would guaranty the payment of the coupons upon the first mortgage bonds of the Gulf Company, and, in case the net earnings of the latter company were insufficient to pay the same, the Pacific Company would so change the basis of the division of the earnings specified in the said agreement that the Gulf Company should re-

ceive therefrom a sufficient income to pay the interest on its first mortgage bonds, and its taxes. The original agreement contains this provision:

"It is expressly understood and agreed that the covenants and agreements herein, so far as the same relate to a division of the earnings and the basis of such, are strictly covenants and agreements between the parties hereto, and none of the covenants and agreements herein on the part of the party of the second part [the Pacific Company] are intended to create, nor shall the same be construed to create, or be a mortgage or pledge, legal or equitable, of the earnings of the party of the second part for any purpose whatsoever, and nothing herein contained is intended, nor shall the same be construed or held, to affect any duty or obligation on the part of the party of the second part to the government of the United States under its charter or any act of congress."

The first mortgage bonds of the Gulf Company referred to in this agreement bear date December 1, 1889, and are payable 50 years from that date. Pursuant to said agreement, the Pacific Company indorsed its guaranty of the payment of the coupons upon each of these bonds. The bonds amount to \$15,714,000, and the interest coupons upon them amount to more than \$750,000 per annum. The earnings of the Gulf Company upon the basis of division first named in the agreement fall short of an amount sufficient to pay its operating expenses, taxes, and the interest on its first mortgage bonds by more than a million dollars per annum, and in order to comply with these contracts the receivers of the Pacific Company must take from the net earnings of that company more than a million dollars per annum, and pay it into the treasury of the Gulf Company. If this is done, the income of the Pacific Company will be insufficient to pay its operating expenses and to meet its other obligations. The receivers took possession of and operated the railroads of the Gulf Company under the orders of this court until December 18, 1893. December 12, 1893, an order was made by this court, sitting at Denver, in the district of Colorado, upon a bill which had been filed in that court by one John Evans on the 12th day of August, 1893, appointing Frank Trumbull receiver of the Gulf Company, and directing the receivers of the Pacific Company to surrender and deliver to him all the property of the Gulf Company. This they did December 18, 1893. January 15, 1894, they notified the receiver of the Gulf Company that they renounced the benefits of, and would not undertake to perform the obligations of, the Pacific Company under the agreements of April 1, 1890, and July 5, 1893. January 27, 1894, they notified the receiver of the Gulf Company that they would no longer run their trains over its line from Julesburg to La Salle. For the purposes of this hearing these contracts will be treated as valid agreements of the contracting parties. The covenants of the Pacific Company contained in these agreements do not run with or bind any of its real or personal property, and what is said in this opinion has no reference to contracts or covenants that do. It is well settled that the receivers of an insolvent railroad corporation, appointed by a court of chancery to preserve its property and operate its railroads, do not stand in the shoes of the corporation. They are neither the representatives of the insolvent

corporation nor of its creditors or stockholders. They are the officers and representatives of the court, the hands of the court, in which it holds the property while it operates the railroads of the insolvent corporation for the benefit of those ultimately entitled to the property and the income. The court is not bound to pay the debts nor to perform the obligations of the insolvent, nor are its receivers. No one ever contends that the obligations of the insolvent corporation to pay its debts are assumed by its receivers. The only difference between the liability of such receivers to pay the debts and their liability to perform the executory contracts of an insolvent corporation is that the consideration of the former is generally received by the insolvent, while the consideration of the latter may be obtained by the receivers; and if, for an unreasonable length of time, they accept the benefits, they may thereby assume the liabilities of such contracts. The possibility of such an assumption of liability imposed upon these receivers a corresponding duty. This duty was to carefully examine every lease, traffic, or other executory contract of the Pacific Company, and to determine in each case whether or not it was for the best interest of all the creditors and stockholders of the insolvent corporation, for whose ultimate benefit they held its property, that they should accept the benefits and assume the burdens of such lease or contract. They were entitled to a reasonable time after their appointment to make this examination and determination. They were appointed October 13, 1893. They renounced these contracts January 15, 1894. In view of the great number of executory contracts the Pacific Company was a party to, and the heavy interests involved in this receivership, this was not an unreasonable time, in our opinion, to use in the examination and determination of this question. Moreover, we think the chief consideration for the assumption by the Pacific Company of its liabilities under these contracts was that the Gulf Company should be operated in harmony with and practically under the supervision and control of the Pacific Company itself. December 12, 1893, a separate receiver of the Gulf Company was appointed, who on December 18, 1893, took from the receivers of the Pacific Company the possession and control of the property of the Gulf Company. This receiver has since operated the railroads of the Gulf Company free from the supervision and control of the receivers of the Pacific Company, and has thus withdrawn from them that consideration. This of itself is, in our opinion, a sufficient reason why the receivers of the Pacific Company should not be required to perform the covenants of that company contained in these contracts subsequent to December 18, 1893. Specific performance of such contracts as these cannot be enforced against receivers who have not assumed the obligations therein by any word or act of their own, because, as was well said by Mr. Justice Swayne in *Express Co. v. Railroad Co.*, 99 U. S. 191, 200:

"A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money as by the service sought to be enforced."

The result is that these receivers were not bound by the covenants and obligations of the Pacific Company contained in these contracts by virtue of the order appointing them. They had the option within a reasonable time after their appointment to accept these leases and assume these obligations, or to renounce the former and refuse to be bound by the latter. They exercised this option within a reasonable time, and wisely renounced the contracts. In support of our views in this case we refer to the following authorities: *Express Co. v. Railroad Co.*, 99 U. S. 191; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 96, 12 Sup. Ct. 787; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 113, 12 Sup. Ct. 795; *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. 863; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 259; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 58 Fed. 257, 266; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, Id. 277, 280, 281.

In *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, the Quincy, Missouri & Pacific Railroad Company was being operated in the year 1884 by the Wabash, St. Louis & Pacific Railway Company, under a lease for 99 years, made in 1879, by which the Wabash Company undertook to pay a certain rental, including the interest on the bonds of the Quincy Company. In May, 1884, Humphreys and another were appointed receivers of the Wabash Company by the circuit court of this circuit, sitting at St. Louis, and took possession of and operated the railroads of both companies as such receivers. In June, 1884, they reported to the court that the earnings of the Quincy road were insufficient to pay the agreed rental. On January 16 and May 15, 1885, they made like reports. On April 16, 1885, the court directed: (1) "That subdivisional accounts must be paid separately." (2) "Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus." (3) "Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. * * *" (4) "Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph and St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand." *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. 863. The receivers complied with this order, but the earnings of the Quincy Company were insufficient to pay the agreed rental. December 8, 1885, the trustees for the bond holders of the Quincy Company petitioned the circuit court to direct the receivers to pay to them the unpaid rental according to the terms of the lease for the time during which the receivers had operated the Quincy road, and to decree it to be a lien superior and paramount to all mortgages on the property of the Wabash Company. This petition was denied, and on appeal that decision was affirmed by the supreme court, although the receivers had remained in possession of and operated the Quincy road for more than six months after their appointment. Similar rulings were made by the

circuit court sitting at St. Louis upon other claims of like character against the receivers of the Wabash Company, and they have been affirmed by the supreme court in *St. Joseph & St. L. R. Co. v. Humphreys*, supra, and in *U. S. Trust Co. v. Wabash W. Ry. Co.*, supra, until the opinion delivered by Judge Brewer in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. 863, has become an embodiment of the settled law of this country upon the questions before us. The conclusion we have reached is in accord with that opinion, and the orders for the accounting of the receivers and for the management of the various railroads in their possession in this receivership will hereafter conform to it.

In accordance with these views, the order directing the receivers to operate the Julesburg branch will be rescinded, and the receivers of the two companies will negotiate and agree upon a fair and just traffic arrangement, carefully considering the interest of the public as well as that of the real parties they respectively represent; and, if they are unable so to agree, they will submit their differences to this court, and they will be at once settled.

So far as the claim of the Gulf Company or its receiver to the amount of interest which accrued on its bonds prior to the appointment of the receivers of the Pacific Company is concerned, we are aware of no principle of law and of no equitable consideration that will take this claim out of the category of the simple contract liabilities of the Pacific Company of like date and character, or relieve it from the effect of any valid offsets or counterclaims the Pacific Company may have against the Gulf Company. This claim must be considered in the general accounting between these corporations. But the receiver of the Gulf Company insists that by operating the railroad of that company from October 13 to December 18, 1893, and by various acts and statements during that time, the receivers of the Pacific Company accepted the benefits and assumed the liabilities of these contracts for that period, and that they ought to be directed to pay at once, and in preference to all other claims, the interest on the bonds of the Gulf Company that accrued during that time. The authorities to which we have referred leave no doubt of the following propositions: First. The appointment of the receivers did not ipso facto make them liable to pay this interest according to these contracts. Second. The fact that they took possession of and operated the railroad of the Gulf Company for 65 days would not of itself establish an assumption by them of the Pacific Company's liability under these contracts, because they had the right to operate the road for a reasonable time, to ascertain whether or not it was to the interest of all the parties for whom they held the Pacific Company's property that they should assume this liability; and 65 days was not an unreasonable time to use in determining this question. Third. The burden of proof is on the receiver of the Gulf Company to establish the proposition that these receivers did assume this liability. The receivers strenuously deny that they did so. This issue is squarely made by the petitions of the parties and the arguments of their counsel. As we understand it, it involves the disposition of about \$200,000. No

testimony has been taken, no witness has been examined or cross-examined on this question, but it is submitted to us, and was, as we are informed, submitted to the courts upon the earlier hearings, on allegations and denials and extracts from affidavits and statements of individual receivers and others found in the files of the courts, and generally made with no reference to this issue, but with special reference to questions entirely foreign to it. This evidence is fragmentary and unsatisfactory, and we are not satisfied from it that these receivers ever intended to or ever did assume or agree to pay the interest on the Gulf Company's bonds during these 65 days. This may be established by subsequent proof, and opportunity will be given to do so. Nor are we willing to say at this time, and in the very unsatisfactory condition of the evidence relative to the financial condition and to the accruing liabilities and income of the Pacific Company, that it would be just and equitable to the real parties in interest in this receivership to pay to the receiver of the Gulf Company now the full amount of this interest as compensation for the use of this railroad during these 65 days. It is too early in the administration of this vast trust to tell to what extent the obligations of the Pacific Company can be met by its earnings and the earnings of its constituent or allied companies. We cannot yet learn how many of the latter companies may have their traffic agreements renounced by the receivers, and may present claims for preference in payment like that before us. The payment of the receiver of the Gulf Company as a preferred creditor now, at the contract rate fixed by the traffic contract, for the 65 days the receivers of the Pacific Company operated that road, might deprive creditors of the same or a higher rank of any payment at all. For these reasons we think it is unwise at this time to require the receivers to pay for the use or operation of any of the constituent lines any larger amount than the amount those lines have actually earned. Accordingly the orders made in the Colorado district on February 12 and February 14, 1894, and the like orders made in the Wyoming district, will be rescinded. A special master will be appointed in this cause. All the claims of the Gulf Company against the Pacific Company prior to October 13, 1893, and all the claims of the Pacific Company against the Gulf Company accruing prior to that date, will be referred to him. All the claims of the Gulf Company and its receiver against the Pacific Company or its receivers which have accrued subsequent to October 13, 1893, and all the claims of the receivers of the Pacific Company against the Gulf Company or its receiver which have accrued subsequent to that date, will be likewise referred to him. He will be directed to determine the law and the facts in these controversies, and directed to report the general balance due from the Gulf Company to the Pacific Company, or from the Pacific Company to the Gulf Company, as the case may be, on account of the claims of the respective parties accruing prior to October 13, 1893. He will also be directed to report the general balance due from the receivers of the Pacific Company to the Gulf Company or its receiver, or from the Gulf Company or its

receiver to the receivers of the Pacific Company, as the case may be, on account of their respective claims accruing subsequent to October 13, 1893, and to find and report to this court what amount, if any, of the balance so found to be due, should be treated as a preferred claim by the receivers of the Pacific Company in the administration of the trust imposed upon them.

It is unnecessary to discuss or decide here whether the circuit court sitting in Colorado or Wyoming is a court of ancillary jurisdiction in the matter of this receivership. These receivers were first appointed in this court sitting in Nebraska. So far as the general management of the trust imposed upon them, the general operation of the railroad system in their charge in this circuit, and their general accounting, is concerned, they must report to and be governed by this court sitting in Nebraska. The impracticability of properly administering this great trust under any other practice, and the intolerable confusion which would result from contradictory orders regarding these subjects made in the different districts in the circuit, will commend this rule of practice to every judge within the jurisdiction, and prevent any interference or modification of the orders issued in these matters by the circuit court for the district of Nebraska, except by appeal or upon rehearing; but the circuit courts in the districts of Colorado and Wyoming have jurisdiction to hear and determine the claims of the citizens of those districts against the insolvent corporation and the receivers of it, and their determination of those matters will be equally respected by the court sitting in Nebraska. Citizens of one district will not be required to go to another district to assert their claims against receivers appointed by the courts of both districts.

GULF STATES LAND CO. v. PARKER, State Tax Collector, et al.

(Circuit Court, E. D. Louisiana. April 16, 1894.)

No. 11,913.

1. TAXATION—LIEN—RECORDING.

City taxes, declared by the charter of New Orleans of 1870 (Act No. 7, Ex. Sess. 1870, § 20) to be a lien and privilege which should exist until fully paid, and which were once recorded in compliance with Const. La. 1868, providing that liens and privileges should not affect third persons, unless recorded, continued to be a lien, although not reinscribed within 10 years, as required by law to continue in force mortgages in general, re-inscription being a matter of legislative discretion. Nor was the lien extinguished by a sale of the property for state taxes, state and city taxes being concurrent privileges.

2. SAME—SALE FOR NONPAYMENT—TAXES ON LAND BOUGHT IN BY STATE.

Under Act La. 1888, No. 80, authorizing the sale by the state of lands bought in and adjudicated to it at tax sales, which provides that purchasers shall take the property subject to subsequent taxes thereon, where, by the deeds to such purchasers, they assume, as part of the price, all taxes assessed while the state held the property, it is chargeable with city taxes assessed during that time; and prescription does not run against the city, as to its taxes, while the property was held by the state.

This was a suit by the Gulf States Land Company against C. Harrison Parker, state tax collector, and the city of New Orleans, to restrain the sale of land for state and city taxes.

W. S. Benedict, for complainant.

H. L. Dufour, for city of New Orleans.

PARLANGE, District Judge. Complainant prays for an injunction to restrain C. Harrison Parker, state tax collector, and the city of New Orleans, from selling for state and city taxes 51 pieces of real estate situated in said city. No proof having been offered by the state, and it not appearing in the record that any taxes are due to or claimed by the state, it is assumed that all state taxes have been paid, and that the same are eliminated from the case. The city taxes complained of were assessed for the year 1880, and for years subsequent thereto. Forty-eight of said pieces of real estate were sold by the state, and bought in by and adjudicated to the state, at different tax sales, in the years 1883, 1884, 1885, 1886, 1887, and 1888, under the three revenue acts, No. 77 of 1880, No. 96 of 1882, and No. 98 of 1886. The other three pieces of real estate were adjudicated by the tax collector directly to D. Negrotto at a tax sale made in 1888 under Act No. 98 of 1886. Forty-one of said 48 pieces of real estate were sold by the state to D. Negrotto in 1889; 4 of the same were sold by the state in 1890 to H. H. Sawyer; 1 of the same was sold by the state in 1889 to T. Gachet; and the other 2 were sold by the state to complainant in 1891; all of the sales of said 48 pieces of real estate by the state, after their adjudication to the state, having been made under Act No. 80 of 1888. The complainant acquired 44 of said pieces of real estate from D. Negrotto in 1890, 4 of them from H. H. Sawyer in 1890, 1 of them from T. Gachet in 1890, and 2 of them by purchase in 1891 directly from the state under Act No. 80 of 1888. There is no dispute as to the facts.

The two questions of law presented are the following: (1) Are the privileges for the city taxes assessed from 1870 to 1876, both inclusive, preempted for want of reinscription within 10 years from the original inscription; and did the purchasers from the state acquire the properties free from any incumbrances for said taxes? (2) Are the properties which had been adjudicated to the state, and were subsequently sold by the state under Act No. 80 of 1888, charged with incumbrances for the city taxes assessed during the time they stood in the name of the state?

As to the first question, I have never before heard it doubted that if city taxes for the years from 1870 to 1876, both inclusive, were once recorded, the privilege for their payment is imprescriptible, regardless of reinscription. Section 20 of Act No. 7 of Extra Session of 1870 (City Charter) declares city taxes "to be a lien and privilege upon the property of any person or corporation, and said lien and privilege shall exist in favor of the city of New Orleans * * * until the same shall be fully paid, and the same shall be paid in preference to all mortgages and incumbrances other than

taxes due the state." This language is perfectly plain. The taxes are declared to create a lien and privilege, and the lien and privilege shall exist until the taxes which they secure are fully paid. It is true that, under the constitution of 1868, liens and privileges did not affect third persons, unless recorded; and hence it was imperative to record city taxes, as these taxes were recorded. I find in the record an agreement which I understand to be intended as an admission of the recordation. But, while the constitution of 1868 enacted registry, it did not deal with the question of reinscription, which was left wholly to legislative discretion. It was perfectly competent for the legislature, under the constitution of 1868, to provide that mortgages and privileges, when once recorded, should continue to exist until fully satisfied. It would be competent to-day for the legislature to repeal the law of reinscription. In point of fact, there are mortgages which continue in force without reinscription. Such are mortgages to secure the claims of a wife or of a minor (Civil Code, art. 3369); mortgages in favor of property banks (Rev. St. § 3140; *Haynes v. Courtney*, 15 La. Ann. 630; *Latiolais v. Bank*, 33 La. Ann. 1453). When the legislature, in 1870, declared that the privilege of the city for taxes should exist until the taxes should be fully paid, I understand that reinscription was dispensed with, as clearly as if it was so stated in terms. The legislature plainly intended to establish, and did establish, an imprescriptible privilege, which was to continue to exist until the payment of the tax, without any other requirement than compliance with the constitution of 1868, by a registry. But the supreme court of the state has settled the question. In *Davidson v. Lindop*, 36 La. Ann. 766, it was held that, under section 20 of the city charter of 1870, "the tax privileges of the city of New Orleans were practically imprescriptible." The city taxes involved in that case were for the years 1871 to 1879. Some of them must have been more than 10 years old at the time the suit was brought. Yet no question was raised as to the failure to reinscribe. *Davidson v. Lindop* was affirmed in *Reed v. Creditors*, 39 La. Ann. 124, 1 South. 784. In *Succession of Mercier*, 42 La. Ann. 1144, 8 South. 732, involving city taxes for the years 1871 to 1889, the supreme court, citing *Davidson v. Lindop* and other cases, said, again, "The liens, privileges, and mortgages securing the payment of taxes due the state and city prior to 1879 were practically imprescriptible." In that case nearly all the taxes must have been more than 10 years old. In *State ex rel Dowers v. Recorder of Mortgages*, 12 South. 880, the supreme court said:

"In *Davidson v. Lindop*, we held that the privileges securing municipal taxes antecedent to 1877 were practically imprescriptible; but in *Succession of Stewart*, 41 La. Ann. 127, 6 South. 587, we held that the provisions of Act 96 of 1877 regulated the prescription of municipal tax liens and privileges securing the payment of taxes assessed in the years 1880, 1882, and 1883, as well as those assessed in 1877, 1878, and 1879. The principles announced in those cases have been repeatedly affirmed since, and same may be considered as finally and firmly settled."

In that case the city taxes involved were assessed during the years 1877 to 1888, and some of them must have been more than 10 years old.

There is no force in the argument that the compulsory sale of property for state taxes extinguishes city taxes on the theory that the latter are inferior in rank to the former. The supreme court has expressly settled that point, and has held that "state and city taxes are concurrent privileges," and that the rights of both are assimilated to those of concurrent mortgage creditors. *Bellocq v. City of New Orleans*, 31 La. Ann. 472. In *Martinez v. Collectors*, 42 La. Ann. 683, 7 South. 796, the supreme court said:

"Properties were adjudicated to the state. The only purpose of the ownership was to secure the payment of the taxes. In adjudicating the property to the plaintiff, the state cannot be held to have defeated the object in view; to have abandoned the purpose of the divestiture of the title, i. e. the collection of taxes; and to have relinquished any remedy for their collection."

Besides the clear provision of section 20 of the city charter of 1870, and the authorities above cited, assistance is afforded, in answering the question as to the necessity of reinscription, by the general doctrine that the revenue law is *sui generis*, and that it is not every textual provision of the Civil Code which is applicable to questions arising between the fisc and the taxpayer. See *Saloy v. Woods*, 40 La. Ann. 586, 4 South. 209 (holding that article 176 of the constitution, as to the time within which privileges must be recorded, does not apply to privileges for taxes). *Succession of Mercier*, 42 La. Ann. 1145, 8 South. 732 (holding that a judgment for taxes does not perempt in 10 years); *Reed v. Creditors*, 39 La. Ann. 124, 1 South. 784 (as to prescription). I am clear that the city taxes from 1870 to 1876, both inclusive, involved in the instant case, having been recorded prior to the purchases by complainant or its grantors, the properties are now liable for all such unpaid taxes.

As to the second question of law presented I am equally clear that the properties adjudicated to the state, and sold by the state under Act No. 80 of 1888, are now chargeable with all city taxes which were assessed on them during the time that the same stood in the name of the state, and that no prescription ran against such taxes during that time. The only object which the legislature has in providing for the purchase by the state, and for the subsequent resale by the state, of the property of the delinquent taxpayer, is to collect the revenue. I have already cited *Martinez v. Collectors* to that effect. Far from there being, in any of the revenue laws now under consideration, an intimation that the state, by purchasing property for taxes, intends to impair in any manner the security provided for city taxes, the contrary appears by clear language. Act No. 96 of 1882, § 89; Act No. 98 of 1886, § 94. Act No. 80 of 1888 says, expressly (section 5):

"All the sales under this act shall vest in the purchaser an absolute and clear title to the property conveyed in the deed of sale * * * free from all mortgages, liens, privileges and incumbrances whatsoever, except all city and municipal taxes."

Section 6 of the act says:

"The price bid and paid * * * shall be in full and final payment and satisfaction of all state taxes together with all costs thereon due and exigible v.60f.no.7—62

at the time the property was adjudicated to the state, and the purchaser shall take said property subject to all subsequent taxes, state, parish and municipal."

This language is perfectly clear, and, if construction were needed, it would be found in the *Dowers Case*, already cited, in which the supreme court held, expressly, that property purchased from the state under the tax laws is liable for all state and city taxes assessed upon it while it stood in the name of the state. The same doctrine had been held in *Martinez v. Collectors*, above cited, which latter case also disposes of the question whether prescription runs against taxes assessed while the property stands in the name of the state. In the *Martinez Case* the doctrine is announced that when a purchaser from the state, at a tax sale, assumes the payment of taxes, he cannot thereafter plead the invalidity of the assessments, or urge that the taxes were prescribed when he assumed them; and how, on principle, could it be held otherwise? Complainant's very deeds, or the deeds of its vendors, contain an assumption of all taxes assessed while the state held the property. Complainant, or its vendors, bought under a statute which distinctly charges the property with those taxes. The assumed taxes were part of the price which complainant, or its vendors, agreed to pay for the property. Where is the power of the court to relieve complainant? How can complainant claim the property, and repudiate its obligation to pay the full price agreed upon? The *Dowers Case*, above cited, disposes fully of the supposed constitutional difficulty arising from taxing state property, and that case also disposes of the argument that confusion operates when the state bids in property at a tax sale. No such questions arise. It is elementary that the state may, as an individual can, make such conditions as it chooses in selling its property. If one of those conditions is that the purchaser shall assume and pay, as part of the price, all the taxes of which the state and city have kept record while the state held the property, and the purchaser agrees to the condition, it is inconceivable that the purchaser could take and keep the property without fulfilling his obligation voluntarily assumed.

There is no question of prescription involved. Prescription presupposes a debtor who, by lapse of time, is conclusively presumed to have paid the debt. But no such presumption can arise where, as in the matter presented, there is no debtor, and the state and city are merely keeping a record of the taxes which the property would have owed if it had belonged to individuals, in contemplation of a sale of the same conditioned upon the assumption of those taxes by the purchaser.

While these considerations are, in my judgment, perfectly conclusive, I may add that the maxim "*Contra non valentem*" seems to operate, also, in favor of the city. The whole policy of the state revenue laws being highly favorable to the preservation of the security provided for municipal taxes, it seems that the city could not be charged with laches when the state, by purchasing the property subject to taxation, renders it impossible for the city to collect its taxes.

I am aware that in *Scholfield v. Succession of West*, 44 La. Ann. 278, 10 South. 806, the supreme court has held that under section 3615, Rev. St., which prohibits the sheriff from passing a sale "unless the state, parish and municipal taxes due on the same be first paid," the words "taxes due" must be confined to taxes having a subsisting privilege on the property. But that decision, while perfectly sound, bears in no wise on the present case, in which complainant seeks to escape the payment of part of the price which it or its grantors agreed to pay in the form of an assumption of certain specified claims of the city.

Of course, if any of the tax privileges involved in this case were prescribed under Acts No. 77 of 1880, No. 96 of 1882, or Nos. 26 and 98 of 1886, prior to the adjudications to the state, complainant should be relieved from them. As to the three properties which were never adjudicated to the state, but were bought directly by Negretto at tax collector's sale under Act No. 98 of 1886, if at the time of said sales to Negretto there were city taxes, other than taxes for years previous to 1877, the privileges for which were already prescribed under the statutes of prescription just mentioned, complainant should also be relieved as to those taxes. Counsel will prepare a decree in accordance with the views above expressed, and will submit the same to the court for examination and signature.

TEXAS & P. R. CO. v. BLOOM.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 191.

1. WRIT OF ERROR—ISSUE AND RETURN—DISMISSAL.

A writ of error will not be dismissed because returnable within 30 days, as prescribed by rule of court, although authorized by order of the judge allowing it to be made returnable within 60 days, or because the citation is returnable within 30 days, and not on any specified day, or because the prayer for reversal was filed after the assignment of errors.

2. CIRCUIT COURT OF APPEALS—JURISDICTION.

A circuit court of appeals has jurisdiction of a case in which the jurisdiction of the court below is in issue, or which involves the construction or application of the federal constitution (Act March 3, 1891, § 5), if other questions are also involved.

3. RAILROAD COMPANIES—RECEIVERS—DAMAGES FROM OPERATION OF ROAD.

Where earnings of a railroad while in the hands of a receiver, more than sufficient to pay claims for damages from negligence in the operation of the road by him, are diverted into betterments, of which the railroad company has the benefit on the return of the property to it, an action at law on such a claim may be maintained against the company, and a personal judgment may be rendered against it thereon. *Railway Co. v. Johnson*, 13 S. W. 463, 76 Tex. 421, followed.

4. SAME — DISCHARGE OF RECEIVER — LIMITATION OF TIME FOR PRESENTING CLAIMS.

An order discharging the receiver of a railroad, restoring the property to the railroad company, and requiring all claims against the receiver to be presented to the court before a certain date, in default whereof they shall be barred, does not preclude the recovery, on a claim not presented within that time, of a personal judgment against the railroad company, on the

ground that it has received in betterments earnings out of which such claim should have been paid. *Railway Co. v. Johnson*, 13 S. W. 463, 76 Tex. 421; *Id.*, 14 Sup. Ct. 250, followed.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by Vic Bloom against the Texas & Pacific Railroad Company and John C. Brown, receiver of the company, for damages for personal injuries, brought in a court of the state of Texas and removed to the United States circuit court. The receiver died, and thereafter the action was prosecuted against the railroad company. Said defendant's demurrers to plaintiff's pleadings were overruled, and the cause was tried before a jury, which found a verdict for plaintiff, and judgment was entered thereon. Defendant brought error.

Plaintiff was injured on August 27, 1888, while a passenger on the railroad of defendant company, of which defendant Brown had been appointed receiver by the United States circuit court for the eastern district of Louisiana. The action was begun on January 2, 1889. Plaintiff's petition alleged that while, at the time of the injury, the receiver was ostensibly operating and controlling the road, it was in truth operated by him for the exclusive benefit of the railroad company, and the company was receiving its earnings; that the court which appointed the receiver had made an order discharging him, on October 31, 1888, except as to judgments and claims against him as receiver, or against the railroad in his hands, which might be presented, or on which suit might be commenced, by February, 1889, and directing him to account to the railroad company for all receipts, and to deliver to it its railway and all its property and effects, to be received and held by it subject to all claims against the receiver which might be presented, or upon which suit might be commenced, by February, 1889. The petition further alleged that the property was placed in the hands of the receiver at the instance of the railway company, and for its own benefit, and that the receivership was fraudulently procured; that the current receipts and earnings of the road, to the amount of several million dollars, were used in the betterment of the property, and were being so used at the time plaintiff was injured; that the road was never sold, and that, before plaintiff was injured, the railroad company to all intents and purposes took and still was in possession of the property, including said betterments. The order discharging the receiver, attached to and made part of the petition, contained provisions that the property should be turned back to the railroad company, subject "to any and all judgments which have heretofore been rendered in favor of interveners in this case, and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of interveners while it retains the cases for their determination, or interventions now pending and undetermined or which may be filed prior to February, 1889;" and that "all claims against the receiver as such up to October 31, 1888, be presented and be prosecuted by intervention prior to February 1, 1889, and, if not so presented by that date, the same to be barred, and shall not be a charge on the property of said company."

The railroad company answered by general demurrer and by special exceptions, to the effect that it appeared by plaintiff's petition that, if plaintiff had any claim against the property in the hands of the railroad company, it was barred by the terms of the order discharging the receiver, pleaded the general denial, set up contributory negligence, and pleaded the order discharging the receiver as a bar to any recovery in this suit.

Plaintiff replied by a general denial and special replication, alleging that the receiver had died since the institution of the suit; that plaintiff was not a party to the suit in which the order discharging the receiver was made, and was not affected thereby; that, on the final discharge of the receiver, the railroad company took its property, including the earnings, receipts, and

betterments of its road while in the hands of the receiver; and that the railroad company, at the date plaintiff was injured, was receiving all the earnings and current receipts of its railroad, and held and operated the same for its own benefit. To this defendant demurred. The circuit court overruled defendant's demurrers, and the jury found a verdict for plaintiff for \$8,000, and judgment was entered thereon.

The defendant railroad company assigned various errors in overruling its demurrers, in admission of evidence, in giving and refusing to give certain instructions, and in rendering judgment on the verdict, some of which presented questions as to the right of plaintiff to maintain an action at law against defendant for the injuries alleged, and the jurisdiction and power of a court of law to render a personal judgment against defendant, on the ground that the jurisdiction of the cause of action was in equity, and that the judgment, if any, should have been a decree enforcing the claim against the property; others raised questions as to the effect of the order discharging the receiver and requiring all claims against him to be presented by a certain date, and declaring that, if not so presented, they should be barred, and should not be a charge on the property of the company; and another raised a question of plaintiff's contributory negligence, which was not pressed on the argument.

Thereafter defendant in error moved to dismiss the writ of error on the grounds that, although the order of the judge allowing the writ authorized it, when sued out, to be made returnable in 60 days therefrom, it was not returnable in that time, or on any certain specified day, but within 30 days; that the citation was not made returnable on any certain day, but within 30 days from its date; that the prayer for reversal was not filed at the same time with the assignments of error; and that the circuit court of appeals had no jurisdiction of the writ of error or of the questions involved, because the jurisdiction of the court below, and its power to render the judgment, were in issue, and the questions raised by the assignments of error involved the construction or application of the federal constitution.

T. J. Freeman, for plaintiff in error.

James G. Dudley and W. S. Moore, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

McCORMICK, Circuit Judge. The motion of the defendant to dismiss this writ of error we do not consider well taken, and it is refused.

The substantial issues pressed by the plaintiff in error have been fully litigated by it in recent cases in the state courts. *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463; *Railway Co. v. Overheiser*, 76 Tex. 437, 13 S. W. 468; *Railway Co. v. Griffin*, 76 Tex. 441, 13 S. W. 471. On the authority of these cases, as affirmed by the supreme court of the United States in *Railway Co. v. Johnson*, in their opinion delivered January 3, 1894 (14 Sup. Ct. 250), the judgment of the circuit court must be affirmed.

WASHINGTON & I. R. CO. v. COEUR D'ALENE RY. & NAV. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 12, 1894.)

No. 113.

1. TERRITORIAL COURTS—TRANSFER OF CAUSE ON ADMISSION OF STATE.

In ejectment in a court of Idaho territory against the lessee and lessor of the premises, the summons was returned served as to both, and, on the admission of Idaho as a state, both petitioned for removal of the

cause to the circuit court created by the act of admission (26 Stat. 215), on the ground that the lessee was a federal corporation. *Held*, that the action was "pending" as to both defendants, within the provision of that act (section 18), giving the court jurisdiction of such cases, although in fact the lessee was not served, and did not appear therein, and this appeared by the judgment subsequently entered.

2. **SAME—PROCEEDINGS FOR TRANSFER—JURISDICTIONAL FACTS.**

The "request in writing" for such transfer, required by the statute, must show the facts necessary to give jurisdiction, unless they appear elsewhere in the record.

3. **PUBLIC LANDS—RAILROAD RIGHTS OF WAY—CONFLICTING SURVEYS.**

A railroad company which surveys an extension of its line over public lands beyond one of the termini fixed by its charter, and afterwards files supplemental articles of incorporation, authorizing it to make the extension, acquires by such survey no right of way, under the act of March 3, 1875 (18 Stat. 482), as against another company, which, having full powers, makes a survey over the same land after the former company's survey, but before the filing of its supplemental articles.

4. **SAME—CHANGE OF ROUTE.**

The filing of a map of the route selected, under this act, and the approval thereof by the secretary of the interior, do not prevent the company from afterwards, and within the time allowed by law, adopting a different route, so long as the rights of others have not intervened; and this without regard to the rules and regulations of the department of the interior.

In Error to the Circuit Court of the United States for the District of Idaho.

This was an action of ejectment brought in a court of Idaho territory by the Washington & Idaho Railroad Company against the Coeur d'Alene Railway & Navigation Company and the Northern Pacific Railroad Company to recover land alleged to constitute part of plaintiff's right of way. On the admission of Idaho as a state, the case was removed by defendants to the federal circuit court. The case was tried to the court without a jury, and judgment was entered for defendants. Plaintiff then sued out this writ of error.

W. W. Cotton, for plaintiff in error.

McBride & Allen and W. H. Francis, for defendants in error.

Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

GILBERT, Circuit Judge. On May 15, 1889, the Washington & Idaho Railroad Company brought an action of ejectment in the district court of the first judicial district of the territory of Idaho against the Coeur d'Alene Railway & Navigation Company for the recovery of a strip of land, described as the right of way of the plaintiff's railway, being 100 feet in width on each side of the described center line of the plaintiff's road. The complaint alleged that the Coeur d'Alene Railway & Navigation Company entered into possession of the described premises, and ejected the plaintiff therefrom, and that the Northern Pacific Railroad Company is in possession thereof as the tenant of its codefendant. The Coeur d'Alene Railway & Navigation Company answered the complaint, denying the title of plaintiff, and admitting that it, the said de-

fendant, entered into possession of the premises, and still holds the same. The answer also pleaded estoppel, alleging that the Coeur d'Alene Railway & Navigation Company had constructed a railroad over the premises in question, with the knowledge of the plaintiff. A demurrer was filed by the plaintiff to the answer by way of estoppel, on August 27, 1890, and the action was removed by the defendants into the circuit court of the United States for the district of Idaho. On May 23, 1892, the cause was tried before the court, without a jury, upon the complaint and the separate answer of the Coeur d'Alene Railway & Navigation Company, and the court thereupon made findings of fact and conclusions of law in favor of the defendant, the Coeur d'Alene Railway & Navigation Company adjudging that the plaintiff take nothing by the action, and that the defendants have judgment for costs. The plaintiff brings this writ of error to review that judgment.

The first assignment of error is that the circuit court had no jurisdiction to hear or determine the cause. The jurisdiction of the court is invoked by reason of the federal question involved in the fact that the Northern Pacific Railroad Company, a federal corporation, is a party to the action. The statute under which Idaho was admitted into the Union was approved July 3, 1890 (26 Stat. 215). Section 18 provides:

"That in respect to all cases, proceedings and matters now pending in the supreme or district courts of said territory at the time of the admission into the Union of the state of Idaho, and arising within the limits of said state whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of commencement of such cases, the said circuit and district courts, respectively, shall be the successors of such supreme and district courts of said territory."

It is argued that this action was not "pending" against the Northern Pacific Railroad Company, for the reason that that company was never served, and never appeared in the action; and that the federal character of the corporation can only give rise to a federal question when the corporation is an actual party to the suit, actually present and engaged in the litigation.

It cannot be said that the Northern Pacific Company was not an actual party to the litigation. It was not only made a party, but it was a proper party. It was the party in possession of premises sought to be recovered by an action of ejectment. Its right of possession was determinable by the judgment to be rendered in that action. It was no less a party from the fact that in the action of ejectment by the law of Idaho, as by the law of many other states, the tenant in possession might, by disclosing his interest as tenant only, permit his landlord to defend the action. The object of the action was to obtain the possession of the premises described in the complaint, and to obtain an adjudication in favor of the plaintiff's claim of title to the same. These objects could not be secured without the presence of both the defendants.

The right to remove the cause under the statute above quoted is determined by the condition of the case at that time, not by the

subsequent course of the litigation. The inquiry is whether, at the time Idaho was admitted to the Union, this action was pending against both the defendants. An action is deemed to be pending from the time of its commencement until its final determination upon appeal. The action was commenced by filing the complaint. At the same time summons was issued, to be served upon both the defendants. The return recites that service was made upon both the defendants. So far as the record shows, the return remained unchallenged until entry of the final judgment, which recites that no service had been made upon the Northern Pacific Company, and that no appearance had been made by that defendant. At the time when the cause was removed, the return of the service was on file, but no default had been taken against the Northern Pacific Company, and no disposition had been made of the plaintiff's controversy against it. That defendant, in presenting its petition for removal to the circuit court, declared itself to be one of the defendants in the case, and recited the fact that the cause "is now pending in the state court, and is properly within the jurisdiction of the circuit court of the United States." It is obvious that, if the service upon that corporation were defective, other service upon an alias summons could have been had before or after the removal, and it cannot be said that the action was not at the time of the removal pending as to both the defendants. The fact that service was not subsequently had, and that no appearance was made in the cause by the Northern Pacific Company, and that a trial was had upon the answer of its codefendant alone, does not, in our judgment, affect the question under consideration.

It is further argued that, even if it be conceded that the action was pending as to the Northern Pacific Company at the time of the admission of Idaho, still it does not affirmatively appear from the record that the jurisdictional facts existed at the commencement of the action, but that, on the contrary, the allegations of the petition for removal are all confined to the date of the petition itself. On the other hand it is contended that the cause is removed, not under the removal acts, but under the special provisions of the statute above quoted, which permit the removal upon the simple request in writing of a party to the suit, and that it is not necessary that the jurisdictional facts appear in the record; it is sufficient if they exist. We are unable to concur in this view. A "request in writing" and a petition are one and the same thing. When the rules governing the practice of the federal courts are considered, it is evident that congress in providing for the transfer of causes pending in the courts of Idaho, upon the written request of a party, intended that the request should perform the essential functions of a petition for removal under the removal acts, and that, if the jurisdictional facts elsewhere appeared in the record, a simple request in writing for the transfer would be sufficient. If these facts were not apparent from the record, the request should advise the court of the grounds upon which the jurisdiction is invoked. It was not contemplated that, in the case of suits so removed from the courts of Idaho, a departure should be made from the rule, else-

where uniformly observed, that the jurisdictional facts must appear of record.

What are the jurisdictional facts that should be made to appear in this case? It was only necessary to show that one of the parties to the cause, at the commencement of the action and at the time of the admission of Idaho, was a federal corporation, and that the amount in controversy exceeded \$2,000. These facts distinctly appear from the record. The complaint alleges that the Northern Pacific Company, at all the times mentioned in the complaint, was a corporation duly organized under the laws of the United States. The petition for removal alleges that that company is a corporation organized and existing under and by virtue of an act of congress entitled "An act granting the lands," etc., approved July 2, 1864. It necessarily follows from these averments that the Northern Pacific Company was a federal corporation at the commencement of the action, on the date of the approval of the act admitting Idaho, and at all times since. There can be no pretense that that corporation was a nominal party collusively joined as a defendant for the purpose of conferring jurisdiction upon the federal courts, for at the commencement of the action no such removal was possible.

The other assignments of error challenge the correctness of the findings of the court below. As there is no bill of exceptions presented in the record, the power of this court on writ of error is limited to the consideration of the question whether or not the findings of fact justify the conclusions of law arrived at by the trial court. It appears from the findings of fact that the plaintiff was organized under the laws of Washington, July 3, 1886, with the power, as expressed in its articles of incorporation, to construct a railroad to the town of Wardner in Shoshone county, Idaho. If its road had been constructed as described in the articles, it would not have included the premises in controversy, but on the 8th day of November, 1886, the plaintiff company filed supplemental articles providing for an extension of its road through the town of Wallace over the premises in controversy. Before filing these articles, however, on the 28th day of October, 1886, the plaintiff caused its line of survey to be made, locating its extension on the premises described in the complaint. On the following day, the defendant Coeur d'Alene Railway & Navigation Company, a corporation created under the laws of Montana, and having a legal status in Idaho from and after the 20th day of July, 1886, surveyed its road through Wardner, over practically the line adopted by the plaintiff. It is obviously true, as found by the court below, that the survey made by the plaintiff on the 28th day of October, 1886, could confer no rights whatever as against the survey made upon the 29th. At that time the plaintiff had not the power, through its charter, to construct a road over the premises in controversy. It had no such power prior to the 8th day of November, 1886. The act of congress under which both companies claim the right of way in question provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any

state or territory * * * which shall have filed with the secretary of the interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

It is plain that, under this act, no corporation could acquire a right of way upon any line not described in its charter or in its articles of incorporation; and it necessarily follows that no initiatory step could be taken to secure such right of way by the survey upon the ground or otherwise. Until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff corporation, its acts in making survey were of no avail, and it follows that, so far as the conflicting rights of these two corporations are concerned, the status of the plaintiff is the same as if its survey of October 28, 1886, had not been made.

It is further urged that, as the findings show that the Coeur d'Alene Railway & Navigation Company surveyed three distinct lines at said town of Wallace, known as lines A, B, and C, the last named being the line in dispute, and on the 8th day of November, 1886, it filed in the local land office a plat of its route, adopting the line B, the plaintiff was thereby misled to its injury. To this it may be said that such injury does not appear from any fact in the record. The finding is that the plat of the line B was filed by mistake, and that the line C was the one actually adopted, and intended to be placed on record in the filed plat. Section 4 of the act of congress above referred to provides that within 12 months after the location of any section of 20 miles of road, if upon surveyed lands, or, if upon unsurveyed lands, within 12 months after the survey thereof by the United States, the plat of the same shall be filed. At that time the lands in controversy, and all the lands along the line, were unsurveyed public lands. In the summer and fall of 1887, the Coeur d'Alene Railway & Navigation Company completed its line of road over the land in controversy; no further survey was made by the plaintiff until 1888, and the plaintiff did nothing whatever on the premises in controversy in the way of constructing a road until that year.

It is contended that the rules and regulations of the department of the interior issued November 7, 1879, and in force during the period of this controversy, confined the Coeur d'Alene Railway & Navigation Company to the line of route adopted by its first map, and it is argued that, while that company might not have been required under the act to file its map at the time such filing was made, yet it had the right to do so under the regulations of the secretary of the interior, and that, when such map was approved by the secretary, the company thereupon "secured" the benefits of the act; in other words, that, by the filing of the map upon line B, the defendant secured the benefits of the act upon that line, and could not thereafter alter its route so as to affect the rights of any other party. In *U. S. v. Chaplin*, 31 Fed. 890, Judge Deady said of these rules that "when they coincide with the law they are superfluous, and when they do not, or go beyond it, they are invalid." We find no warrant in the act for saying that a

railroad company, having adopted one line of survey along the route provided for in its articles of incorporation, and having filed the plat thereof, may not subsequently, and within the time allowed it by law for so doing, adopt another route, and no reason is apparent why, instead of filing a second plat, it may not construct its road on the line surveyed and adopted, so long as the rights of others have not intervened. In this case, as shown from the findings, no rights of the plaintiff had intervened prior to the actual construction of the road of the Coeur d'Alene Railway & Navigation Company upon the premises in controversy in this suit, and no error is apparent in the judgment rendered upon the findings of the court below.

The judgment is affirmed, with costs to the defendant in error.

ZOPFI v. POSTAL TELEGRAPH CABLE CO.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 177.

1. NEGLIGENCE—PROXIMATE CAUSE.

An obstruction in a highway is not the proximate cause of an injury sustained by one slipping and falling thereon, unless its presence caused, or contributed to cause, the fall.

2. SAME—QUESTION FOR JURY.

Where the jury may reasonably infer that one crossing a highway had to jump over an obstruction to reach a platform at the side of the way, in such a way that his foot slipped on the platform, and he fell backward on the obstruction, it is for them to determine whether the presence of the obstruction contributed to the fall.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

This was an action by Emma Zopfi, by her next friend, against the Postal Telegraph Cable Company, to recover damages for personal injuries. The circuit court directed a verdict for defendant, and entered judgment accordingly, to review which plaintiff sued out this writ of error.

John Ruhm & Son, James Trimble, and E. L. Gregory, for plaintiff.
Vertrees & Vertrees, for respondent.

Before LURTON, Circuit Judge, and BARR and KEY, District Judges.

KEY, District Judge. The defendant undertook to erect a telegraph line on the turnpike road between Nashville and Gallatin, Tenn. The poles which were to support the wires were placed along the turnpike at or near the points at which they were to be erected. The plaintiff, who is a minor, and was 13 years of age at the time of the injury complained of, lived with her father, who is her next friend in this action, upon the Gallatin pike, about three miles from Nashville. He owned a parcel of land occupied as his home, which abutted upon the turnpike. There was a pathway leading from his

house to the pike. At the point where this path reached the pike, there was a gate. There was a strip of the public road, of about 10 feet, between this gate and the metaled portion of the pike. Across this strip, the pike was approached over a platform about four feet in length, and then by stepping-stones. This strip, especially in rainy weather, was covered with water and mud. One of the poles mentioned was placed lengthwise along the turnpike, so that its large end extended along about one-half or two-thirds of the side of the platform at the gate, about a foot or more from the platform, and covered the stepping-stone, or nearly all of it, next to the platform. The distance from the stepping-stone which could be used, to the platform, was 33 inches. The day was very rainy, and the end of the platform across which the pole did not extend could not be reached, except by going through water and mud. The pole was a peeled chestnut, and the platform was wet and slippery. The plaintiff was returning from school upon the afternoon of September 23, 1890, and approached the gate mentioned with an umbrella in one hand, and her school books in the other. Reaching the stepping-stone next to the pole, she stepped over the pole, without touching it, to the platform, when her foot slipped, and she fell backward upon the pole; and by her contact therewith, in her fall, she was seriously and permanently injured in her right hip, to recover damages for which this suit is brought. Upon the trial of the cause the judge directed the jury to return a verdict in favor of the defendant, which was done; and error is assigned upon this action of the judge, because, it is said, the cause should have been submitted to the jury for their consideration and determination.

It is urged on behalf of the plaintiff that, though the pole may not have been the proximate cause of the fall of the plaintiff, it was the proximate cause of her injury, and, as the pole was left there by the negligence of the defendant, it is liable, and that whether this is so, or not, should have been left to the jury to decide.

What are proximate or remote causes of injury, or what are proximate or remote damages for injuries, are subjects involved in much confusion and conflict by the decisions of courts and the dissertations of law writers. Wharton says:

"A negligence is the juridical cause of an injury, when it consists of such an act or omission on the part of a responsible human being as, in ordinary, natural sequence, immediately results in such injury." Whart. Neg. § 73.

He further says:

"At this point emerges the distinction between conditions and causes; a distinction, the overlooking of which has led to much confusion in this branch of the law. What is the cause of a given phenomenon? The necessitarian philosophers, who treat all the influences which lead to a particular result as of logically equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. Thus, for instance, a spark from the imperfectly guarded smoke pipe of a locomotive sets fire to a haystack in a neighboring field. What is the cause of this fire? 'The sum of all the antecedents,' answers Mr. Mill, the ablest exponent of the necessitarian philosophy. Apply this concretely, and it would be difficult to see how any antecedent event can be excluded from taking a place among the causes by which the fire in question is produced. Certainly,

we must say that either if the railroad in question had not been built (an event depending upon an almost infinite number of conditions precedent, among which we may mention the discovery of iron, steam, and coal), or the haystack in question had not been erected (to which there is also almost an infinite number of necessary antecedents, the failure of any one of which would have involved the failure of the haystack), no fire would have taken place. Jurisprudence, however, does not concern itself with refinements such as these. Its object is to promote right and redress wrong; and, without undertaking to propound any theory of the human will, it contents itself with announcing as a fact established by experience that, by making a law that a human 'antecedent' shall be punishable for a wrongful act, such 'antecedent,' if not restrained from committing the wrong, may be compelled to redress it. The question, therefore, when an injury is done, is whether there is any responsible person who could, if he had chosen, have prevented it, but who, either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intentionally, a series of material forces by which the injury was produced. This is the basis of the distinction between conditions and causes. We may concede that all the antecedents of a particular event are conditions without which it could not exist, and that, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. But, except so far as those conditions are capable of being molded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will. It knows no cause, therefore, except such a will; and the will, when thus responsible, and when acting on natural forces in such a way as through them to do a wrong, it treats as the cause of the wrong. As a legal proposition, therefore, we may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury. On the other hand, the fact that a party is shown to have been negligent in a particular proceeding does not make him liable for an injury produced by conditions to which his negligence did not contribute." Whart. Neg. (2d Ed.) § 85.

Regarding these principles as sound, it follows that the liability for the plaintiff's injury depends upon the cause of her fall. If the pole was the cause of her fall, or one of the causes which made her fall, the defendant is liable for the injury, for the fall is the juridical cause of the injury. Suppose a steamboat sinks in the river because of the negligence of its officers, and a passenger is drowned, and its cargo is lost. The water drowns the passenger, and destroys the cargo. It is the immediate cause of the destruction of both. But the negligence of those in control of the boat is the juridical cause of the loss.

The position of plaintiff's counsel, that, though the pole may not be the cause of plaintiff's fall, yet it is the cause of her injury, and defendant is liable therefor, is not sustained by the cases in 90 and 91 Tenn., and 17 and 20 S. W., which are cited as authority for them. In *Deming v. Storage Co.*, 90 Tenn. 352, 17 S. W. 89, the court says:

"It is insisted here that neither the delay nor the breakage of the train, but the fire, was the proximate cause of the loss. In this we do not concur. Granting that the slight delay would not, of itself, have made the company liable, here we have, in addition, the breaking of train machinery when the effort is made to remove the cotton, but for which it might have been saved, notwithstanding the fire. This, we think, was, therefore, the proximate cause of the loss. * * * It is true that the fire destroyed the

cotton, and in that sense caused the loss; but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it, had not the breaking of the train, while it was being removed, happened, so that but for this fact the cotton would have been saved. This must, therefore, be held to be the proximate cause of the loss, and if it was the result of negligence the carrier must answer for it."

In this case there is a proximate juridical cause for the injury,—the weakness or insufficiency of the machinery with which effort was made to remove the cotton, and the delay in consequence, while in the case we have in hand the contention is that, though the pole may not have caused the fall, it produced the injury. Upon this theory there is no contribution by the pole to the fall of the plaintiff, but the step upon the slippery platform caused the fall, and the fall upon the pole produced the injury. There was no conjoint, concurrent causation in the parts performed by the step upon the platform and by the pole, according to plaintiff's position. One caused the fall, and the other, not contributing to the fall, produced the injury, so that the part performed by each in the incident was separate, distinct, and independent, instead of co-operative and concurrent, according to plaintiff's contention.

Nor does the case of *Railway Co. v. Kelly*, 91 Tenn. 699, 20 S. W. 312, give support to plaintiff's insistence in this respect. In that case, as well as in the case of *Deming v. Storage Co.*, *supra*, the goods were destroyed by fire, but the fire did not occur through any negligence on the part of the defendant, and some other cause for the loss must be found before defendant could be held liable therefor. In the *Kelly Case* the court says:

"The fire and the loss may have different causes. The fire destroyed the goods, but it does not follow that the cause of the fire and the cause of the loss to the plaintiff were one and the same, in legal contemplation. They may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss, in such sense that they would not have been lost without the failure. Had the defendant delivered the goods, they would have been removed, and the loss averted. The negligent and wrongful detention of the goods, and that alone, exposed them to the fire; and but for that detention they would not have been destroyed, though the fire did occur. Thus, it becomes obvious that the negligence of the railway company was the proximate cause of the loss." 91 Tenn. 703, 20 S. W. 312.

The proof showed that the goods had been in the carrier's depot for four days, and had been destroyed by fire on the fifth, and that, on each of these days, plaintiff had inquired for the goods, for the purpose of removing them, and was informed the goods had not arrived. In this case the court declares the negligence of the defendant to be the proximate, legal cause of the loss, and there is none other to be found. In the cause in hand, if it be admitted that the pole did not contribute to plaintiff's fall, but that the same was caused solely by the step upon the platform, the proximate, juridical cause of the injury must be found in one or the other of these incidents, and not in both; for, though they followed each other, they were not produced by the concurrent, co-operating influence of both, but the cause and the result arose from distinct and independent agencies, and so the fall must have been the prox-

imate cause of the injury. The cases just mentioned, instead of supporting plaintiff's theory, and sustaining the recent decision of the supreme court of Tennessee referred to in argument, are in conformity with the opposing view.

The other cases referred to by plaintiff's counsel have no analogies with the present case that make them of authority in its decision. They arise in cases in which the law, either municipal, statutory, or common, imposed duties upon persons or corporations, which their failure to observe and perform resulted in the injuries for which the suits were brought. Our opinion on this branch of plaintiff's contention is that there was no error in the judge's holding.

Plaintiff's counsel further insist that the judge erred in taking the case from the jury, and in declining to allow it, under the facts established by the evidence, to determine whether the negligence of the defendant was the proximate cause of the injury.

In *Insurance Co. v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18, it was said that, "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved," and that a case should never be withdrawn from them "unless the testimony be of such conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." So, in *Randall v. Railroad Co.*, 109 U. S. 478, 482, 3 Sup. Ct. 322, it was declared to be the settled law "that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Goodlett v. Railroad Co.*, 122 U. S. 411, 7 Sup. Ct. 1254. "A case should not be withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Railway Co. v. Cox*, 145 U. S. 606, 12 Sup. Ct. 905; *Dunlap v. Railroad Co.*, 130 U. S. 649, 652, 9 Sup. Ct. 647; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118. "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Railroad Co. v. Powers*, 149 U. S. 45, 13 Sup. Ct. 748. These decisions of the supreme court of the United States do not go to the extent of requiring that every conflict in the testimony shall be submitted to the jury. A mere scintilla of evidence is not sufficient to demand such a course. There must be something more than a mere conflict. It must be serious and important. There must be sufficient testimony to support a verdict after allowing the jury to draw all the inferences it could draw justifiably. The verdict should be supported

by such testimony as would sustain the verdict upon any view which might be properly taken of the facts the evidence tended to establish. The case of *Goodlett v. Railroad Co.*, supra, and of *Railroad Co. v. Jones*, 95 U. S. 439, 443, furnish examples in which courts withdrew causes from the consideration of the jury, or should have done so, notwithstanding there were conflicts in the testimony, but these conflicts did not arise to the dignity and importance necessary to deprive the judge of his right and duty to take the case from the jury.

The question for determination in this case is, ought the case, under the circumstances and facts proven, to have been submitted to the jury, as to whether the pole caused plaintiff's fall, or contributed to that result? In coming to a conclusion as to this, we are to take such legitimate view of the proof as is most favorable to the plaintiff. It is stated in the testimony that the stepping-stone next the pole and the platform were upon the same grade, or nearly so, and upon about the same grade as the surface of the pike between the stepping-stone and the platform; that the distance between the stone and the platform was 33 inches; that the pole with which defendant obstructed plaintiff's pass way was between the stepping-stone and the platform, and was 18 inches in diameter at the point of obstruction. And consequently the plaintiff (a girl 13 years of age) was required, in taking the step to the platform, to raise her foot one foot and a half above the grade of the stepping-stone and surface of the pike and platform, in making the step to the platform. The pole was peeled, and necessarily wet and slippery, and the platform was also wet and slippery. The girl cleared the pole. Such a step as she must have taken was long, awkward to make, and unusual in its character. When she stepped upon the platform with her advanced foot, a jury might reasonably infer that her hindmost foot had left the stepping-stone, for if it had still been placed upon the stone when the foot upon the platform slipped, and she fell, she would have fallen forward or astride the pole, and not backward, and it is not an unreasonable inference that she had to jump or spring so as to clear the log and reach the platform. We do not say that the facts and inferences here given are true. We only say that there is testimony in the record to sustain such a view, while there are other facts and circumstances proven, from which contrary conclusions and inferences may be drawn. It is not our province to venture an opinion as to whether the testimony weighs more upon one side or the other, but we believe that, taking the testimony all together, and looking to the facts, circumstances, and conditions surrounding the transaction, it ought to have been left to the jury to consider and determine whether the pole which obstructed the pass way caused, or contributed to cause, the fall of the plaintiff, and the judge erred in failing to do so. For this error the cause will be remanded, with directions that the verdict and judgment be set aside, and a new trial awarded, and it is so ordered.

LOUISVILLE & N. R. CO. v. EAST TENNESSEE, V. & G. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1894.)

No. 69.

1. CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSINGS.

It is not per se contributory negligence, when recovery is sought for injury to a car, to halt a train, in accordance with long mutual acquiescence, at a point where two railways cross each other, where a collision thereupon follows through failure of an approaching train to stop within 50 feet of the crossing (Act Ky. March 10, 1894) by reason of defective brakes.

2. SAME—EVIDENCE.

Proof of contributory negligence in not moving a train with due diligence out of the way of a train running "wild" cannot be established by evidence which is consistent with two contradictory states of fact.

3. DAMAGES—EVIDENCE.

Evidence, in mitigation of damages for injury to a car, that another car of a different kind had once been taken apart and lengthened, is not admissible.

In Error to the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a writ of error to the judgment of the circuit court of the United States for the eastern district of Tennessee, northern division, in favor of the East Tennessee, Virginia & Georgia Railway Company, hereafter referred to as the "Tennessee Company," against the Louisville & Nashville Railroad Company, hereafter referred to as the "Louisville Company," for \$11,219.94, as damages for an injury to a sleeping car caused by the collision with it of a freight train of the Louisville Company.

The facts are as follows: On the 7th day of November, 1890, about 3 o'clock in the morning, the north-bound passenger train of the Cincinnati, New Orleans & Texas Pacific Railway Company, hereafter referred to as the "Cincinnati Company," arrived at Junction City, Ky., where its tracks cross those of the Louisville Company at grade. After coming to a full stop, 100 feet from the crossing, the train moved on over the crossing until the baggage and mail cars were at the platform of the station, on the north side. The platform was not long enough for the whole train, so that the smoking car was left on the crossing with the ladies' car, and the sleeping car behind it. Within two minutes after the train had stopped the second time, and while the baggage and mail matter were being transferred to the platform, a freight train upon the Louisville Company's line, bound east, reached the top of a grade which descends for a mile and a quarter to this junction from the west. The engineer of the freight train whistled several times for brakes, but, finding that the brakes were useless, and that the train was beyond the control of the crew, he blew signals of alarm to the Cincinnati passenger train, which he could see as he came down the grade. The engineer and conductor of the passenger train, in accordance with their duty, had gone to the telegraph office to register, and receive telegraphic orders, and did not hear the alarm signal. A porter of the passenger train did hear it, however, and he signaled to the fireman of the passenger engine, who at once started up his engine, and succeeded in pulling over the crossing the smoking car and the ladies' car. The sleeping car "Orkney," however, was only half over the Louisville track when the freight train struck it, carrying away the four middle sections, and leaving the two ends standing. No one was killed, but two or three persons were injured. The sleeping car belonged to the Pullman Company, but was under the control of the Tennessee Company by virtue of a contract which made the latter liable to the Pullman Company for any injury to the car. It was running in the Cincinnati Company's train by an arrangement between the Cincinnati and Tennessee Companies for through sleeping cars from Cincinnati to Jacksonville

over the lines of both. For eight years it had been the habit of both the Louisville and the Cincinnati Companies to allow their trains to stand upon the railway crossing at this station while the baggage and mail were being transferred. The platforms of both companies were so short that trains coming from the south on the Cincinnati track and from the west on the Louisville track could not stop their baggage and mail cars alongside the platform without leaving the rear cars either on the crossing or on the other side of it. This was well known to all the employes of both railway companies engaged in running trains by this junction.

The statute of Kentucky passed May 10, 1890, provides: "That whenever railways cross each other in this state the trains shall be brought to a full stop at least fifty feet before getting to the crossing: provided, however, that the provisions of this section shall not be applicable where the crossings of such roads are regulated by derailing switches or other safety appliances which prevent collisions at crossings nor where a flagman or watchman is stationed at such crossings and signals that the train may cross in safety. (2) That any corporation failing to stop its trains as herein directed shall be guilty of misdemeanor and shall be fined not less than one hundred or more than five hundred dollars for each offense; and the engineers of said trains shall be fined not less than twenty nor more than one hundred dollars for each offense."

Henry H. Ingersoll and Masterson Peyton, for plaintiff in error.

Henderson & Jeroulman and Edward Colston, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The only real defense in this case was that the Cincinnati Company was guilty of contributory negligence, and the chief errors assigned are based on rulings made in the trial of this issue. All the evidence on both sides showed, without contradiction, that the Louisville Company was guilty of negligence in sending out a freight train equipped with poor brakes. Counsel for defendant in error contend that the errors assigned on the issue of contributory negligence are immaterial, because the recovery of the Tennessee Company, the plaintiff below, could not be defeated by the contributory negligence, if any, of the Cincinnati Company. It is claimed that, under the contract existing between the two companies as to the use of the injured sleeping car, the Cincinnati Company was not the agent or partner, but only the special bailee, of the Tennessee Company, and that from such a relation, no responsibility for the contributory negligence of the former can be imputed to the latter. Thus is presented a question of the application of the principle laid down in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, to the facts of this case, which has elicited an interesting discussion by counsel. But it is not necessary to decide it. The court below held with the plaintiff in error on the point, and the judgment can be sustained without reversing that ruling.

The main error assigned is that the court refused to charge that it was contributory negligence per se for the Cincinnati Company to halt its train on the crossing, and did charge that the Louisville Company was estopped to make this defense after acquiescing in

and taking part in such a practice for eight years. It is to be observed that this is not a suit by a passenger against a common carrier, and that the standard of negligence as between the two companies is quite different from that which obtains in suits by an injured passenger. This distinction is fully brought out in the opinion of the supreme court of Iowa in the case of *Kellow v. Railway Co.*, 68 Iowa, 470, 23 N. W. 740, and 27 N. W. 466, upon which counsel for plaintiff in error chiefly rely. That case was quite like this in its facts, except that there was no statute of Iowa requiring trains to stop before crossing, though it was their known custom to do so. There a passenger was killed, and the suit was brought by his representatives against the company in whose car he was. The court, in effect, held that the question was one for the jury to determine, whether, in allowing the car to stand upon the crossing, the company had exercised every precaution that human foresight could suggest. The jury had returned a special verdict that the defendant company "could not reasonably have expected or anticipated, under the circumstances, that cars without any control would run down upon the crossing as they did." The court held that this finding did not negative the possibility that the company had not taken every precaution against danger to its passengers which human foresight could suggest, and expressly made the distinction between the standard of care to be maintained in such a case between a passenger and his carrier and that to be maintained between the carrier and a stranger. The principle that the standard of due care and the existence of negligence depend upon the relation existing between the party sought to be charged and the party injured is elementary, and is too well settled to need lengthy discussion. *Valley Co. v. Howe*, 6 U. S. App. 172, 3 C. C. A. 121, 52 Fed. 362; *Denman v. Railroad Co.*, 26 Minn. 357, 4 N. W. 605. The recovery here sought was for injury to property. The same action would have lain if the car injured had had no passengers, or if it had been a freight car. Why should the standard of due care for property, as between the companies, vary because in a particular case one of them may be under a duty to a third person of a higher and more exacting character than that which he ought to exercise in regard to his property? The Louisville Company cannot shield itself from liability for admitted negligence by holding the Cincinnati Company to that high degree of care which it owes only to its passengers. The standard of care to which the Cincinnati Company can be held is that which a reasonably prudent man would exercise in the protection of his own property. Did the Cincinnati Company exercise such care in allowing its train to stand upon the crossing?

The statute of Kentucky required the Louisville train, on penalty of a fine, to be imposed both on the company and the engineer, to come to a full stop 50 feet before the crossing. By acquiescence in the arrangement for halting trains upon the crossing, each company impliedly agreed that during the occupancy of the track by the train of one the other would not, either negligently or intentionally, disturb or interfere with that occupancy. Was it negligence, as between the two companies, for the one to rely on the other's com-

pliance with the statute and its tacit agreement? It seems to us clear that it was not. It does not lie in the mouth of the Louisville Company, after consenting that the Cincinnati Company should put its train in a place not dangerous, except through the negligence of the Louisville Company, to say that the Cincinnati Company was wanting in due care in reposing such invited confidence. It is not negligence, ordinarily, for one to act on the theory that another will comply with his statutory duty, unless there is some reason for thinking otherwise. *Jetter v. Railroad Co.*, 41* N. Y. 154; *Baker v. Pendergast*, 32 Ohio St. 494; *Railroad Co. v. Schneider*, 45 Ohio St. 678-699, 17 N. E. 321; *Stapley v. Railroad Co.*, L. R. 1 Exch. 21. Still less can the charge of contributory negligence be made by one who invited or consented to the action, and thereby impliedly agreed that it should be attended with no danger from him. The cases of *Railroad Co. v. Houston*, 95 U. S. 697, and *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, are said to be contrary to the authorities just cited. We do not think there is any conflict. The latter were suits for injuries to travelers in crossing a railroad track, and the question was whether it was any excuse for the traveler not to look and listen because the engineer had not either rung the bell or blown the whistle. The supreme court held that it was not. In such a case, of course, in order that the signal which the engineer is required to give should be of any service, the traveler is obliged to use his senses to observe it. He knows that the trains will cross, and have the right to cross the road, at such a rate of speed, as to make it impossible for them to stop, should he be on the track. The crossing is therefore necessarily a place of danger, and it is manifestly negligence in him not to look and listen both for the signal and the train. Where, however, it is the statutory duty of every train to stop at the crossing, and the railroad company agrees that every train will stop there, a very different question is presented.

To state the case in another way, the conduct of the Cincinnati Company, in allowing its train to stand upon the track, was not, in view of the arrangement between the companies by which it was permitted, the proximate cause of the accident, and could not, therefore, constitute contributory negligence defeating its action. If, with a knowledge of what the plaintiff has done or is about to do, the defendant can, by ordinary care, avoid the injury likely to result therefrom, and does not, defendant's failure to avoid the injury is the last link in the chain of causes, and is, in law, the sole proximate cause. The conduct of the plaintiff is not, then, a cause but a condition of the situation with respect to which the defendant has to act. The principle is established by a long series of cases. In *Davies v. Mann*, 10 Mees. & W. 546, the plaintiff negligently left his donkey in the street, with its fore feet fettered. The defendant's driver negligently drove his team against it, and killed it. The court of exchequer held that, even if it was negligent and unlawful for the donkey to be thus left in the street, it was no bar to the recovery. So, in *Mayor, etc., of Colchester v. Brooke*, 7 Adol. & E. (N. S.) 339, 377, 378, where oysters were negligently and unlawfully left in the channel of a navigable river, it was held that a vessel which negli-

gently ran against them, knowing them to be there, was liable for the injury. So, in *Greenland v. Chaplin*, 5 Exch. 243, where a passenger on one steamboat was injured by the fall of an anchor caused by another boat's negligently colliding with the first boat, it was held that the colliding boat was liable, although the passenger was in a dangerous place in the bow, and the anchor was carelessly stowed. So, in *Austin v. Steamboat Co.*, 43 N. Y. 75, the action was by a tow for injury from a collision by a steamboat. The tow had run aground, and the steamer, in attempting to get by her through a new channel, became unmanageable, and sheered into her. It was held to be negligence causing the collision in the steamer to seek the new channel, and the fact that the tow had run aground through the same negligence was held to be no defense. These cases have been upheld and followed by the supreme court of the United States in *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653. See, also, *Valley Co. v. Howe*, 6 U. S. App. 172, 3 C. C. A. 121, 52 Fed. 362; *Radley v. Railway Co.*, 1 App. Cas. 754; *Whart. Neg.* § 329 et seq. If the engineer of the Louisville train, after seeing the Cincinnati train on the track, had been negligent in applying his brakes, the application of the cases just cited to the case at bar would be obvious, for then clearly the negligence of the Louisville engineer would have intervened as a cause between the position of the Cincinnati train upon the track and the collision. But there is nothing to show that the Louisville engineer was negligent after he saw the Cincinnati train. The negligence of his company was anterior to that, and consisted in allowing its train to start on its trip with a poor equipment of brakes. At first blush, it might seem, therefore, that the position of the Cincinnati train upon the track was nearer in the chain of causes to the collision than the failure of the Louisville Company to provide good brakes. But the negligence of a person and its proximity as a legal cause to the ensuing accident is determined by the knowledge he has of the situation in respect to which he is called upon to act. If he invites another to do an act which only the possibility of negligence on his part renders dangerous, then his subsequent negligence, though concurrent in point of time with the invited act, is nearer in the chain of legal causes to the resulting injury. The practice of the Cincinnati Company to halt its trains upon the crossing was well known to and was acquiesced in by the Louisville Company. Even if the practice was negligent, the Louisville Company, knowing its existence when it sent out a train to Junction City, could reasonably anticipate that the train would possibly and probably be on the grade west of the junction at a time when a Cincinnati train should be standing on the crossing, and that poor brakes would result in collision. Therefore it is that the position of the Cincinnati train on the track at the time of the collision was not the legal cause of it, at least so far as the Louisville Company was concerned, but was a condition of the situation with respect to which the latter company was obliged to use due care when it started the freight train on the trip, and the absence of such care in not providing good brakes was the sole proximate cause of the accident.

It is insisted that the Cincinnati Company was not entitled to a

verdict, because the agreement to stop trains on the crossing was void as against public policy. As already pointed out, the practice was not forbidden by the Kentucky statute. Whether it was negligence per se towards a passenger is a question which we need not decide. Suffice it to say that the question is one of negligence between the two companies, and nothing else. Even if, for the sake of argument, it be conceded that the agreement for such use of the crossing could not be enforced because of the element of possible danger to a passenger, this suit is not based on any such agreement. The action is for a tort. It will defeat an action for tort if the injured party, in making his case, must show that he was at the time of the injury violating a positive statute, or committing malum in se, provided such violation of law or crime contributes to the injury. Pol. Torts, 150, 151. But the act of the Cincinnati Company in allowing its train to stand on the crossing was neither malum prohibitum nor malum in se. If it was wrongful, it was so because it was negligence, and its effect upon the Cincinnati Company's right to recover must be determined under the ordinary rules obtaining in negligence cases. According to those rules, as we have seen, if there was any negligence on the part of the Cincinnati Company, it was not the proximate cause of the accident. For these reasons we think the court was right in instructing the jury that, so far as the Louisville Company was concerned, it was not contributory negligence for the Cincinnati Company to halt its trains upon the crossing.

The court left to the jury the question whether the Cincinnati train was moved over the crossing with due diligence after the employees of that company had reason to apprehend the approaching danger. Upon this issue the telegraph operator of the Louisville Company at the junction testified that he spoke to the conductor and the engineer of the Cincinnati train in the crowd on the platform, and said that the freight train was "wild, or loose;" that this was in time to enable them to get their train out of the way, but that they paid no attention to what he said, and did not seem to hear him. The engineer testified that he heard no warning. The conductor was not produced. The defendant below asked the court to call the jury's attention to the fact that the conductor was not produced, and the court failed to do so. The court, in the original charge, had said upon this point:

"Now, there is the engineer, who swears he was not notified of any such danger. There is a witness who says the engineer was, although he says he does not know whether the engineer heard him or not."

And then, after being requested to give certain charges, including the one in respect to the conductor, the court said:

"These other propositions I have substantially repeated in my charge. It is only asking me to say over what I have said. You must be satisfied of two things: that these agents of the C. S. road [C., N. O. & T. P. Ry.] were notified in time; that after such notice they used active diligence in discovering and avoiding danger. I told you there was a difference between the witnesses, especially the engineer and another witness. Take the whole body of the case, and come to your conclusions as to what are the facts in the case, and return your verdict accordingly."

We do not think that there was any prejudicial error in the court's failing to give the charge as requested. The evidence of the telegraph operator was of a kind not to need contradiction, because it was rather more consistent with the hypothesis that the conductor did not hear the operator than that he did. It is hardly conceivable that, if the conductor had heard the words which were said to have been spoken, he would not have given some sign. When a party with the burden on him introduces evidence consistent with two different states of fact, he proves neither. *Ellis v. Railway Co.*, L. R. 9 C. P. 551.

Error is assigned to the action of the court in ruling out the depositions of two witnesses who testified that the private car of the president of the Nashville, Chattanooga & St. Louis Railway Company had been lengthened 10 feet by the insertion of a section in the middle of the car. This was offered on the question of damages, to show that it would have been possible to repair the injured sleeping car by reuniting the two ends. It was plainly incompetent for the purpose. The defendant was permitted to call experts to prove that the sleeping car, as it was after the collision, could have been thus repaired; but it clearly had no right in chief to show particular instances, and especially did it not have the right to prove as a particular instance that another car of a different kind had once been taken apart in a car shop and lengthened. Such an instance had no legitimate tendency to prove that a sleeping car which had been broken into two parts by the collision of a freight train might be treated in the same way. There was evidence to show that after the accident the wreck of the sleeping car was dismantled by employes of the Cincinnati Company, and things of value carried away. The court charged the jury that the measure of damages was the difference between the value of the car before the accident and its value just after the accident and before it was dismantled. This was right. The complaint that, under this charge, the damages found were excessive, we cannot consider. *Association v. Rutherford*, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513.

The judgment of the circuit court is affirmed, with costs.

KANSAS CITY, FT. S. & M. R. CO. et al. v. KIRKSEY.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1894.)

No. 137.

1. MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY.

A switchman riding on the front of a switch engine was killed by the derailing thereof, which was caused by sand washing down from a pile near the track, and becoming embedded between the rails. The accident occurred about 6 o'clock in the morning, and there had been a heavy rain an hour or two before. The track had been examined at 12 the preceding night. Just before the accident, a wall, undermined by the rain, had fallen upon a passenger train, and at the time the section boss and his men were engaged in rescuing the dead and injured. *Held*, that it could not be said, as matter of law, that the company was guilty of negligence in not sending somebody to examine the track after the rain, and the question was one for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

An intimation of the danger was signaled by another switchman to deceased, as he stood on the front of the approaching engine, but apparently he did not see it; and there was some evidence that the sand was over the rails. *Held*, that as it was the duty of deceased to watch for signals, and observe obstructions, it was not apparent, as matter of law, that he was not guilty of contributory negligence, and this question, too, was one for the jury.

3. SAME—EVIDENCE—FLAGMAN AT STREET CROSSING.

Ordinances requiring railroad companies to keep flagmen at street crossings are not intended for the protection of the company's employes; and therefore, in an action for negligently causing the death of a switchman riding on a switch engine, which was derailed by an obstruction at a crossing where no flagman was stationed, it is error to admit such an ordinance in evidence.

In Error to the Circuit Court of the United States, for the Western Division of the Western District of Tennessee.

This was an action by Rosina Kirksey against Kansas City, Ft. Scott & Memphis Railroad Company and Newport News & Mississippi Valley Railroad Company for damages for the death of her husband. The circuit court directed a verdict for plaintiff, and defendants bring error.

Holmes Cummins, E. F. Adams, C. H. Trimble, and Wallace Pratt, for plaintiffs in error.

G. P. M. Turner and John R. Flippen, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge. This is a proceeding in error, brought by the Kansas City, Ft. Scott & Memphis Railroad Company, hereafter to be referred to as the Kansas City Company, and the Newport News & Mississippi Valley Company, hereafter to be referred to as the Newport News Company, to reverse a judgment against both companies in favor of Rosina Kirksey for damages for the death of her husband, occurring, as she alleged, by the wrongful act of the two companies.

The court below held that by the undisputed facts in the case it was conclusively shown that both companies were guilty of negligence, and the deceased was not guilty of contributory negligence, and therefore directed a verdict for plaintiff, leaving to the jury only the question of damages. The main controversy arises over the action of the court in thus withdrawing the questions of negligence and contributory negligence from the jury.

The facts of the case as developed by the evidence were as follows: Between the city of Memphis and the Mississippi river the parallel tracks of three different companies run north and south, crossing at right angles the streets of the city which extend to the river. The west track is that of the Kansas City Company, the middle track is that of the Belt Line Company, and the east track is that of the Newport News Company. A little to the north of Jefferson street, which is one of the streets crossed by these three tracks, there is a spur or switch track, called the "Little Rock Switch,"

which, after connecting with the Newport News track, runs up a grade, forming an embankment, immediately to the right of the Newport News track, about three or four feet high. Archibald Kirksey, the deceased, was a switchman upon the yard switch engine of the Kansas City Company. Between half past 5 and 6 o'clock on the morning of the 8th of July this switch engine drew out a half dozen freight cars from the Newport News freight station, to switch them to another part of the railway yard. Kirksey's place was on the front footboard of the engine. His duty is described as that of "following" the engine. His station was on the right-hand side, where the engineer could see his signals. His duty was to throw switches necessary for the shifting of trains, and to observe all obstructions upon the track, and signal to the engineer of their presence. The train passed over from the Kansas City track to the Newport News track, as, by arrangement between the companies, it had the right to do, and was in the habit of doing. It was broad daylight, but was raining some. There had been a moderate fall of rain the night before, and a particularly heavy fall somewhere between 4 and 5 o'clock. As the engine crossed two or three of the streets, before reaching Jefferson street, it had to run through water and debris, which concealed the track. Upon approaching Jefferson street an engine was seen standing still at the crossing on or near the Belt Line track. It had, in fact, been derailed, just as the Kansas City engine was soon to be. A switchman upon the Belt Line engine motioned to those upon the Kansas City engine, and pointed to the Jefferson street crossing of the Newport News track. No attention was paid to this by any one on the latter engine. In running over the Jefferson street crossing, the engine was derailed and ran into the Little Rock switch embankment, already referred to. Kirksey, who sat upon the front footboard of the engine, was crushed between the embankment and the steam chest of the engine, and was instantly killed. A pile of sand had been left upon the ground just east of the Newport News track and in the corner made by that track and Jefferson street, and the heavy rain had swept the sand down in between the rails of the track, so as to leave nothing but the tops of the rails visible. The action of the water was such as to harden the sand between the rails so that it lifted the flanges of the engine wheels from the rails, and threw the engine off the track. The section boss of the Newport News Company, whose duty it was in person or by subordinates to examine the track, and keep it clear from obstructions, had been over this crossing at 12 o'clock the night before, in company with a subordinate called a "track walker," and found the track unobstructed. About 4 o'clock that morning a train of cars had safely passed over Jefferson street on the same track, and the engine returning, without cars, some 20 minutes later, found no difficulty in recrossing. The heavy fall of rain already mentioned occurred shortly after. The result of this heavy rain was to undermine a large wall, which stood in the passenger station of the Newport News Company, and to throw it down upon a passenger train standing near. Many of the passengers were buried in the debris,

and several were killed. The section boss and all his force were at once summoned to save the living and disentomb the dead, and they were busily engaged in this work at the time of the derailing of Kirksey's engine. The engine was running at a speed not exceeding 5 or 6 miles an hour at the time of the derailment, and it could have been stopped within 10 or 15 feet, had Kirksey signaled to the engineer to do so, or had the engineer himself observed any obstruction upon the track. The place, where the pile of sand was, belonged to the city of Memphis. The sand had been there a month, having been placed there without the agency or authority of the railway companies. Slight quantities of sand were upon the track at 12 o'clock, when the section boss passed Jefferson street, and had been there before, but they had never caused any injury or inconvenience. The size of the sand pile is nowhere disclosed in the record.

On this state of facts, we are of the opinion that the learned judge in the court below erred in taking the questions of negligence and contributory negligence away from the jury. It is the rule in the federal courts that the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside the verdict in opposition to it. *Railroad Co. v. Converse*, 139 U. S. 469-472, 11 Sup. Ct. 569; *Schofield v. Railroad Co.*, 114 U. S. 615-618, 5 Sup. Ct. 1125; *Randall v. Railroad Co.*, 109 U. S. 478-482, 3 Sup. Ct. 322. But it often happens that, though the facts of a case are undisputed, the inference from those facts as to negligence or the absence of it on the part of him whose conduct is in question is an inference of fact to be drawn by the jury. This is the case where the presence or absence of negligence is not so clear but that reasonable men, viewing the same facts, may differ in regard to it. Said Mr. Justice Brewer in *Railroad Co. v. Powers*, 149 U. S. 43-45, 13 Sup. Ct. 748:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569."

The function of a court with respect to the issue of negligence or no negligence is to decide whether the facts are such that the jury may legitimately reach a conclusion either that there was negligence or that there was no negligence. The function of the jury, after the court has held that either inference is open to them, is to decide whether or not in fact there was negligence. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Railway Co. v. Jackson*, 3 App. Cas. 193. If the conduct of the defendants is not at once condemned as negligence or carelessness by the general knowledge and experience of men, the question is always one for the jury. Gaynor

v. Railroad Co., 100 Mass. 208-212. The result is, therefore, that unless we conclude that no fair-minded man or jury could legitimately infer from the facts of this case either that the railroad company was not guilty of negligence resulting in Kirksey's death, or that Kirksey was guilty of negligence contributing to his death, the judgment must be reversed. The duty of the railroad company to an employé running upon its trains with respect to its tracks is well settled. The company is not an insurer of the safety of its track, but it must use reasonable care—the care which a prudent man would exercise under the same circumstances—to keep its track free from obstructions and defect. *Hewitt v. Railroad Co.*, 67 Mich. 61, 34 N. W. 659; *Railroad Co. v. McDade*, 135 U. S. 554-570, 10 Sup. Ct. 1044.

The question of negligence on the facts is one of degree. How often did reasonable prudence require the railroad company to send a man over its tracks in its railroad yard to see that there was no obstruction upon them. The intervals between the examination of the track might be so short on the one hand or so long upon the other that the court could say as a matter of law that in the one case there was no negligence and in the other that there was negligence. But we do not think this to be such an extreme case. An examination had been made at 12 o'clock the night before. The accident occurred about 6 in the morning. Certainly a court could not charge as a matter of law that under ordinary circumstances it was negligence on the part of the company not to send a track walker between midnight and morning over every foot of the several miles of the company's yard track. But it is said that the peculiar circumstances here remove all doubt of negligence. Those circumstances are the presence of the sand pile near enough the track at Jefferson street to make obstruction possible, and the heavy fall of rain shortly after 4 o'clock in the morning. It is a fair inference that but for the heavy fall of rain there would have been no derailment of the engine, because, as already stated, a loaded train and a light engine did pass over the crossing after 4 o'clock, and before the heavy rain, without any accident. The learned judge of the court below was of the opinion that the very fact of the heavy fall of rain ought to have induced the section boss of the company in charge of the track to send some one out to observe whether the sand had not obstructed the track. Just at that time the section boss and his entire staff of subordinates were called by the emergency growing out of the same fall of rain to rescue human life at another part of the railway yard. In such an emergency the jury might properly infer that it was not negligence for the section boss to act upon the belief that there was more need to call all the men available to the place of known death and injury than to send them to remove obstructions upon the track for switch engines. The accident to Kirksey was a peculiar one, and one not very likely to happen. Under ordinary circumstances, a switch engine running in broad daylight at only five miles an hour might be easily stopped before injury could result from any obstruction upon the track which would be likely to derail it. It is not

for us to say what conclusion the jury should have reached. It is enough for us to say that they might with reason have concluded from the facts that the section boss and his subordinates used the care of ordinarily prudent men under the circumstances, and that the failure to remove the sand was not negligence. It follows that it was error for the court to take the question from the jury.

We are of the same opinion as to the issue of contributory negligence. It was the duty of Kirksey to observe all obstructions upon the track, and to call the engineer's attention to the same. There was ample time, had the engineer been signaled by Kirksey after he could see the crossing, to stop before the point was reached at which the engine was derailed. He was signaled to by the switchman of the Belt Line road, and his attention called to something unusual at the crossing. The switchman thinks that Kirksey did not see this signal. It was his business to look out for signals of any kind, and for obstructions. It may be that the sand was so packed between the rails as not to indicate any obstruction. There was, however, some evidence that it was several inches over the rails. We think it was fairly a question for the jury to say whether or not Kirksey was wanting in reasonable alertness and attention in failing to see or understand the signal of the Belt Line switchman, or in failing to observe this obstruction, and in not signaling its presence to the engineer. It was an error, therefore, to take this issue from the jury.

Another error assigned is that the court allowed to be read in evidence, the following ordinance of the city of Memphis:

"All railroads whose trains or cars are drawn by steam engines within the limits of this district, shall provide flagmen for each street such trains may cross; and these flagmen shall keep constantly on duty at each street when such trains cross, and until the engine has crossed such street, waving a flag in day time and a red lighted lamp at night to give warning to all of the approaching trains, and the engineer on each of such trains shall keep the bell constantly ringing while his train is passing through the district; and any and all persons or railroad companies offending against this ordinance shall be fined," etc.

There was no flagman at Jefferson street when the accident occurred, and the ordinance was relied upon as the basis for argument that, if the company had had a flagman there, he would have signaled the train to stop, and the accident would not have occurred; wherefore it was said that the failure of the Newport News Company to obey the ordinance was a violation of its duty causing the accident. Manifestly the ordinance was passed to save the public traveling along the streets from injury by passing trains, and was not enacted at all for the purpose of protecting the employes of companies engaged upon its trains. The presence or absence of the flagman at this crossing had nothing to do, therefore, with the operation of the trains, except to keep the public out of the way of them. The absence of the flagman may have been a failure of duty by the railroad company to the traveling public, but it was not a failure of duty to any of its employes. We think that the ordinance was improperly admitted, and was prejudicial to the defendants below.

Another assignment of error is based on the court's refusal to direct a verdict for the Kansas City Company, because this accident occurred on the Newport News Company's track, and there was no evidence to show that the crew in charge of the switch engine and train had any orders or authority from the Kansas City Company to use any track but its own. The evidence is not as clear as it ought to be in regard to the arrangement by which the Kansas City engine was on the Newport News track, but, as the case must be tried again, and this will probably be brought out more clearly, we express no opinion on the question raised.

There were other assignments of error which we do not think it necessary to consider. The judgment of the court below is reversed, and a new trial ordered, the costs in this court to abide the event.

LEWIS v. PENNSYLVANIA STEEL CO.

(Circuit Court of Appeals, Third Circuit. March 30, 1894.)

No. 19.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a petition for a rehearing. See, for former opinion, 8 C. C. A. 41, 59 Fed. 129.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

PER CURIAM. We have very carefully considered the petition for a rehearing of this case, and the reasons assigned in support of the application. The opinion of the court on file was concurred in by all the judges, and they adhere to the views therein announced. To what we have already said, we simply add that, if the appellant could be regarded as a pioneer in this particular field of invention, still the express limitations of his fourth claim are such as to preclude a decision that the defendant's turn-over device is within its terms. The application for a rehearing is denied.

STATE OF TENNESSEE, to Use of UNITED STATES, v. HILL et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1894.)

No. 48.

1. DISTRICT COURTS—JURISDICTION—ACTION BY UNITED STATES ON A SHERIFF'S BOND.

When the United States have a right, under a state statute, to sue in the name of the state upon the official bond of a sheriff, to recover damages for negligently allowing the escape of a federal prisoner, such action is within the jurisdiction of the federal district court.

2. SHERIFFS—ESCAPE OF FEDERAL PRISONER—ACTION BY UNITED STATES FOR DAMAGES.

In Tennessee, where the statute makes the sheriff civilly responsible for the safe-keeping of prisoners committed to his care (Code, §§ 6238-6242),

and allows any party aggrieved to sue on his official bond in the name of the state (Id. §§ 3492-3494), the United States may maintain such an action to recover pecuniary damages occasioned by allowing the escape of a prisoner under indictment by a federal grand jury; and among the elements of such damage may be included the expenses of the arrest and keeping of the prisoner, the benefit of which is lost by his escape, and also money expended in recapturing him.

In Error to the District Court of the United States for the Middle District of Tennessee.

The appellant sued the appellees, Hill and the sureties on his sheriff's bond, and filed this declaration:

"The State of Tennessee, for the use of the United States of America, Plaintiff, vs. Wm. J. Hill, H. C. Hudson, James W. Johnson, R. G. Fehr, J. G. Sawyer, T. M. Graham, B. H. Beazeley and V. E. Shwab, Defendants. (No. 832.)

"The plaintiff sues the defendants for this: That on the 1st day of January, 1892, and on divers other days before said date, the defendant William J. Hill was the sheriff of Davidson county, Tennessee, within said middle district of Tennessee, duly elected, qualified, and acting as such sheriff. That on the 1st day of September, 1890, he, the said William J. Hill, as required by the law of the state of Tennessee, executed a bond in the penal sum of \$40,000, with the defendants H. C. Hudson, Jas. W. Johnson, R. G. Fehr, J. G. Sawyer, T. M. Graham, B. H. Beazeley, and V. E. Shwab as sureties thereon, and they, the said sureties, executed said bond, and it was approved and delivered; that said bond was conditioned as required by the law of Tennessee, in cases of sheriff's bonds, and was, among other things, conditioned that he, the said William J. Hill, would 'faithfully execute the office of sheriff of Davidson county, and perform its duties and functions during his continuance in office,' etc. A certified copy of said bond as it was delivered to, executed before, and accepted and approved by the judge of the county court of Davidson county, and filed as provided by law, together with a duly-certified copy of the oath of office taken by the said William J. Hill as sheriff, is here to the court shown, and made a part hereof. That among the duties of said William J. Hill as sheriff, as provided by law, is the following, to wit: 'To take charge and custody of the jail of said county, and of the prisoners therein; to receive those lawfully committed, and to keep them, himself or by his deputies or jailer, until discharged by law.' That by the statutes of the state of Tennessee, in such cases made and provided: '(1) The county jail is used as a prison for the safe keeping and confinement of all persons committed thereto under the authority of law. (2) The foregoing provisions extend to persons committed by authority of the courts of the United States. (3) The sheriff is liable for failing to receive and keep all persons delivered under the authority of the United States to the like pains and penalties as to similar failures in the case of persons committed under the authority of the state. (4) The sheriff has the custody and charge of the jail of his county, and of all persons committed thereto, and may appoint a jailer, for whose acts he is civilly responsible. (5) It is made the duty of the sheriff to take charge and custody of the jail of his county, and of the prisoners therein; to receive those lawfully committed, and to keep them himself or by his deputies or jailer until discharged by law.'

"And the plaintiff says that the conditions of said bond, executed by the defendants as aforesaid, have been broken in this, that is to say: One Thomas C. Boalen, at the October term, 1891, of the United States circuit court for the middle district of Tennessee, was duly indicted by the grand jury of said court for violation of sections 5440, 5456, 5477, and 5469, of the Revised Statutes of the United States, to wit: 'For stealing, embezzling, and taking out of the street mail box at the corner of Church and Market streets, in the city of Nashville, a letter containing a check, and he unlawfully opening it, and embezzling said check therein contained. For taking from the street mail box another letter, and opening it, and embezzling said check therein contained.

For conspiring with Charles Hubbard, alias Charles Dymond, and Charles J. K. Stratton, alias Harry Armstrong, to commit the offense of breaking open said mail box and taking therefrom said two letters, and opening the letters and embezzling two checks therein contained. For willfully and maliciously destroying mail matter deposited in said letter box. For feloniously having in his possession certain keys suited to locks on the street mail boxes in use by the United States for receiving mail in the city of Nashville, etc. For stealing and taking from an authorized depository for mail matter, to wit, the street mail box in the city of Nashville, two letters deposited in said mail box. For opening and embezzling and destroying two drafts, which he, the said Thomas C. Boalen, took out of a street mail box, in the city of Nashville, one of said letters containing a draft for \$601.05, and another a draft for \$352.50, and embezzling said two letters and drafts.' That, after said indictment was found as aforesaid, the said Thomas C. Boalen was arrested by due process of law on a warrant sworn out before Will Haight, a United States circuit court commissioner, at Atlanta, Ga., on the — day of November, 1891, and thereupon, to wit, on the 9th day of November, 1891, an order was made by the circuit court of the United States for the northern district of Georgia 'that he, the said Thomas C. Boalen, be removed and transferred to the circuit court for the middle district of Tennessee,' etc. That thereafter, to wit, on or about the 10th day of November, 1891, the United States marshal for the northern district of Georgia, as he was ordered to do, did transfer the said Boalen to the middle district of Tennessee, and there delivered him to C. B. Harrison, United States marshal for the middle district of Tennessee. That thereupon, under an order of commitment duly made by H. M. Doak, Esq., United States circuit court commissioner for the middle district of Tennessee, being an officer authorized by law to issue said order, to wit, on the 10th day of November, 1891, which was during the time for which said bond aforesaid was executed by the defendants, the said United States marshal did commit the said Thomas C. Boalen to the jail of Davidson county, within said district, and to the custody of him, the said William J. Hill, sheriff for Davidson county, aforesaid, who was then acting as such sheriff. That thereupon, to wit, on the — day of —, 1891, the said William J. Hill, failing to do his duty, and without the leave and license of, and against the will of, the plaintiff, negligently and unlawfully suffered and permitted the said Thomas C. Boalen to escape and go at large wheresoever he would, out of the custody of him, the said William J. Hill, so being such sheriff as aforesaid, and the said Thomas C. Boalen is still at large, and cannot be found. Whereby the said plaintiff has been and is greatly injured, and plaintiff is greatly delayed and prevented from prosecuting the said Thomas C. Boalen for the great crimes and felonies by him committed, contrary to the statutes and against the peace and dignity of the United States; and plaintiff is greatly delayed in and prevented from prosecuting him, the said Thomas C. Boalen, under the said indictment so found as aforesaid against him by the grand jurors for the said United States circuit court for the middle district of Tennessee. in the cause of the United States vs. Thomas C. Boalen et al., then and there pending before the said United States circuit court for the middle district of Tennessee; and whereby the said plaintiff aforesaid is delayed in and prevented from causing the said Thomas C. Boalen to be punished with imprisonment for the term and terms of years which is provided by statute as a punishment in such cases, and is delayed in and prevented from recovering from him, the said Thomas C. Boalen, the fines imposed by law for violation of the United States statutes,—\$10,000. And in endeavors to arrest and to cause the arrest and capture of him, the said Thomas C. Boalen, who was notoriously one of a gang of dangerous offenders, plying their vocation in many places in the United States, prior to the time he was found and arrested in Atlanta, Georgia, to wit, on the — day of November, 1891, and leading up to the arrest, and bringing about the arrest, the plaintiff necessarily expended large sums of money, to wit: \$10,000, for traveling and other necessary expenses of officers and employes of the United States post-office department; and, also, \$2,000, for other necessary expenses in that behalf, such as advertisements, printing, etc., etc. And for the arrest

and imprisonment and trial of the said Thomas C. Boalen, at Atlanta, Georgia, proceedings for removal, and removal from Atlanta, Georgia, to Nashville, the plaintiff necessarily expended another large sum of money, to wit, \$1,000. And for endeavors to recapture and ferret out the whereabouts of the said Thomas C. Boalen, since he, the said defendant, William J. Hill, negligently, carelessly, etc., as aforesaid, allowed him to escape from his custody, the said plaintiff has necessarily expended another large sum of money, to wit, \$1,000, and other necessary expenses in this behalf,—\$1,000. To the plaintiffs' damage twenty-five thousand dollars (\$25,000). Hence suit.

John Ruhm,

"U. S. Attorney, M. D. T."

The defendants demurred to this declaration, and alleged several grounds therefor. The principal ones are: "(1) Because the defendants were not liable to a civil action on the bond given to the state of Tennessee at the suit of the United States for damages for the alleged negligence. (2) The said action is one that cannot be maintained in United States district court. That the liability of the officers of the state of Tennessee upon their official bonds can only be enforced in its own court, and that the state of Tennessee is a necessary party plaintiff, and no suit can be brought by her or in her name against citizens of the state of Tennessee in a United States court sitting in that state. (3) That no recovery can be had for expenses incurred by the officers of the United States for the arrest, imprisonment, and trial of said Boalen, or for his removal from Atlanta, Ga., to Nashville, Tennessee, because the same was not a debt or liability against said Boalen. (4) That no recovery could be had for the fines imposed by law for the offenses charged against said Boalen until conviction and imposition of said fines by a verdict of a jury and judgment of the court against him. (5) That the money expended by plaintiff in an effort to recapture said Boalen after his escape is not recoverable, in this action, for the reason such expense would not be recoverable against Boalen should he be recaptured, convicted, and sentenced. (6) Because the declaration nowhere alleges that said escaped prisoner was guilty of the offenses charged in the indictment." The demurrer was sustained, and the suit dismissed by district court.

John Ruhm, U. S. Atty., for plaintiff in error.

Tillman & Tillman and W. D. Covington, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

BARR, District Judge, after stating the facts as above, delivered the opinion of the court.

Many errors have been assigned, but we need only consider whether the suit as brought was maintainable. The opinion of the court is very brief, but the learned judge seems to have been of the opinion that no expenses incurred by the United States in causing the indictment, arrest, or removal of the prisoner, nor the expenses of his recapture, could be recovered against the sheriff and his sureties, unless such expenses could have been recovered against the prisoner had he been convicted, and that the fines which might have been assessed against him, had he been convicted of the offense or offenses charged, could not be considered in estimating the damages unless the prisoner had been previously convicted and fined. It may be conceded that, had said Boalen been tried and convicted, none of the expenses alleged to have been incurred by the United States could have been assessed against him, and judgment rendered therefor on the indictment. But this is not an action at

law against a sheriff for an escape in which the measure of damages is confined to the interest which a creditor has or might have in his imprisoned debtor. It is an action on the official bond of a sheriff, in which one of the obligations is that he will faithfully perform his duty as sheriff. Among other duties, the sheriff has the charge and custody of the jail of his county, and the prisoners legally committed therein, until discharged by law. This includes federal as well as state prisoners, and the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints. Code Tenn. §§ 6238-6242. The sheriff executed his bond to the state, but any party aggrieved can under the statute sue on the bond in the name of the state, and in such cases the suing party is considered the real plaintiff. Id. §§ 3492-3494.

The district court has, by the express terms of the act of congress, jurisdiction of all suits at common law brought by the United States; hence there is no difficulty as to the jurisdiction of that court, if there is a cause of action on this bond alleged in favor of the United States. It is insisted that although Boalen was in the legal custody of the sheriff, and his escape is alleged to have been by the negligence of the sheriff, the United States cannot maintain an action for his escape, because the United States, in the arrest and punishment of offenders against its laws, acts as sovereign, and not in its corporate capacity, and, therefore, cannot have an action for damages, whatever may have been the negligence of a jailer in allowing the escape of the prisoner, Boalen; and *Cotton v. U. S.*, 11 How. 229, and *South v. Maryland*, 18 How. 396, are referred to as sustaining this proposition. *Cotton v. U. S.*, 11 How. 229, was an action of trespass quare clausum fregit brought by the United States against Cotton for cutting and carrying away pine timber from the lands of the United States. The error complained of by Cotton was the refusal of the trial court to instruct: "(1) That the only remedy for the United States for cutting pine timber on public lands was by indictment; (2) that the United States have no common law remedy for private wrongs." The supreme court sustained this refusal of the lower court, and there is nothing in the opinion sustaining the distinction suggested. Indeed, the court say, in answering the suggestion, that an indictment was the only remedy; that "the punishment of the public offense is no bar to the remedy for the private injury." In *South v. Maryland*, reported in 18 How. 396, the action was against a sheriff and his sureties for his refusal and neglect in not rescuing one Pottle from mob violence, and the court held the action could not be maintained. The court held that the duty of the sheriff to protect Pottle from mob violence arose from his being a conservator of the peace, and his neglect was not merely the neglect to perform a ministerial duty. In the opinion the court divided the duties and powers of a sheriff at common law into four distinct classes. In the ministerial class are put the duty of a sheriff as keeper of the county jail, and his liability for the safe-keeping of prisoners committed to his custody. The court says, in the course of the opinion:

"It is an undisputed principle of the common law that for a breach of a public duty an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party who is injured by him."

In this case an individual was suing; hence, the use of that word by the court. But the question of the liability of a ministerial officer in a civil action for misfeasance or nonfeasance to a state or the United States was neither presented nor considered by the court. Neither is there any suggestion of a distinction between the sovereign powers and the corporate capacity of the United States as to the right to institute a civil action. The sovereign power and corporate capacity of the United States are so intermingled that it is often impossible to separate them, or to know when one ceases and the other commences. But, whatever may be the distinction, it can have no relation to the right of the United States to bring a civil action or to defend one, if they so elect. It is argued, however, that as there has not been a trial of Boalen, and it is not alleged he was guilty of the crimes for which he is indicted, and for which he may be fined if guilty, there can be no recovery, because the alleged negligence of the jailer has not caused the United States any pecuniary injury, but rather the contrary, as the escaped prisoner was no longer a charge upon the United States. This argument overlooks the fact that the United States, in arresting and imprisoning Boalen, who was charged with the violation of its criminal laws, acted under an undoubted power, and in the performance of a duty, and that, in the exercise of this power and the performance of this duty, it has expended money in causing the arrest, removal to Nashville, and the imprisonment there, of Boalen, to secure his trial for indictable crimes, and that the benefit of the money thus expended by the United States has been entirely lost by the negligence of his jailer.

Such actions as this are unusual, but this fact is certainly not conclusive against the right, since criminal proceedings against an officer who has given bond for the faithful discharge of his duties, for misfeasance or nonfeasance in office, may have proven to be the more efficient remedy. No decision has been cited in which the right of action in such a case as this one has been denied, and there are two cases at least in which such right of action has been recognized and sustained. *Com. v. Reed*, 2 Bush, 618, 3 Bush, 516. In *Com. v. Reed*, 2 Bush, 618, the Kentucky court of appeals sustained an action on a sheriff's bond against him and his sureties for the negligence of the sheriff in failing to arrest a person on bench warrants issued on indictments for unlawful gaming, and for willfully taking insufficient surety on bond for the appearance of another person whom he had arrested for the same offense. The court of appeals, by C. J. Robertson, in the opinion said:

"Although there may be no precedent for any judicial recognition of such a remedy, yet we perceive no reason why it should not be available; and it seems to us that principle sanctions it, and that it is sustained by both the common and statutory law of Kentucky."

This court, in another part of the opinion, say:

"Nor is the undeterminateness of the damages, and the difficulty of ascertaining their precise amount by any certain or fixed standard, a sufficient answer. The same difficulty occurs in many other classes of action undoubtedly maintainable."

In this case the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints, and as we have seen the United States may sue, and a cause of action is alleged in the declaration, the demurrer should have been overruled. The measure or extent of damages is not now before this court, and we do not indicate an opinion thereon. The judgment of the district court sustaining the demurrer to the declaration and dismissing the action is reversed, and the district court is directed to set aside said order, and proceed in conformity with this opinion.

TAFT, Circuit Judge (concurring). I concur in the foregoing opinion, and only wish to add that negligence of the sheriff resulting in the escape of Boalen, which made the duty of the United States as a government to apprehend and punish him more onerous in a pecuniary way, was a breach of the bond, and a pecuniary injury to the United States, for which they may recover damages. The last count in the declaration is for \$1,000 expended in Boalen's recapture after his escape from the sheriff's custody, and that, even if there is no other averment of recoverable damages, as to which no opinion will be expressed, is sufficient to make the declaration good.

GIRD et al. v. CALIFORNIA OIL CO.

(Circuit Court, S. D. California. April 2, 1894.)

No. 302.

COSTS IN CIRCUIT COURT—TAXATION—PRINTING BRIEFS.

The costs of printing briefs for submission to the circuit court are not taxable in the ninth circuit, as there is no rule requiring briefs to be printed.

This is an appeal from the action of the clerk in taxing in the defendant's bill of costs an item for "printing brief, \$40."

Samuel Minor and Edward Lynch, for plaintiffs.

John D. Pope, for defendant.

ROSS, District Judge. There is in this circuit no rule of court requiring briefs to be printed, nor was there any special order to that effect made in the case. And, as neither the statutes nor the rules in equity adopted by the supreme court require it to be done, the brief in question must be taken to have been voluntarily printed by the defendant. Under such circumstances, the prevailing party cannot recover of the losing one the costs of such printing. *Neff v. Pennoyer*, 3 Sawy. 336, Fed. Cas. No. 10,084; *Hussey v. Bradley*, 5 Blatchf. 212, Fed. Cas. No. 6,946; *Dennis v. Eddy*, 12 Blatchf. 198, Fed. Cas. No. 3,793; *Ferguson v. Dent*, 46 Fed. 93. The item in question must, therefore, be disallowed. So ordered.

UNITED STATES v. ALBERT et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—DOTTED SWISSES.

"Swiss Muslins" or "Dotted Swisses," being cotton goods in which the threads can be counted independently of the dots, the dots being woven at the same time with the cloth, but consisting of threads distinct from both warp and filling, are dutiable under the countable provisions of paragraph 346 of the act of October 1, 1890, and not under paragraph 355, as "manufactures of cotton not specially provided for." 57 Fed. 192, reversed. Hedden v. Robertson, 14 Sup. Ct. 434, 151 U. S. 520, followed.

Appeal from a Decision of the Circuit Court for the Southern District of New York (57 Fed. 192), sustaining the decision of the board of general appraisers, which overruled the classification by the collector of merchandise known as "Swiss Muslin."

Thomas Greenwood, Asst. U. S. Dist. Atty.

W. Wickham Smith, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1891 the firm of Albert, Haager & Co. imported into the port of New York sundry invoices of manufactures of cotton known in trade as "Dotted Swisses" or "Swiss Muslins." The collector classified them for duty at 60 per cent. ad valorem, as embroideries, or articles embroidered by machinery, which are composed of cotton, under the provisions of paragraph 373 of the tariff act of October 1, 1890. As the claim that the articles were embroideries has now been abandoned, because the testimony abundantly sustained the theory of the importers upon that question of fact, no further attention need be paid to the embroidery paragraph. The importers protested, claiming that the merchandise was not in fact embroidered, and was not commercially known as "embroideries," and that it was either dutiable at 40 per cent. ad valorem, as a manufacture of cotton not specially provided for, under paragraph 355 of the tariff act of October 1, 1890, or that it was dutiable as bleached cottons, according to the number of threads to the square inch, and the value, at the respective rates provided in the paragraphs from 344 to 348, inclusive, in the same act. Paragraph 355 is as follows:

"Cotton damask, in the piece or otherwise, and all manufactures of cotton, not specially provided for in this act, forty per centum ad valorem."

Paragraph 346, which, among that series of paragraphs specified in the protest, is the one which is applicable to the case, is as follows:

"Cotton cloth, not bleached, dyed, colored; stained, painted, or printed, exceeding one hundred, and not exceeding one hundred and fifty threads to the square inch, counting the warp and filling, three cents per square yard; if bleached, four cents per square yard; if dyed, colored, stained, painted, or printed, five cents per square yard: provided, that on all cotton cloth exceeding one hundred, and not exceeding one hundred and fifty threads, to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over seven and one half cents per

square yard; bleached, valued at over ten cents per square yard; dyed, colored, stained, painted, or printed, valued at over twelve and one half cents per square yard, there shall be levied, collected, and paid, a duty of forty per centum ad valorem."

The board of general appraisers found that the merchandise was not embroideries; that plain portions of the fabric, counting the warp and filling, contain exceeding 100 and not exceeding 150 threads to the square inch; but, following the decision of the circuit court in *Robertson v. Hedden*, 40 Fed. 322, which will be hereafter referred to, held that Swiss muslins did not come within the provisions of the so-called "countable cotton" paragraphs, but were to be classified under paragraph 355, as manufactures of cotton not specially provided for.

Swiss muslins are bleached cotton goods, which are woven upon a loom. The warp or threads which run longitudinally, extend from one end of the piece to the other, and the filling or threads that extend from side to side, run from edge to edge through the width of the piece. In addition to the plain loom, there is an attachment which produces the spots, dots, or other figures which ornament the goods, and which are woven at the same time with the rest of the cloth. In the appellant's brief, the account which the experts gave of the method of manufacture, and which was not always given so as to be easily understood, is condensed as follows:

"These figures were made of continuous threads, and in lines parallel to the lengths of the cloths, in such way that each of such lines of these figures was formed by the same bobbin or shuttle, and, consequently, by one and the same thread. As made by these bobbins or shuttles, the figures of each of these lines were connected, on the wrong side of these cloths, by the thread of which they were made. Subsequently all such threads, or rather so much of them as connected these figures in the manner described, were cut off close to these figures, so that, in these cloths as finished and imported, no one of these threads, of which these figures were made in the manner already described, ran continuously through these cloths from end to end, or from edge to edge, or selvedge to selvedge; but, on the contrary, each of these figures, so far as any of such threads was concerned, was entirely separated and disconnected from the other."

The threads which compose these figures are not a part of the filling. They are additional to the filling, and the piece would be perfect without them. Notwithstanding their existence, and the fact that they are thickly scattered over the surface of the cloth, the number of threads to the square inch which make up the warp and filling can be counted or accurately estimated. They are countable. In *Robertson v. Hedden*, supra, it was shown, and it is also true with respect to the Swiss muslins which are the subject of this controversy, that, "if the threads of the figure were counted with those of the groundwork, the number of threads per square inch would differ in different portions of the fabric; while, if the latter only were counted, the number of threads to the square inch would be uniform. The circuit court, in construing the "countable clauses" of the cotton schedule of the tariff act of March 3, 1883, which are kindred to those of the act of October 1, 1890, was of

opinion that the threads of the figures which, like those of the Swiss muslins, were woven upon the loom at the same time with the fabric itself, were to be counted, and that the statute meant that the cloth to which it referred should be homogeneous, so that the number of threads per square inch should not differ in different parts of the fabric.

The supreme court in *Hedden v. Robertson*, 151 U. S. 520, 14 Sup. Ct. 434, did not concur in this view, but was of opinion that the provisions of the act of 1883 "fix the rate of duty by a classification based on the number of threads in a square inch of cotton cloth, without reference to the mode by which the count shall be made, and without regard to the incidental ornamentation of the fabric," and further said:

"We have no authority, where the duty is thus specifically declared, to make an exception, based upon something that might be added to the cloth in the way of figures or patterns placed upon the groundwork of the fabric. The groundwork being cotton cloth, within the terms and provisions of the statute, and the threads thereof being countable, the goods were dutiable, by the express language of the statute, at the rate which was exacted by the collector from the defendant in error."

The decision of the supreme court that "the ornamentation placed upon the groundwork of the fabric does not change its character as cotton cloth, subject to the countable clause of the statute," is controlling upon this appeal, and compels the conclusion that the merchandise in this case should have been classified for duty, and the entries thereof should have been liquidated, under the provisions of paragraph 346.

The decision of the circuit court is reversed.

UNITED STATES v. ZENTGRAF.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

CUSTOMS DUTIES—DUTIABLE WEIGHT—ULTRAMARINE BLUE.

Ultramarine blue in pulp, which consists of the ultramarine ground in water so as to form a thick paste, is dutiable, under paragraph 55 of the act of October 1, 1890, at 4½ cents a pound on the full weight of the paste, and not on the weight of the ultramarine contained therein when dry.

Appeal from the Decision of the Circuit Court for the Southern District of New York sustaining the decision of the board of general appraisers, who reversed the decision of the collector upon the amount of duty to be imposed upon ultramarine blue in pulp.

Henry C. Platt, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

Albert Comstock, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The merchandise in question was ultramarine blue in pulp, which was imported into the port of New

York on May 29, 1891. A duty of $4\frac{1}{2}$ cents per pound was exacted by the collector upon the net weight of the imported article, under the provisions of paragraph 55 of the tariff act of October 1, 1890, which is as follows: "Ultramarine blue, four and one half cents per pound." The importer protested against the assessment of duty upon the whole weight, claiming that the assessment should be only upon the weight of the ultramarine blue contained in the pulp.

Ultramarine blue is imported in the form of powder, of little lumps or drops, and in pulp. The pulp is a thick paste, which is made by grinding the ultramarine in water, and is used to produce a high gloss upon paper hangings. It is sold by the pound, but the price is reduced in accordance with the quantity of water contained in it. The board of general appraisers decided that the duty should be assessed only upon the actual quantity of ultramarine blue in the casks at $4\frac{1}{2}$ cents per pound, and their decision was sustained by the circuit judge "with extreme doubt."

If the foregoing statement contained all the facts which are applicable to the case, the reason of the decision of the board of general appraisers would be very persuasive; but other provisions of the tariff act of October 1, 1890, in that portion of Schedule A which relates to colors, are important. Thus, paragraph 50 imposed upon "blues * * * dry or ground in or mixed with oil," a duty of six cents per pound, and "in pulp or mixed with water six cents per pound on the material contained therein when dry." Paragraph 53 contained the same provision, in the same language, in regard to chrome yellow, chrome green, and like chromium colors. Under paragraph 57, the duty of 12 cents per pound is imposed upon vermilion red, whether dry or ground in oil or water. It seems apparent that congress was aware of the differing methods in which colors were prepared for the market,—that they were either dry, or mixed with oil, or mixed with water,—and, with respect to a portion of the blues and to the chromium colors, provided in terms that when they were mixed with water the specific duty per pound should be assessed only on the weight of the color actually contained therein. Congress knew of the distinction between material dry and ground in water, and discriminated between the two methods, when it chose to do so. It omitted any discrimination in regard to ultramarine blue, and presumably for a satisfactory reason. The distinction which the legislature carefully made in paragraphs 50 and 53, and which was not made in paragraph 55, leads us to the conclusion that the distinction was intentionally omitted, and that the article known as "ultramarine blue" is dutiable at $4\frac{1}{2}$ cents per pound in whatever form it is commercially known and purchased.

The decision of the circuit court is reversed.

MAYOR, ETC., OF CITY OF NEW YORK et al. v. AMERICAN CABLE
RY. CO.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

ASSIGNMENT OF PATENTS—PATENT-OFFICE RECORDS.

Certified copies of the patent-office record of instruments purporting to be assignments are not prima facie proof of the execution or genuineness of the instruments. *Dederick v. Agricultural Co.*, 26 Fed. 763, and *National Folding Box & Paper Co. v. American Paper Pail & Box Co.*, 55 Fed. 488, disapproved.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by the American Cable Railway Company against the mayor, aldermen, and commonalty of the city of New York, for infringement of letters patent No. 271,727, issued February 6, 1883, to Daniel J. Miller, for improvements in the construction of cable railways. There was a decree for complainant in the court below (56 Fed. 149), and defendants appeal.

Francis Forbes and William N. Dykman (on the brief), for appellants.

Chas. Howard Williams, Daniel H. Driscoll, and Edward W. Cady (on the brief), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The complainant's title to the letters patent in suit depends upon the authenticity of the mesne assignments under which it claims. No evidence was introduced tending to prove the execution of the assignments from the patentee to Horton, from Horton to the Cable Railway Construction Company, and from the Cable Railway Construction Company to the complainant, except duly-certified copies of the patent-office record of three instruments which purport to be such assignments. The objection that the instruments were not sufficiently proved was taken in due season, and was insisted upon at the hearing in the circuit court. We are of opinion that the objection was valid, and consequently that the complainant was not entitled to a decree.

The assignment of a patent is not a public document, but is merely a private writing. There is no statutory provision requiring it to be recorded in the patent office. Section 4898 of the Revised Statutes permits this to be done for the protection of the assignee against a subsequent bona fide purchaser or mortgagee. The section does not make the recorded instrument evidence, does not require the assignment to be executed in the presence of any public officer, or to be acknowledged or authenticated in any way before recording, and does not provide or contemplate that it shall remain subsequently in the custody of the office. It devolves upon the patent office merely the clerical duty of recording any instrument which purports to be the assignment of a patent. We are aware of no principle which gives to such a record the effect of primary evidence, or of

prima facie proof of the execution or the genuineness of the original document. To give it such effect would enable parties to manufacture evidence for themselves.

Section 892 of the Revised Statutes does not touch the point. That section provides that written or printed copies of any records, books, papers, or drawings belonging to the patent office shall be evidence in all cases wherein the originals could be evidence. The original assignment does not belong to the patent office. The section makes a copy evidence of the same class as the original record, but has no application when the original record is not competent. The early cases of *Brooks v. Jenkins*, 3 McLean, 432, Fed. Cas. No. 1,953, and *Parker v. Haworth*, 4 McLean, 370, Fed. Cas. No. 10,738, in which it was held that a certified copy of the patent-office record of an assignment of a patent is prima facie evidence of the genuineness of the instrument, were decided at first instance, and apparently without much consideration. The rule of these cases has been accepted without discussion in the later cases of *Lee v. Blandy*, 1 Bond, 361, Fed. Cas. No. 8,182; *Dederick v. Agricultural Co.*, 26 Fed. 763; *National Folding Box & Paper Co. v. American Paper Pail & Box Co.*, 55 Fed. 488. It is not improbable that these decisions were influenced by the technical nature of the objection in the particular cases. But the rule opens the door to fraud, as any stranger can put an assignment upon record; and it imposes upon a defendant who honestly doubts whether a party who claims title to a patent is the owner the burden which ought to rest upon his adversary. Our conclusions are supported by the opinion of the circuit court of appeals in *Paine v. Trask*, 5 C. C. A. 497, 56 Fed. 233, where the question was considered with care, although its decision was unnecessary to the judgment.

We have not considered the point argued by the appellants that the bill should have been dismissed because no proof was given of the complainant's incorporation. The assignment of errors does not present the question. Although, upon the proofs in the circuit court, the complainant was not entitled to a decree, it would have been a proper exercise of discretion on the part of the court, in view of the reliance which the complainant had doubtless placed upon the adjudications which have been referred to, to permit the complainant to reopen the proofs, and the cause to be reheard. In reversing the decree and directing the dismissal of the complainant's bill, we do so without prejudice to the granting by the circuit court of such an application, if seasonably made by the complainant.

The decree is reversed, with instructions to the circuit court to proceed in conformity with this opinion.

THE STATE OF VIRGINIA.

In re STATE STEAMSHIP CO.

(District Court, E. D. New York. April 13, 1894.)

SHIPPING—LIMITATION OF LIABILITY.

Where the British owner of a British ship is proceeded against in an American court by both British and American cargo owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britain.

This was a petition for limitation of liability for loss of cargo by the steamship State of Virginia, filed by the State Steamship Company.

Wing, Shoudy & Putnam, for petitioner.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, District Judge. In July, 1879, the steamship State of Virginia, owned by the State Steamship Company, and bound for a voyage from New York to Glasgow, with a cargo, stranded on Sable Island. Her cargo sustained damage, for which suits were commenced by certain English underwriters and by certain American underwriters against the owners, in personam, in this court. Thereafter, and before the suits came on for trial, this petition for limitation of liability was filed by the State Steamship Company, and an order was made to appraise the value of the steamship State of Virginia and her pending freight on the voyage, and the interest of the petitioner in the same. The petitioner is a corporation organized under the laws of Great Britain. The steamship State of Virginia was a British vessel. The proofs taken before the commissioner show that the vessel became a wreck, and that the cost of her attempted rescue was greater than the sum realized from the property saved. The commissioner accordingly reported that the steamer and her freight, after the disaster and stranding aforesaid, were of no value. To this finding, exception has been taken, in order to raise the question whether a British owner of a British ship, being proceeded against in an American court by both British and American cargo owners, in respect to a loss of cargo occurring in British waters, can claim the limitation of liability provided by the statutes of the United States, or whether the limitation of this liability is to be determined by the law of Great Britain, there being a statute of Great Britain whereby the liability of a shipowner is limited to eight pounds per ton of gross registered tonnage. No objection being taken to the method adopted for presenting this question for the decision of the court upon this question, I have given it due consideration; and my opinion is that the extent of the liability of the shipowner, in a case like this, is determined by the statutes of the United States, and not by the statutes of Great Britain. The exceptions are therefore overruled.

PHOENIX TOWING & TRANSP. CO. v. MAYOR, ETC., OF CITY OF
NEW YORK.

(District Court, S. D. New York. March 27, 1894.)

TUGS AND TOWS—MOORING SCOW—EXPOSED PLACE—GALE—DAMAGE—LIABILITY.

Defendant chartered libelant's scow to carry garbage to sea. On returning from a trip, the scow was made fast to the sea fence, in a position which would be exposed in case it should come on to blow from the west, and without any notice of the mooring being given to libelant. There was no custom or usage between the parties that authorized defendant to leave the scow at that place without previous arrangement with libelant, although two other scows had been left there by libelant's directions during the few days previous. At the time of mooring this scow, the weather indications were threatening, and the master of the scow protested against being left there. He had thereafter no means of mooring the scow, and was in no way negligent. During the night it blew a gale from the northwest, and in the morning the scow was found to be damaged. *Held*, that defendants were liable.

Stewart & Macklin, for libelant.

William H. Clark, Corp. Counsel, and James M. Ward, Asst. Corp. Counsel, for claimants.

BROWN, District Judge. About 3 or 4 o'clock in the afternoon of Sunday, the 19th of February, 1893, the libelant's scow *Seth Low*, which had been used by the defendant for carrying garbage outside of Sandy Hook, was left at the Erie Basin breakwater, or sea fence. The place of mooring was comparatively safe, except as against strong westerly winds. During the night the wind changed from southward to a violent westerly gale, and the scow sank from pounding. The above libel was filed to recover damages.

Several of the libelant's scows had been in use by the defendant under arrangements for daily hire. A few days before, the defendant was notified that the scows would be wanted, and that they should be returned as soon as they were discharged. The practice upon returning scows was for the defendant to inquire by telephone of the libelant at what place the scows should be left, and to leave them in accordance with the answer received in reply. Two other scows, upon being discharged, had been left by the libelant's directions at the sea fence during one or two days preceding. The *Seth Low* being loaded, was taken to the stake boats at Gravesend on Saturday night, and during the following day (Sunday) towed out to sea, her cargo dumped, and she was then brought back to the sea fence, as above stated. It does not appear that any previous inquiry had been made where she should be left for the libelant to receive her; nor was the libelant notified, though the captain of the *Municipal*—the tug in charge—testifies that he received directions from the defendant to leave her at the Erie Basin breakwater.

When left there, the captain of the scow protested that it was not a proper place, and desired to be taken to *Gowanus*, not far distant. The weight of evidence shows that the weather was at that time somewhat threatening; the wind being from the south

at the rate of about 15 miles per hour, and the sky overcast. Storm signals were set on the government station three times during the day, indicating that a blow of above 25 miles an hour was to be expected. The captain of the scow did all he could to prevent being left there; he had no means of moving the scow, and, as I find, was in no way negligent or lacking in due care. At 11 o'clock p. m. the wind had hauled more to the westward, and from 10 to 12 o'clock, midnight, it increased from 19 to 33 miles per hour, and subsequently, during the night, became still more violent from the northwest. At half past 11 p. m. the boat rolled and pounded so that nothing aboard, as the captain testifies, would remain in place, and he and his wife were forced to leave her. The following morning she was found more or less broken and half full of water.

Upon the above facts, I am obliged to hold the defendant responsible for the damages. There was no usage between the parties that authorized the defendant to leave the scow at the sea fence, at the libelant's risk, without previous notice and arrangement. The libelant was reasonably entitled to have opportunity, through previous notice, to remove the boat from the place where it might be left, before it could be charged with the risk of allowing her to remain. The fact that the libelant authorized two scows previously to be left at the same place under an arrangement which gave it the opportunity to remove them at once, or to leave them at its own option, until there was need of removal, was no authority and no justification for the defendant to leave the subsequent scow without notice, and with no such opportunity. The reason why the usual arrangement was not made probably was, that the defendant's officers did not receive timely notice on Saturday from its working superintendent that the scow would be discharged on Sunday so as to be able to communicate with the libelant by telephone on Saturday, in accordance with the usual custom. This, however, was not at the libelant's risk. Until the scow was properly delivered, she remained under the responsibility of the defendants. Due notice was necessary for such a proper delivery; and in the absence of this, the defendant remains responsible.

Decree for the libelant, with costs.

THE DAKOTA.

WALSH v. THE DAKOTA.

(District Court, S. D. New York. March 26, 1894.)

COLLISION—STEAM VESSELS CROSSING—STARBOARD HAND RULE.

The ferryboat D., while crossing the East river from Brooklyn to New York, collided with the tug O. B., at the time going up stream near the New York shore, and having the D. on her starboard hand. On conflicting evidence the court found that the tide was nearly slack, and the D. making nearly a direct course across the river to her slip; that as soon as she saw the tug threatening to go between her and her slip, she blew one whistle, slowed down, and stopped and backed as soon as danger became

apparent. *Held*, that the ferryboat had done all that was required of her, and that the collision was due to the failure of the tug to keep out of the way.

Goodrich, Deady & Goodrich, for libelant.
Wilcox, Adams & Green, for respondent.

BROWN, District Judge. The ferryboat Dakota, while crossing from her slip at Broadway, Brooklyn, to Grand street, New York, came in collision with the libelant's tugboat Olive Baker, at about half past 6 in the morning of August 15, 1893. The starboard bow of the ferryboat struck the starboard side of the tug about amidships, at an angle of from $2\frac{1}{2}$ to 3 points. The time was about an hour and a half after low water at Governor's Island; and as the current in the East river continues to run down for about an hour and a half after low water, although there is a little upward current along the shores somewhat earlier, it is certain that there could not have been much flood tide to cause the ferryboat to deviate very greatly from a straight course across the river.

Beyond the fact that the Dakota gave a signal of one whistle, almost every other circumstance in the case is a subject of most flagrant contradiction. The general theory of the libelant, to the effect that after the Dakota had given one whistle, and the Olive Baker had passed to the right, so that the boats were really out of all danger of collision, the Dakota, when pointing astern of the tug, and nearly straight down river towards the navy yard, gave two whistles and swung still more to port towards the Brooklyn shore until she ran upon the Baker far on the Brooklyn side of the river, is not only improbable in the highest degree, but is contradicted throughout by the respondent's witnesses. Such navigation by the ferryboat is inconceivable and cannot be credited. The burden of proof is upon the libelant. I cannot regard any part of his case as established. The Dakota gave no signal of two whistles; but after her first single whistle, she gave only an alarm signal of three whistles. The collision was near the New York shore. I find that the ferryboat pursued her customary course towards the Grand street slip; that there was but a slight flood current, and that she did not head down river, or towards the navy yard at any time, nor towards the southwest, though the pilot's mistake and confusion in testifying, or some error in his compass, gives a slight color to the libelant's contention in that regard. As soon as the Olive Baker was seen coming up near the New York side, threatening to go between the Dakota and her slip, the Dakota properly gave a signal of one whistle, slowed down, and afterwards stopped and backed as soon as danger from the Baker became apparent. This was in accordance with the rules of navigation. When her whistle was given, the Olive Baker had the Dakota on her own starboard hand, and was bound to keep out of the way. She could easily have done so, either by going to the right, as was her duty to do, or by stopping and backing; neither of which she did.

I find that the Dakota did all that was required of her, by stop-

ping and backing as soon as such action on her part was apparently needful to avoid collision; and that the collision arose from the failure of the Olive Baker to take proper and timely steps to keep out of the way.

The libel is dismissed, with costs.

THE JOHN T. PRATT.

THE A. R. KEENE.

NATIONAL STORAGE CO. v. THE JOHN T. PRATT et al.

ROGERS v. THE JOHN T. PRATT.

(District Court, S. D. New York. March 24, 1894.)

COLLISION—STEAM AND SAIL MEETING—FAULTY LOOKOUT—CHANGE OF COURSE.

A tug, going down New York bay at night, incumbered with scows in tow on a hawser, saw ahead the lights of a sailing vessel, and took measures to avoid her by blowing one whistle and sheering to the right, after which she continued her original course. Owing to a faulty lookout on the schooner, the latter changed her course when near the tow, either by reason of taking in sails preparatory to anchoring, or by an intentional change of course towards her anchorage ground, and ran in between the tug and the tow, and collided with one of the scows. *Held*, that the sole liability was with the schooner, for negligent lookout and unwarranted change of course when approaching a steam vessel.

Goodrich, Deady & Goodrich, for National Storage Co.

Stewart & Macklin, for the John T. Pratt.

Wing, Shoudy & Putnam, for the A. R. Keene.

BROWN, District Judge. At about 10 o'clock in the evening of July 13, 1893, as the steam tug Pratt was hauling three mud scows out to sea by a hawser from 40 to 50 fathoms in length, the schooner Keene, coming up the bay, with a moderate southwest wind, came in collision with the forward scow, by which both were badly damaged, to recover for which, the above libels were filed.

The collision was about one-third of the distance from Bedloe's Island to Robin's Reef. The night was mild and clear starlight. The tug and the schooner being at first nearly head and head, and the colored lights of each being visible to the other, the tug, when at a considerable distance, gave a signal of one whistle, indicating that she would go to the right, ported her wheel, hauled off to the right for a few minutes, and then continued down on her course. The schooner was intending to anchor upon the anchorage ground off and below the Statue of Liberty. Before the collision, her topsails, jibs, spanker, and foresail were all taken in; and the concurrent testimony is that she struck the forward end of the scow at a considerable angle, having run in between the forward part of the scow and the tug, after having passed the tug at a considerable distance to the eastward of her.

The clear preponderance of evidence and probability satisfies me

that the whole fault of this collision was with the schooner, in that she did not maintain a proper lookout; did not observe the vertical lights of the tug, indicating a tow, nor the lights upon each of the scows; nor did she observe the scows themselves, which were easily distinguishable at a sufficient distance; and that she changed her course towards her anchorage ground, and ran in between the tug and tow in consequence of her failure to keep a proper lookout. The crew had been taking in sail preparatory to anchoring, and this might naturally account for some relaxation in the lookout. The change of course might have taken place without much change of her helm, in consequence of having taken in her jibs, and foresail, the last only very shortly before the collision, leaving her mainsail still drawing on the starboard side, and tending to bring her bow to port. But it is immaterial whether her change of course happened negligently from this cause, or from an intentional change of helm, which her witnesses deny.

The faults alleged against the Pratt I find to be immaterial. Her vertical lights must have come, as I find, sufficiently in view of the schooner in abundant time to warn the latter against allowing any change in her course; and whether the distance between the vertical lights was the usual distance or not, they were sufficient to indicate a tow; while the tow itself, and its lights, were also easily distinguishable, had any proper lookout been kept. The absence of a separate lookout on the tug, is plainly immaterial, since the schooner was seen in time, and her movements evidently perfectly observed by the pilot at the wheel of the Pratt. The collision really occurred, as I find, through a heedless change in the schooner's course, without paying attention to the tow during preparations for anchoring. The Pratt, incumbered with such a tow, did all she was called on to do to avoid the collision, which would not have occurred but for the schooner's above named faults.

The libels should be sustained as to the Keene, and dismissed as to the Pratt, with costs.